M&A/PE Quarterly

Fried Frank's quarterly roundup of key M&A/PE developments

Where Things Stand at the End of 2022

In this Fried Frank M&A/PE Quarterly, we present our fourth annual end-of-the-year summary of "Where Things Stand" in the M&A/PE world.

While M&A activity ebbs and flows over time, it endures as a central feature of the global corporate landscape. At the end of 2022, following a record-breaking surge of activity in 2021, we are in a period of decreased M&A activity due to macroeconomic pressures, including a low-growth or recessionary environment, historic inflation, increased cost of capital, more volatility in stock markets, growing geopolitical tensions, and continued supply chain, technology and other post-pandemic challenges. Global M&A deal volume (measured by value) decreased 53% in the third quarter compared to last year, representing the second-lowest volume in any quarter since the first quarter of 2017. Countervailing factors, however, include that U.S. corporations and private equity funds continue to have very high levels of "dry powder," businesses face ongoing pressures to adapt to a global and high-tech world, and there are opportunities for acquisitions at lower prices than previously available.

Thus, while deal activity is expected to be down significantly from recent peak levels, we expect a moderate level of activity in 2023. In light of increased uncertainty due to the economic environment and increased regulatory uncertainty for deals, as well as recent developments (such as the Musk-Twitter situation) that highlighted the potential for busted or delayed deals, we anticipate a heightened focus on deal risk—with buyers generally engaging in more extensive pre-signing due diligence and targets seeking more deal certainty and stronger termination protections. As usual, practitioners will be adapting strategies, structures and terms in response to the prevailing headwinds; and we expect a continuation of the convergence of investment strategies seen over the past few years, with a blurring of the lines in the approaches taken by corporate acquirors, PE firms, activist shareholders and even institutional investors.

Below, we discuss key topics in M&A, followed by a discussion of this year's trends in Delaware law. (*A list of the 2022 Delaware decisions discussed is included at the end of this Quarterly*.)

ANTITRUST. Worldwide, competition authorities have applied increased scrutiny to deals. In the U.S., the antitrust agencies have been vocal about an overall more aggressive approach to antitrust enforcement; have been pursuing broader theories of competitive harm in terms of merger review, single-firm conduct and agreements between commercial actors; and have been focusing on issues that were rarely

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considered under traditional antitrust analysis (such as effects on competition for supply inputs and labor markets). In addition, the Department of Justice's policy favoring litigation to block deals and disfavoring remedies complicates and can delay deals for which a divestiture or other fix can resolve competitive concerns. On November 10, 2022, the Federal Trade Commission announced a new policy with a novel focus on conduct in its "incipiency" (that is, before it necessarily constitutes a violation of the antitrust laws), based on "indicia of unfairness" and a *tendency* to harm competitive conditions. Under the new policy, the FTC may prohibit conduct that it may not have otherwise been able to address (such as interlocking directors or board observers of competing firms not covered by other antitrust laws; M&A transactions that may later ripen into violations of the antitrust laws, including series of acquisitions that individually may not present competitive concerns; and M&A transactions involving nascent competitors that may tend to lessen current or future competition). The increased attention to and intensity of antitrust review and enforcement, on a global basis, has increased antitrust uncertainty and risk broadly, extended deal timelines, and led to greater potential for divergent outcomes across various antitrust jurisdictions. (See the Fried Frank Antitrust & Competition Law Alert discussing the new FTC policy here.)

REGULATORY. Increased regulatory scrutiny of deals also continues globally, with heightened attention to a deal's impact on broad issues such as national security, data security, and protection of "sensitive" industries—making deals, especially if involving cross-border jurisdictions, more uncertain, time-consuming, and difficult. In the U.S., on October 20, 2022, CFIUS (the Committee on Foreign Investment in the U.S.) issued its first-ever enforcement and penalty guidelines—underscoring that CFIUS remains focused on monitoring and enforcement and intends to continue its recent approach of imposing monetary penalties for violations of its regulations and mitigation agreements. The new guidelines outline the types of conduct that may constitute violations of CFIUS laws and regulations, as well as the types of aggravating circumstances (such as senior management having known or should have known of the violating conduct) and mitigating factors (such as robust written compliance policies, training, and a strong culture of compliance) that CFIUS will consider. (See the Fried Frank International Trade and Investment Alert discussing the new CFIUS guidelines here.)

ESG. Social forces continue to drive increased attention to ESG; large institutional investors have continued their pressure on corporations to address ESG issues; and acquirors are increasingly viewing ESG strength as an indicator of overall good management and a factor in assessing value. While the predominant emphasis in recent years has been on environmental concerns, there is now also significant attention to DEI (diversity, equity and inclusion) and other social justice and equality issues. At the same time, while shareholder proposals and activism campaigns centered on ESG increased, the outcomes were mixed this year (with the success rate on environmental shareholder proposals having notably dropped, amid a growing chorus of complaints that climate change-related proposals have become too prescriptive). Also, recent pressure has developed from some investors and state regulators to roll back efforts to address ESG issues (including those relating to climate change). And the development of standardized metrics to measure and compare ESG performance, while evolving, has continued to prove challenging.

With respect to federal regulation, on March 21, 2022, the SEC proposed a comprehensive set of climate-related disclosure requirements that would require SEC registrants to provide expansive qualitative and quantitative

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climate-related information in their registration statements and periodic reports filed with the SEC—representing a significant expansion of SEC registrant disclosure requirements. In May 25, 2022, the SEC proposed new ESG-related disclosure rules that would require funds and advisers to provide more specific disclosures in fund prospectuses, annual reports and adviser brochures based on the ESG strategies they pursue. Adoption of these new rules has been delayed based on industry concerns, as well as legal uncertainty about agency authority following the U.S. Supreme Court's June 27, 2022 ruling in *West Virginia v. EPA* (which held that federal agencies cannot regulate "major questions" with significant economic or political implications unless expressly authorized by Congress to do so). (See the Fried Frank Client Memorandum on the proposed new climate-related rules here.)

SHAREHOLDER ACTIVISM. Shareholder activism in the U.S. increased in 2022, returning to pre-pandemic levels (with record-breaking activity in the first quarter of the year and a notable rise in campaigns against larger companies). A predominant focus continued to be M&A-related objectives, although there was a notable increase in campaigns focused on corporate strategy and operations, replacing management, and ESG (or political) issues. In the current environment of macroeconomic uncertainty and a depressed stock market, activist activity may increase further as underperforming companies are targeted. Notably, de-SPACed companies continue to be targeted by activists despite the companies' strong defensive mechanisms adopted in connection with SPAC's initial public offerings. Increased activism targeted at climate-related disclosures and actions is expected if the SEC's new proposed climate disclosure policies are adopted. Also, the SEC's new universal proxy rules, which went into effect September 1, 2022, may encourage more first-time activists and more proxy battles, as use of the universal proxy card should decrease the cost and may increase the likelihood of success for dissident stockholders. At the same time, activism may be depressed based on the slow-down in M&A activity; and the SEC's new proposed 13D rules (discussed below) could have a chilling effect. Notably, companies have been more aggressively defending against activist campaigns than in the recent past.

As always, boards should prepare *in advance* for the potential of an activist campaign, including by having a response team in place; maintaining contact, and engaging in substantive two-way dialogue, with key investors; having defensive protections (such as shareholder rights plans and enhanced advance director nomination bylaws) in place; and "thinking like an activist" to identify, and then address, board, operational, ESG, and other potential vulnerabilities. (See also "Proxy Contests" below; and see the Fried Frank article discussing activism here.)

PROXY CONTESTS. The increased prevalence of stockholder proposals under Rule 14a-8 has continued, as has the shift in focus from governance issues to political topics. This year, for the first time, a majority of stockholder proposals went to a vote. The SEC's new rules limiting the bases for exclusion of stockholder proposals went into effect September 1, 2022, and are likely to sustain or further the rise in stockholder proposals. In addition, the SEC's new universal proxy rules went into effect September 1, 2022, and are expected to result in more proxy contests, including more challenges of particular directors with vulnerabilities in experience, over-boarding, overlong tenure, lack of diversity, absenteeism, or otherwise. The 2022 proxy contests reflected the continued strong influence of the key proxy advisory firms on proxy contest outcomes. An emerging trend of note is activists combining ESG proposals with an activist campaign focused on M&A objectives or director nominees, using the former to gain stockholder attention and support for the latter. Another potentially important development has been the adoption by certain large passive index funds of policies permitting their institutional investors themselves to determine how their underlying shares will be voted on certain corporate matters (for example, on director nominees, ESG proposals, and say-on-pay). Some funds have recently announced, or are considering, an expansion of these policies to cover their retail investors as well—which will make institutional support in proxy contests less predictable. (See also "Shareholder Activism" and "ESG" above; and see the Fried Frank article discussing proxy contests here.)

SPACS. 2022 marked the end of the SPAC boom of 2020-2021, with new SPACs essentially ground to a halt, soaring redemption rates, and a record number of SPACs being liquidated after being unable to complete a de-SPAC transaction within the required time period. While the SPAC reset reflects negative macroeconomic conditions and the broader slowdown in M&A activity, SPACs also faced increased regulatory and judicial scrutiny. On March 30, 2022, the SEC proposed new rules that are expected to make the SPAC process lengthier, more costly and more complex, and, critically, to impose a significantly greater risk of liability for the entities involved than they would face in a traditional initial public offering. Also, in April 2022, Nasdaq, in response to a letter it received from the SEC Investor Advocate, requested comment from the public on whether the listing standards for SPACs should prohibit the consummation of a business combination when a majority of a SPAC's public shareholders exercise their redemption rights or, alternatively, should prohibit shareholders voting in favor of a proposed business combination from having the right to redeem their shares in connection with that business combination. In addition, SPACs are facing significantly declined investor interest in light of generally disappointing stock price performance of de-SPACed companies overall; significant reduction in the availability

of PIPE (private-investment-in-public-equity) financing to support de-SPACs; and a new, non-deductible 1% excise tax on stock repurchases, which became effective January 1, 2023, that may apply to SPAC redemptions (other than pursuant to a complete liquidation of the SPAC, according to IRS guidance issued December 27, 2022). At the same time, however, we note that several hundred existing SPACs are still searching for de-SPAC transactions; SPAC sponsors have continued to pursue large de-SPAC transactions in the technology space; and practitioners continue to make modifications to the SPAC structure in response to the regulatory, judicial and market headwinds. (See the Fried Frank M&A/PE Briefing discussing SPACs and offering related practice points here.)

13D. On February 10, 2022, the SEC proposed new rules that, most notably, would shorten the current ten-day deadline for initial Schedule 13D filings to five days and would accelerate the amendment deadline to just one business day. In addition, the proposed new rules would substantially revise and expand the determination of Section 13(d) groups, and (together with other proposed rules) would expand disclosure obligations arising from holding cash-settled derivative securities. The proposed changes would reduce the opportunity to acquire ownership of (and other exposure to) a company's stock before making public disclosure, thereby reducing an activist's or acquiror's ability to acquire a large stake before the target and the public learn of it, and thus likely reducing the opportunity to benefit from any post-announcement increase in the company's stock price. The Musk-Twitter and Cohen-Bed Bath & Beyond situations this year highlighted again the issues that arise from the delayed timing of Schedule 13D disclosures of purchases and sales of significant equity stakes through market purchases. (See the Fried Frank Client Memorandum discussing the proposed Schedules 13D and 13G amendments here; and see the Fried Frank M&A/PE Quarterly note discussing Twitter and BB&B here.)

DGCL—OFFICER EXCULPATION. On August 1, 2022, amendments to the Delaware General Corporation Law took effect that now permit Delaware corporations to include in their charters provisions that exculpate executive officers from liability for direct (*i.e.*, non-derivative) claims for breaches of the duty of care (*i.e.*, for gross negligence in the conduct of their duties). Previously, the DGCL permitted exculpation only of directors for duty of care violations. (The DGCL prohibits exculpation of duty of loyalty violations.) Most companies continue to take a wait-and-see approach in connection with adoption of charter amendments to provide for officer exculpation, pending further development of proxy firms' policies and stockholders' views on providing exculpation for officers. Only roughly a dozen Delaware companies have submitted stand-alone proxy proposals to amend their charters to provide for officer exculpation. Proxy firms ISS and Glass Lewis both recommended in favor of officer exculpation proposals at several Delaware companies this year; however, the firms' new guidelines for 2023 (adopted in December and November 2022, respectively) do not provide a blanket policy in favor of officer exculpation but, instead, consideration on a case-by-case. ISS states that it will take into consideration the extent to which the charter would "eliminate" directors' and officers' liability for violating the duty of care and the duty of loyalty and would expand beyond the coverage of legal expenses to include liability for fiduciary violations that reflect more than acts of mere carelessness. Glass Lewis states that it expects to recommend against proposals that eliminate monetary liability for breaches of the duty of care for certain corporate officers, unless the board provides a compelling rationale and the provisions are reasonable. Thus, while proxy firm support for officer exculpation provisions generally has been expected, it remains to be seen how the new policies will be applied. (See the Fried Frank M&A/PE Quarterly note discussing the DGCL amendment permitting officer exculpation here.)

Key Developments in Delaware Law

While there were no dramatic, transformational changes in Delaware law in 2022, the courts reaffirmed, and in some cases expanded, important recent trends. Below, we discuss the key developments; and the decisions mentioned are discussed below under "Key Delaware Decisions." (*A list of the decisions discussed is included at the end of this Quarterly.*)

- **Sponsor Liability.** Sponsors generally are protected from liability for actions by their portfolio companies so long as the corporate formalities between them are observed such that it is the portfolio company's board and management (and not the sponsor) that is making the decisions for the company. Usual sponsor activity in connection with monitoring and assisting portfolio companies should not lead to liability for the sponsor; however, a sponsor or its principals (even if having no formal role as a director, officer or employee of the portfolio company) face potential liability for the portfolio company's actions, as an "acting" (or *de facto*) manager, if they are deemed to have "materially participated" in the management of the company either generally or with respect to the challenged transaction. This year, in *P3 Health*, the Court of Chancery held that one of the principals of a PE sponsor (who had no formal role at the portfolio company at issue) may have personal liability for his role in connection with the company's de-SPAC merger in light of his "material participation" with respect to the de-SPAC. The decision serves as a reminder that a sponsor—even (indeed, particularly) when it is the controller of a portfolio company—generally should act with respect to the company *through* its board nominees, equity ownership, and any contractual rights, and should not assert that it is "in charge" of the company or any of the company's transactions.

- **Director Liability.** The Court of Chancery, in *Garfield v. Allen*, expanded potential personal liability of directors by adopting a new theory of director fiduciary liability based on a board's failure to address problems that come to its attention through litigation demand letters. The court adopted this new theory "with trepidation," noting that it is "novel," "lack[s] precedent," and potentially could be used by plaintiffs to inequitable ends (including by "manufacturing a claim against directors by acting as a whistleblower and then suing because the directors did not respond to the whistle"). Accordingly, boards should review their existing processes to ensure that they appropriately consider issues raised in litigation demands the company receives.

- **Activists—and Other "Short Term" Investors.** The Court of Chancery, in *Goldstein v. Denner*, took the expansive view that activists, and other "repeat players" who are "short-term" investors, and the directors appointed by them, may have an *inherent* disabling conflict of interest in a company's sale process—at least when acting in accordance with a "usual playbook" of forcing a near-term sale-of-the-company. The court described such investors as having an inherently divergent interest from the other stockholders given their short-term investment horizon, based on which they may well favor a near-term sale of the company at an inopportune time (even if only based on a desire to "redeploy" their capital to other investments). The court described director-designees of such investors as inherently conflicted given the likelihood that they are grateful for their board seats and their likely expectation of "future benefits" in the form of board seats at the investor's other portfolio companies. We note that the decision may be limited to the context where, as was the case in *Goldstein*, the short-term investor is leading the sale process and has a usual pattern of forcing near-term sales at inopportune times. Moreover, in *Goldstein*, there were additional, egregious alleged actions by the activist director that suggested a lack of loyalty to the company.

- **Officer Liability.** The trend of increased prevalence of fiduciary claims against corporate officers has continued. Further, in *P3 Health*, the court expanded potential liability for officers of Delaware LLCs. The court, applying a new interpretation of the Delaware LLC Act's consent-to-jurisdiction provision, held that the provision extends not only to the "President" of an LLC (as the court had established in prior cases), but extends to any person with a "senior role" at an LLC. The court also indicated that, at the pleading stage of litigation, the court would not find a lack of jurisdiction under the Act based on officers' contentions that, while they held an executive officer title, they in fact did not have a senior role as they did not function consistently with the title. Such a conclusion would require a facts-based inquiry at trial, the court held. Based on *P3 Health*, LLC officers with "C-suite"-type titles should expect more claims against them challenging actions they took as an officer.

- **Controller Conflicts Based on Desire for Liquidity.** The Court of Chancery, in *Goldstein v. Denner*, amplified its erosion in recent years of the *Synthes* doctrine. The *Synthes* doctrine held that a controller had a disabling conflict in a company's sale process if it wished to sell the company to obtain liquidity, but only if the desire for liquidity was based on an "exigent need" for "immediate cash," such that the controller could be expected to have been amenable to accepting even a "fire-sale" price for the company. The court has stepped back the *Synthes* doctrine in several cases over the past few years—and in *Goldstein*, appears to have extended that retreat, stating flatly that a controller may have a disabling conflict in a sale process even if the desire for liquidity is based merely on its wanting to "redeploy" its capital to a different investment. Based on *Goldstein*, controllers may now face a heightened risk of being deemed to be conflicted with respect to a sale of the company.

- **Who is a Controller?** Delaware decisions continue to emphasize that controller status depends on a facts-intensive analysis of all relevant factors. The Court of Chancery has continued to find in some cases that a less-than-majority stockholder (or even a non-stockholder) may have been a *de facto* controller. Notably, in several recent cases, in finding a pleading-stage inference of controller status, the court has focused on allegations that the alleged controller held itself out as having control and/or that others generally viewed it as having control. The court has also mentioned as a relevant factor in several cases that company board meetings were held at the offices of the alleged controller. This year's key decisions include *MPM Holdings*, where the court held at the pleading stage that a 41% stockholder may have been a controller (with the company having the "look and feel" of a portfolio company); and, *Blue v. Fireman*, where the court held at the pleading stage that a non-stockholder creditor (who had a proxy to vote 83% of the company's voting power) was a controller.

- ***MFW*.** The Delaware courts have continued to reconfirm broad applicability of the *MFW* framework to transactions involving conflicted controllers (beyond the squeeze-out merger context of the *MFW* decision itself). This year, in *City Pension Fund v. The Trade Desk*, the Court of Chancery applied *MFW* to a board's adoption of a stockholder-approved charter amendment that extended the sunset of the company's dual-class share structure (which effectively extended the control held by the company's co-founder/CEO/chairman); and, in *Match Group (IAC)*, applied *MFW* to a multi-step

reverse spinoff initiated by the company's controller (who also would control the spun-off company). In both cases, the court found that, notwithstanding flaws in the sale process, the *MFW* prerequisites to business judgment review were satisfied—and the cases were dismissed at the pleading stage. *MFW* also was applied in a traditional conflicted-controller M&A context, in *Smart Local v. BridgeBio Pharma (*where the court rejected arguments that a controller's refusal to sell into a competing offer higher than its own affected the special committee such that the MFW prerequisites were unsatisfied*)*.

- **Director Independence.** Delaware decisions continue to reflect the significant, negative impacts (particularly in the context of related-party deals) from judicial findings that one or more purportedly independent directors may not have been independent. Continuing themes in these decisions are that the standard is low at the pleading stage (reasonable conceivability) for a finding of non-independence; that director compensation and business and personal ties (in each case unless unusually extensive) are not sufficient to establish non-independence; and that the court's analysis of independence typically will involve a wide-ranging, facts-specific, "holistic" inquiry. Of note, the Court of Chancery, in *Goldstein v. Denner*, suggested that directors appointed by activists or other "short-term" investors who are "repeat players" may inherently be non-independent in a sale process (see the discussion above under "Activists and Other 'Short-Term' Investors"); and, in *BGC Partners*, the court found that an outside director may not have been independent based on his unusually lavish and emotional praise for the company's controller.

- **Entire Fairness.** The Court of Chancery continues to emphasize that it is difficult to satisfy the entire fairness standard (the most onerous standard of review) and that the standard requires a "unitary" analysis as to whether both the price and process were fair. However, in two important cases this year, *Tesla Motors (SolarCity)* and *BGC Partners*, the court amplified its recent trend suggesting that fairness of price may be the predominant consideration in an entire fairness analysis. In both of these cases, the court held that the entire fairness standard was satisfied notwithstanding that the sale processes were flawed—indeed, the court stressed that a "perfect" process is neither possible nor necessary to satisfy entire fairness. Also of note, in *Cellular Telephone Partnership*, the court held that entire fairness was *not* satisfied although the price paid to the minority unitholders was based on a valuation by a major, national valuation firm. Importantly, the firm had been selected by the company's conflicted controller and the court viewed the firm's analysis as seriously flawed.

- **SPACS.** The Court of Chancery's docket has been increasingly occupied with challenges to de-SPAC mergers. With the court's first decision to address fiduciary duties in the context of SPACs, *Amo v. MultiPlan*, the court surprised practitioners by holding that de-SAPC mergers generally will be subject to entire fairness review based on conflicts of interest (between the SPAC's fiduciaries and the public stockholders) that are *inherent* in the SPAC structure. Practitioners generally had viewed the disclosure to stockholders of such conflicts in the SPAC's prospectus for its initial public offering as sufficient protection in that respect. Moreover, they had viewed the SPAC stockholders' right, under the typical SPAC structure, to redeem their shares (once an acquisition target has been identified and before the de-SPAC closes) as providing SPAC stockholders with strong protection that would significantly mitigate fiduciary duty risk for SPAC sponsors and directors in connection with de-SPACs. Accordingly, they viewed SPAC sponsors and directors as not analogous to controllers and directors in the non-SPAC context where stockholders can be dragged along in a conflicted merger to which they are opposed and who therefore need the protection of entire fairness review.

  We note that development of the law in the context of SPACs is in its earliest stages. We expect that the law may well evolve such that entire fairness will be applicable only when the disclosure was inadequate such that the stockholders' redemption right was impaired. In the meantime, based on *MultiPlan*, it appears that many challenges to de-SPACs will not be resolved at the pleading stage; and, given that entire fairness may apply, SPAC sponsors and directors should seek to avoid actions or circumstances that could raise fairness concerns.

- **Limited Liability Entity Conflicted-Controller Transactions.** The Delaware Supreme Court, in an opinion with potentially wide and significant impact, reversed the Court of Chancery's decision in *Boardwalk Pipeline v. Bandera (Loews)*. The Court of Chancery had awarded damages of almost $700 million to the public unitholders of a master limited partnership based on "opportunistic and manipulative" conduct by the general partner. The Supreme Court did not overturn the lower court's factual findings as to the general partner's conduct generally, but nonetheless held that there had been no breach of the partnership agreement, which disclaimed fiduciary duties of the general partner.

  Boardwalk highlights the typically very limited rights of minority investors in alternative entities; and indicates that, even in the context of public investors and findings of serious misconduct by a controller, the court is likely to interpret narrowly any limited rights that are provided for when (as is usual) the parties' agreement generally disclaims fiduciary duties. The decision may broadly affect how provisions permitting conflicted transactions subject to receipt of a legal

opinion are drafted and implemented. As the Supreme Court found in this case that the controller acted reasonably in accepting and relying on the opinion based on its having obtained a second opinion (which was not challenged), from a different law firm, as to whether it was reasonable to rely on the first opinion, the decision may lead controllers (and others) who receive opinions that may be potentially problematic in some respect to seek a second opinion as to the reasonableness of accepting and relying on the first opinion. The decision may make it generally more difficult for minority investors to challenge conflicted transactions by controllers of limited liability entities—especially, for example, in the private fund context, where investors typically are more sophisticated and have greater negotiating leverage than the public unitholders involved in *Boardwalk Pipeline* and thus are likely to be viewed by the courts as entitled to even less protection.

Boardwalk highlights that sponsors of non-corporate entities should seek to ensure that the entity's organizational documents include an effective disclaimer of fiduciary duties and that the absence (or limitation, as the case may be) of fiduciary duties is fully disclosed. Potential investors, depending on their negotiating leverage, may wish to seek to provide specific protections; and should ensure, before they invest, that they fully understand the effects of any waiver or limitation of fiduciary duties.

- **Proxy Contests.** The Court of Chancery, in *Totta v. CCSB Financial*, held that a board's adoption of a new interpretation of a charter provision imposing a stockholder voting limitation was impermissible in the face of a proxy contest, notwithstanding that the charter stated that the board's good faith decisions in interpreting the provision would be "conclusive and binding." The court emphasized that a corporate charter provision cannot foreclose the court from applying equitable principles when reviewing board actions; and more broadly, that, in contrast to agreements governing non-corporate entities, corporate charter provisions cannot displace directors' fiduciary duties. Applying enhanced scrutiny review under *Blasius* in light of the proxy contest context, the court found that adoption and application of the new interpretation was inequitable. The decision echoes other recent Delaware decisions that, in various contexts, have limited the effectiveness of grants of broad interpretive authority to a board.

- ***Caremark*.** As reinforced in *Caremark* cases over the years, while management should manage corporate risk on a day-to-day basis, it is part of the *board's* mandate to oversee and monitor the key risks the company faces. Risk management should be made a general corporate priority; the board should, or should designate committees to, identify and monitor key risks on an ongoing basis (including new and emerging risks); and the board's oversight and monitoring efforts should be documented (in board minutes, for example, or other corporate records). Under *Caremark* and its progeny, directors will have personal liability for a failure of board oversight only if there is a "sustained or systematic failure…—such as an utter failure to attempt to assure a reasonable information and reporting system exists" or "consciously ignor[ing] red flags" that indicated risk vulnerabilities.

  Traditionally, *Caremark* claims for failure of board oversight were regularly dismissed at the pleading stage of litigation, with the court commenting consistently that these claims are among the most difficult on which a plaintiff could hope to succeed. In a series of cases starting in 2019, however, plaintiffs were successful in having *Caremark* claims not dismissed at the pleading stage. Plaintiffs' success in this series of cases was driven by particularized complaints made possible by Section 220 books and records investigations; and, importantly, these cases involved alleged factual contexts that were particularly egregious. This year, however, in both *City of Detroit Police v. Hamrock (NiSource)* and *Contr. Indst. Laborers v. Bingle (SolarWinds)*, and last year in *Sorenson (Marriott)*, the Court of Chancery dismissed Caremark claims at the pleading stage. In *NiSource*, the claims were brought following a fatal explosion, allegedly following a longstanding pattern of non-compliance by the company with relevant regulatory requirements. The court dismissed the claims, notwithstanding an alleged company history of non-compliance with relevant regulatory requirements, on the grounds that the company had specifically charged a board committee with responsibility to address the key risks the company faced—and therefore had not "utterly failed" to establish some system of oversight. In *SolarWinds* and *Marriott*, the claims were brought following massive public leaking of private information of the company's customers due to cyberhacking of the company's systems. The court dismissed the claims in both cases—notwithstanding its view that cybersecurity was a "mission-critical" risk for the company and that the company's oversight system of that risk as "subpar""—on the grounds that board committees had been charged with overseeing cybersecurity risk. These most recent cases again emphasize that directors generally face a very low risk of personal liability for a failure of oversight so long as the board implemented any (even a flawed) system of oversight for the company's "mission-critical" risks. At the same time, the previous cases serve as a reminder that there is a real risk of liability for a failure of board oversight.

In another notable development, the court, in *Lebanon Cty. Employees' Rtrmt. Fund v. Collis (AmerisourceBergen)*, in a case of first impression, created an extensive framework for judicial evaluation of a defense in *Caremark* cases that the claims were not timely brought. The court reviewed in detail the challenges in such an evaluation, including how to determine when the claim accrued given allegations that the board ignored red flags of various types and levels of severity over a long period of time. The court held in this case (again, in the context of a particularly egregious alleged factual context) that the claims were timely made and the court rejected dismissal of the case on the basis of non-timeliness. Notably, the court considered the various alleged incidents of ignoring red flags on a "separate accrual" basis, with each giving rise to its own, separate limitations period.

- **Board Minutes.** The Court of Chancery's decisions continue to highlight that negative consequences may flow from silence in board minutes with respect to sale process developments, or from descriptions in board minutes that are inconsistent with the company's public disclosures. The decisions, this year including *Goldstein v. Denner* and *Hightower v. SharpSpring*, underscore that boards should weigh the benefits and disadvantages of preparation of more (rather than less) comprehensive board minutes to establish a record of the care taken by the board. In all cases, boards should carefully compare the company's draft public disclosure to descriptions of the same events in board minutes (and other books and records, potentially including contemporaneous emails) to ensure consistency.

- **Disclosure.** Continuing trends in Delaware disclosure decisions include: (i) a partial swinging back of the pendulum on deference to stockholder-approved transactions—from what had been almost-automatic dismissal of cases under *Corwin* and *MFW*, to now a more intense judicial evaluation of the applicability of these defense tools, in many cases based on whether the disclosure was sufficient for a fully informed vote; (ii) expanded use by plaintiffs of Section 220 books and records investigations to support claims of inadequate disclosure; (iii) amplification of a board's oversight duty with respect to disclosure; (iv) increased targeting of disclosure claims against corporate officers; and (v) judicial acceptance of aiding and abetting liability of buyers for materially flawed target company disclosure.

  On the federal securities litigation front, in *Menora v. Frutarom*, the U.S. Court of Appeals for the Second Circuit established a new, bright-line test that limits standing to bring Rule 10b-5 claims to plaintiffs who "bought or sold shares" *of the company about which the alleged misstatements were made*. We note that, as claims for a target's pre-merger statements about itself generally cannot be brought against the acquiror, investors in an acquiror may now be left without a route to making federal disclosure claims relating to a target's pre-merger misstatements, even when they affected the acquiror's stock price.

- **Discovery of Emails.** The Court of Chancery has continued to grant access, both in Section 220 actions and other litigation, to "informal" board materials, sometimes including directors' and officers' personal emails and other communications, particularly where the formal board materials do not address the subject at issue or the plaintiff has made particularized allegations with respect to the existence of relevant communications. It bears repeated and strong emphasis that emails and other informal communications may be discoverable, are often outcome-determinative of a litigation, and should be drafted and approached with the same care as formal corporate communications. Directors and officers should be advised accordingly when onboarded and then on an ongoing periodic basis. Outside advisors also should be vigilant in seeking to ensure their own appropriate drafting and treatment of emails. The *Twitter v. Musk* litigation discovery rulings this year highlight that the extent (if any) to which the court will grant access to emails will depend on the specific facts and circumstances of the case.

- **Section 220.** Plaintiffs have continued the trend in recent years of obtaining information through Section 220 investigations to enable them to frame more particularized complaints, which has resulted in more cases surviving the pleading stage of litigation than in the past (particularly in the contexts of *Corwin*, *MFW* and *Caremark* cases). The court generally has continued: to permit access under DGCL Section 220 to investigate potential wrongdoing so long as there is any reasonable basis for suspecting it; more frequently to grant access not only to formal board materials but also to informal materials in some circumstances (see "Discovery of Emails" above); and to encourage corporations not to employ overly aggressive litigation strategies in seeking not to produce appropriately requested books and records.

  In decisions this year, the court established that reliable hearsay evidence can be used to demonstrate a "proper purpose" for a Section 220 demand (*NVIDIA*); that resolution of inconsistencies in a company's public disclosures is a proper purpose for a Section 220 demand (*Hightower v. SharpSpring*); and that confidentiality of Section 220 documents will not be granted based on generic concerns about competitors' use of the information (*Rivest v. Hauppauge Digital*). Also of note, in a few litigations not brought under Section 220 (*Wei v. Zoox and Lordstown*), the court has granted access to information based on what would have been available in a Section 220 action even though the stockholder-plaintiffs did not have standing to bring a Section 220 action.

Appraisal. Appraisal risk for deals continues to be greatly reduced—with the Court of Chancery regularly relying on deal-price-less-synergies in cases involving arm's-length mergers, even when the sale process was flawed (so long as not seriously flawed). Of note, however, the court, for the first time, in *BCIM v. HFF*, made a significant adjustment to a fair value determination on the basis of changes that occurred in the target company between signing (when the deal price was set) and closing (as of when, under Delaware law, appraised fair value is to be determined). *BCIM* thus suggests that the appraisal risk is potentially higher in deals involving longer periods of time between signing and closing. (We note that the court also made an adjustment for signing-to-closing changes in last year's *Regal Entertainment* decision, but in that case the adjustment was minimal.) Importantly, while the adjustment to fair value in *BCIM* was based on extraordinary outperformance by the target company during the period pending closing, which was expected to endure, changes in financial results not reflecting a change in fundamental, long-term value generally would not lead the court to make an adjustment.

Other notable appraisal decisions this year were *Ramcell*—which provides a reminder that in appropriate cases the court still may rely on a discounted cash flow (DCF) analysis to determine appraised fair value (and that, when it does, the result may significantly exceed the deal price); and *Zoox*—in which the court limited the appraisal petitioners' discovery to what they could have obtained under a Section 220 demand (in light of the court's conclusion that their actual purpose in bringing the appraisal action was to investigate possible wrongdoing rather than to obtain an appraisal of their shares, and that they were bringing the appraisal action after they lost Section 220 standing due to the respondent's rushing the closing).

- **Advance Notice Director Nominations.** State-of-the-art advance notice director nomination requirements now require more detailed information from the nominator than in the past. The Court of Chancery's decisions continue to emphasize that a stockholder's nomination notice must comply precisely with the company's advance notice requirements. The court established this year in *Lee Enterprises* that enhanced scrutiny judicial review will apply to a board's decision to reject even a plainly non-compliant nomination notice—but, at the same time, the court indicated that directors should meet that standard so long as they acted reasonably. The decision serves as a reminder that a board must act in good faith and equitably when deciding to reject a nomination notice, even when the notice is noncompliant with the bylaw, is submitted outside a takeover context, and/or involves nominations for a minority of board seats.

- **Non-Competes.** Non-competes in connection with the sale of a business face greater judicial and regulatory scrutiny that in the past. Importantly, the Court of Chancery, in *Kodiak*, and the FTC, in its *ARKO/GPM* action, took the view that non-competes agreed in the context of the sale of a business could extend only so far as protecting the goodwill of the business *that was acquired*, and not the goodwill of the buyer's other businesses. Moreover, the court has indicated a strong reluctance to "blue-pencil" non-competes to make them compliant; and, instead, has invalidated them in whole if overbroad. M&A parties should carefully consider the scope and duration of non-competes (and related non-solicitation and confidentiality restrictions) in the context of the specific facts and circumstances of the transaction at issue. As illustrated in *Kodiak* and *ARKO*, overbroad restrictions could result in the buyer being left with no such protection at all and/or even (as occurred in *ARKO*) the invalidation of its other, similar, already-existing agreements. Moreover, in the first week of January 2023, the FTC proposed rules that would ban non-compete agreements in connection with employment.

- **Sandbagging.** The Court of Chancery, in *Arwood v. AW Site Services*, clarified that Delaware is ("or should be") a "pro-sandbagging" jurisdiction. In other words, unless the parties provide otherwise in their agreement, a buyer that sandbags a seller is still entitled to indemnification for breach of the seller's representations and warranties. The court also clarified that the sandbagging doctrine is implicated only if the buyer *actually knew* of the falsity of representations and warranties (even if a failure to know was based on the buyer's own carelessness). We note that the majority of M&A agreements are silent with respect to sandbagging. Following *Arwood*, a seller wishing to avoid being sandbagged should include an explicit anti-sandbagging provision (stating that the buyer cannot recover indemnification for breaches of representations and warranties to the extent that it knew or should have known that they were not true).

- **Ordinary Course Covenants.** This year, the Court of Chancery decided the third major case—*Level 4 Yoga v. CorePower Yoga*—in which a buyer claimed that a target's responses to the COVID-19 pandemic, pending closing, constituted a breach of the target's covenant in the merger agreement to operate, pending closing, only in the ordinary course of business. In the earlier two cases, *AB Stable* (2020) and *Snow Phipps* (2021), the court had established that (i) an ordinary course covenant does not permit operation in what would be the ordinary course *in light of* the occurrence

of an extraordinary event (in these cases, the pandemic) pending closing; and (ii) where the covenant to operate in the ordinary course of business is qualified by the phrase "*consistent with past practice*," the court will look only to the operations of the company itself and not to other companies' operations to determine what is ordinary course. In *AB Stable*, the court found that the target's responses constituted a breach of its covenant and the buyer was not obligated to close; in *Snow Phipps*, the court found that the target's responses did not breach the covenant (as they were *de minimis* and consistent with the company's actions in previous periods of low consumer demand for its products) and the buyer *was* obligated to close. In *Yoga Level 4*, the court found that the target, which owned and operated yoga studios, did not breach its covenant to operate in the ordinary course consistent with past practice when it closed all of its yoga studios in response to the pandemic. The holding was based on unique features of the buyer-target relationship (as franchisor-franchisee), as well as the unusual structure of the merger agreement (which contained no closing conditions or termination rights).

These decisions underscore that ordinary course covenant breach claims will be determined based on the precise drafting of the covenant and the specific facts and circumstances of the case. We would advise that merger parties consider carefully whether (and how much) flexibility should be built into an ordinary course covenant for a target to respond to extraordinary events that may occur between signing and closing. A target may find reliance on the buyer's obligation not to unreasonably withhold consent to non-ordinary course actions insufficient given the potential that a buyer may later decide (based on the occurrence of an extraordinary event or otherwise) that it does not want to close.

- **MAEs.** The Court of Chancery, in *Yoga Level 4 v. CorePower Yoga*, continued its invariable trend (with the sole exception of its 2018 *Akorn* decision) of finding that an extraordinary event that occurred between signing and closing of a merger agreement (in this case, the COVID-19 pandemic) did not constitute a "material adverse effect" (or "material adverse change") that excused the buyer from closing. Although the parties' definition of "MAE," unusally, did not specify any exclusions (such as for pandemics, natural disasters, or calamities), the court held that the pandemic's impact did not have the "durational significance" required for it to constitute an MAE. The court emphasized that, at the time the buyer sought to terminate the agreement, the parties expected the closure of the company's studios to last only a matter of a few weeks. We would note that merger agreement parties should keep in mind that an MAE is whatever the parties define it as—and there may be circumstances under which a buyer and target would consider it appropriate to specify a lower or different standard than the court otherwise would apply with respect to what level of impact and/or durational significance would be required for an event to constitute an MAE. Also of note, the court stated in *Yoga Level 4* that the "durational significance" component of the MAE analysis was particularly important in this case because the strategic buyer was pursuing the acquisition as part of "a long-term strategy." We would advise that private equity buyers, if they have not drafted an MAE definition to specify a durational significance standard, should argue in a judicial proceeding that the court ought to apply a lower standard than unusual in the context of acquisitions by private equity buyers given their typically shorter investment horizons.

- **Cyber-Risk in Payment of Merger Consideration.** A decision with potentially increasing relevance, *Sorenson Impact Fdtn. v. Continental Stock Transfer Trust*, involved cyber-hacking that re-directed payment of merger consideration from certain actual target company stockholders to the hackers. The Court of Chancery held that the buyer may not have fulfilled its obligations to the target stockholders merely by complying with the merger agreement provision requiring it to transfer the merger consideration to the paying agent. At the pleading stage, the court found it reasonably conceivable that the merger agreement could be interpreted to have required that the buyer ensure that the merger consideration was received by the stockholders. The case highlights that M&A transactions present significant opportunities for cyber criminals; and that M&A participants should carefully plan to avoid possible hacking, should be prepared to respond appropriately if hacking occurs, and should consider specifically addressing in their agreements the potential liability issues in the event that hacking (or other improper diversion of merger consideration) occurs. In addition, a buyer, target and paying agent (as well as legal counsel) all should pay attention to red flags that letters of transmittal may be suspect and should seek to ensure appropriate resolution of any irregularities (including by following precisely any instructions relating thereto in the parties' agreements).

- **Contract Interpretation.** The Court of Chancery continues to see an increase in contract interpretation cases. Drafters of merger and other commercial agreements should keep in mind the court's decisions interpreting commonly used words and phrases—including, this year, its interpretation of "consent to [and] not object to" (*Manti v. Carlyle*); "void" (*XRI Invstmt. v. Holifield*); "subject to" (*ITG Brands v. Reynolds American*); and "and" (*Weinberg v. Waystar*). Also, the court reaffirmed its view that standards of efforts set forth in M&A agreements all indicate essentially the same level of obligations (*Menn v. ConMed*).

- **Agreements to Agree.** The Delaware Supreme Court, reversing the Court of Chancery's decision below in *Cox Communications v. T-Mobile US*, held that an agreement to enter into an agreement on terms to be negotiated in the future was binding only in the sense that it required that the parties negotiate in good faith (and did not require that they actually "make a deal"). The decision underscores the need to address clearly and precisely the extent to which a preliminary agreement (or agreement to agree) is intended to be binding or only to commit the parties to negotiate open issues.

Key Delaware Decisions

Below, we discuss in more detail the 2022 court decisions mentioned above.

Sponsor Liability:

P3 Health

In *P3 Health*, the Court of Chancery found, at the pleading stage of litigation, that a principal of the sponsor of a controlled portfolio company may have been an "acting" (or *de facto*) manager of the portfolio company due to his "material participation" in the company's management in connection with the company's de-SPAC merger. We note that many of the principal's actions cited by the court were, in our view, usual for sponsors—for example, the principal allegedly participated in meetings about the transaction, was included on email chains, reviewed documents, and helped with structuring and financing issues. However, *in addition*, the principal had instructed the company's advisors not to distribute draft documents without his or the sponsor's approval; had asserted that he and the sponsor were "in charge" of the transaction; had more information about the transaction than the actual managers did; and kept the company's actual managers in the dark about his and the sponsor's actions and important developments (including, mid-transaction, a significant downward revision of the deal price and serious issues with the deal financing). It was apparently the combination of these activities, as well as an overall negative alleged fact situation, that led to the court's result. (See the further discussion of *P3 Health* below under "Officer Liability"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Director Liability:

Garfield v. Allen

In *Garfield*, the plaintiffs sued directors for not "fixing" awards that had been granted to officers under an equity-based compensation plan after the company received a litigation demand letter alleging that the awards violated "express and unambiguous" restrictions set forth in the plan. The Court of Chancery observed that there was no precedent for imposing liability on directors for failing to address issues raised in demand litigation letters. However, the court reasoned that, as *Caremark* imposes liability for a board's conscious disregard of "red flags," the result should not be different when the red flag is in the form of a litigation demand. The court confirmed that violation of express, unambiguous restrictions in an equity-based plan can imply not only contractual breach, but also bad faith by the directors. The court suggested that the director defendants might have reasonably decided not to seek to fix the flawed awards if the awards had been granted, for example, to outside consultants; but stressed that the failure to seek to fix the awards was especially problematic where, as here, they were readily fixable because they were granted to officers (who had the same fiduciary duties the board did to ensure compliance with the plan). The court rejected the directors' defense that the plan specifically granted them full authority to interpret all provisions of the plan. Such grants of authority can apply only to interpretation of plan provisions that are "ambiguous," the court held. (See the Fried Frank M&A/PE Briefing discussing *Garfield* and offering related practice points here.)

Activists—and Other "Short-Term" Investors:

Goldstein v. Denner

In *Goldstein*, the plaintiff alleged that, in connection with the $11.6 billion cash acquisition of Bioverative (which had recently been spun off from Biogen), the activist investor who was the lead director for the sale process had followed his "usual playbook" of pressuring a public company into putting him on the board, then recruiting his "supporters" onto the board, and then forcing a near-term sale of the company (even though at an inopportune time, in this case in light of the company having been so recently spun off). Further, the director allegedly "supercharged" the usual strategy by causing the hedge fund he controlled to buy a significant stake in Bioverative after the buyer first approached him about its interest in acquiring the company, and then waiting until the expiration period for disgorgement of short-

swing profits under Section 16(b) of the Exchange Act to inform the board of the buyer's interest and to initiate the sale process. Also, notably, the sale price was almost one-third below the company's standalone value based on the company's internal projections in its long-range plan (before management "slashed" the projections); and only 62.5% of the outstanding shares were tendered in the first-step tender offer.

At the pleading stage, the Court of Chancery held that the activist director may have breached his fiduciary duties. (The court reserved judgment as to whether his fund may have aiding and abetting liability for the alleged breach.) The court also held that an outside director may have acted in bad faith by concealing from the board information about conversations he and the activist director had with Sanofi; that two other outside directors may have acted in bad faith by supporting the sale based on their desire to strengthen their relationship with the activist director and his fund; and that all of the directors (including the one outside director who the court deemed to be independent and not to have supported the sale based on self-interest) may have acted in bad faith in issuing disclosure to the stockholders about the sale process that they likely knew was materially inaccurate or misleading. Notably, the court characterized some of its findings as "close calls" that were based on the plaintiff's allegations "taken together"—suggesting that the court's approaches and results may have been different if not for the overall highly negative factual context. (See the discussion of Goldstein below under "Officer Liability," "Controller Conflict Based on Desire for Liquidity," "Director Independence," and "Board Minutes"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Officer Liability:

P3 Health

Goldstein v. Denner

P3 Health. In *P3 Health*, the Court of Chancery held, at the pleading stage, that the General Counsel of the target company (a Delaware LLC) was subject to the jurisdiction of the court under the Delaware LLC Act's consent-to-jurisdiction provision, and thus faced potential liability in connection with her role in the company's challenged de-SPAC merger. The court held, for the first time, that the Act confers jurisdiction over any person with a "senior role" at a Delaware LLC (and not just, as the court had previously decided, over an LLC's "President"). The court rejected the General Counsel's argument that the claim against her should be dismissed because, notwithstanding her title, she did not have a "senior role," as her actual functions were ministerial only (centered on maintaining board minutes). The court held that, at the pleading stage, the court would rely on her title alone, as determining the role she actually played would require a facts-intensive analysis at trial. Separately, the court noted that, in any event, it appeared that she may in fact have played a senior role in connection with the challenged de-SPAC merger, as the role she had advised the board about its legal obligations; had reviewed and commented on outside counsel's drafts of board minutes; and had discussed with the board's outside counsel various legal issues relating to the merger. (See the discussion of *P3 Health* above under "Sponsor Liability"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Goldstein. The Court of Chancery's decision in *Goldstein* highlights the potential of liability for officers in connection with their alleged assistance to conflicted directors in conducting a flawed sale process. In *Goldstein*, the court, at the pleading stage, inferred possible disloyalty by the company's CEO-director and its CFO based on their allegedly having participated in "systematically slashing" the company's projections to support delivery of a fairness opinion for a planned merger championed by the conflicted lead director, when no changes had occurred in the business. The court also inferred possible disloyalty based on their alleged failure to disclose to the board the purchase of company stock made by the lead director's activist fund (which, the court stated, they had reason to know might have been the result of inside information provided by the director about the company's impending sale process). Further, the court inferred possible disloyalty by the CEO-director based on his alleged support for the sale due to his self-interest in obtaining a very significant severance award. In addition, the court inferred possibly disloyalty by the CLO based on her allegedly having "embellished" the board minutes to make the sale process seem less flawed than it actually was. Finally, the court inferred possible disloyalty by all three defendant officers based on their participation in drafting allegedly inaccurate disclosure to the shareholders. The plaintiff's allegations were based primarily on discrepancies between descriptions in the board minutes and internal emails produced in response to a Section 220 books and records demand. The court acknowledged that there were "defendant-friendly" ways to reconcile the discrepancies, but stressed that at the pleading stage the court could not determine facts or "weigh competing inferences." (See the discussion of *Goldstein* above under "Activists and Other 'Short-Term' Investors" and below under "Director Independence" and "Board Minutes"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Controller Conflict Based on Desire for Liquidity:

Goldstein v. Denner

In *Goldstein* (also discussed above under "Activists and Other 'Short-Term' Investors" and "Officer Liability"), the Court of Chancery found at the pleading stage that an activist investor who was the lead director of the company's sale process may have had a disabling conflict of interest in the company's sale process based on his fund's desire for liquidity. Continuing its erosion of the *Synthes* doctrine, the court stated flatly that an investor's desire for liquidity may create a disabling conflict even if the investor does not have an exigent need for liquidity but simply wants to "redeploy" its capital to different investment options or activist campaigns. (See the discussion of *Goldstein* below under "Director Independence" and "Board Minutes"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Who Is a Controller?

MPM Holdings

Blue v. Fireman

MPM Holdings. In *MPM Holdings*, the Court of Chancery held (in a transcript ruling) that private equity firm Apollo may have been a de facto controller of the company in which it was a 41% stockholder. The court emphasized that its determination was based on a holistic analysis of many factors (none of which taken alone necessarily would have supported a finding of control) and that, at the pleading stage, the plaintiff was entitled to all reasonable inferences in its favor. The court noted that 41% stock ownership was, based on standard levels of turnout on votes, enough to enable Apollo to dictate the outcome of any vote unilaterally; that a shared services agreement between the company and an Apollo affiliate gave Apollo "incremental leverage [and] influence" by permitting it to direct control of the company's important daily corporate functions (including its legal and investor relations department, although excluding the functions of the most senior officers of the company); that Apollo "acted like it controlled the company" (including by holding company board meetings at its offices); and that others appeared to consider Apollo as being in control (e.g., potential bidders insisted on speaking with Apollo and the board empowered Apollo to negotiate with them). "This situation has the look and feel of a world where this company is a portfolio company of Apollo," the court stated. (See the Fried Frank M&A/PE Quarterly note discussing *MPM Holdings* here.)

Blue. In *Blue*, the Court of Chancery held, at the pleading stage, that the company's largest creditor was the company's controller. The creditor owned no shares but, through the creditor-debtor relationship, had accrued a right to vote by proxy 83% of the company's voting power. The plaintiffs claimed that stockholders were deprived of merger consideration in the company's de-SPAC merger due to a side-deal the company entered into with the creditor. The creditor allegedly pressured the company to agree to amendments to the company notes and warrants it held, as a price of its voting its proxy in favor of the de-SPAC merger; and the amendments allegedly rendered the merger unfair by diverting material consideration ($40 million) that otherwise would have gone to the stockholders. The court found that the creditor was a controller based on its ability to vote a majority of the outstanding voting power; and the court thus rejected dismissal of the investors' fiduciary claims against the creditor. The court stated that the fact that the voting power had been "secured via [the] creditor-debtor relationship with the company [was] inconsequential." The court stressed that the creditor had control "because it can vote most of the company's stock, not because it holds most of the company's debt." (Of note, the court stated that the entire fairness standard of review would apply at trial, but that it was unclear whether it should apply to the merger or only to the amendments; and the court requested supplemental briefing on this issue.) (See the Fried Frank M&A/PE Quarterly note discussing *Blue* here.)

MFW:

City Pension Fund v. The Trade Desk

Match Group (IAC)

Smart Local v. BridgeBio Pharma

Trade Desk. In *Trade Desk*, stockholders of The Trade Desk challenged an amendment to the company's certificate of incorporation that effectively extended the duration of the company's dual-class stock structure—which, in turn, effectively extended the duration of the voting control held by the company's co-founder/CEO/chairman, who owned 98% of the company's high-vote Class B common stock, representing control over 55% of the combined vote of the

stockholders. The plaintiff alleged that the company's controller, board of directors, and certain officers breached their fiduciary duties in approving the charter amendment and recommending it to the stockholders (who voted to approve it). The board was comprised of the controller and seven outside directors. The amendment was approved by a special committee of three of the outside directors. The Court of Chancery held, at the pleading stage, that, as the transaction involved a conflicted controller, it was subject to review under the entire fairness standard unless the *MFW* prerequisites for business judgment review had been met. The court concluded that the *MFW* prerequisites were satisfied; thus, the case was dismissed.

The court rejected the plaintiff's argument that the stockholder vote was not "fully informed" because it did not reveal that the controller had a "dire need" for liquidity but was unable to sell a large amount of his high-vote stock without tripping the dilution trigger for expiration of the dual-class structure—and, therefore, that he was in a weak bargaining position and the committee thus could have obtained more favorable terms for the minority stockholders. The court found that none of the allegations supported an inference that the controller "required cash for any immediate investment or looming debt"; noted that the controller learned of the dilution trigger issue six months after the amendment was proposed; and emphasized that there was no allegation that the controller at any time had pressured the committee to accelerate the process. (See the discussion of *Trade Desk* below under "Director Independence"; and see the Fried Frank M&A/PE Quarterly article discussing *Trade Desk* here.)

Match Group (IAC). In *Match Group (IAC)*, the stockholders of IAC/Interactive Inc. challenged the company's reverse spinoff of its Match.com dating business. The spinoff was initiated by IAC/Interactive's controller, Barry Diller, who also would control the post-spin company. The Court of Chancery found that the *MFW* prerequisites for business judgment review had been meet. The court rejected the plaintiff's argument that the special committee was operating under a "controlled mindset" and thus failed to fulfill its duty of care as required under *MFW*. The court stated that the duty of care is fulfilled when a committee has "negotiat[ed] diligently with the assistance of advisors." The court emphasized that a plaintiff's disagreement with a committee's strategy, dissatisfaction with the results of its negotiations, or view that the committee did not try hard enough, do not support an inference that the committee did not satisfy its duty of care. (See the discussion of *Match Group* below under "Director Independence"; and see the Fried Frank M&A/PE Quarterly article discussing the decision here.)

Smart Local V. BridgeBio Pharma. In *BridgeBio*, a shareholder of Eidos Therapeutics claimed that the company's controller, BridgeBio Pharma, and three Eidos directors who were also BridgeBio directors or officers, breached their fiduciary duties in connection with a merger pursuant to which BridgeBio acquired the 37% of the outstanding shares of Eidos that it did not already own. The key issue was whether Eidos' rejection of multiple proposals made by a competing bidder ("GSK") (including one made after the special committee decided to recommend the controller's transaction to the board, which was higher than the controller's bid), and alleged inadequate disclosure with respect to those proposals, rendered the *MFW* prerequisites unmet. First, the Court of Chancery rejected the plaintiff's policy argument that *MFW* cannot apply where a competing bidder emerges with an offer that is substantially higher than that offered by the controller and the controller refuses to sell. The court explained that a controller is not required to accept a third party sale or give up its control; and the court observed that *MFW* has been applied in cases where a competing bidder emerged with an offer above the controller's. Second, the court rejected the plaintiff's argument that the special committee lacked full authority in light of the controller's refusal to sell its stake or support the competing proposal. The court explained that the committee still had the authority to say no to the controller's transaction, which was the relevant test.

Third, the court rejected the plaintiff's claim that the committee breached its duty of care by failing to consider meaningfully GSK's competing bids. The court observed that the committee responded to GSK's proposals and pressed the controller to reconsider its stated unwillingness to sell its stake to or otherwise collaborate with GSK, but the controller continued to refuse. A due care violation can be established only by showing that the committee was grossly negligent, the court stressed—not by questioning the sufficiency of the price obtained or citing the controller's intransigence. Fourth, the court rejected the plaintiff's claims that the disclosure was materially inadequate. Fifth, the court rejected the plaintiff's claim that, due to the controller's intransigence, the shareholder vote was coerced. The court explained that, although the shareholders could not obtain the transaction proposed by GSK, the vote was uncoerced, as they could freely choose between maintaining the status quo and voting for the controller's proposed transaction. "Situational coercion" occurs only when the status quo is so undesirable (for example, where the company is financially distressed or about to be de-listed) that it prevents a stockholder vote from operating as a clear endorsement of a transaction. In this case, the court stated, the shareholders were not coerced into approving the controller's transaction "because they had other acceptable alternatives to a deal with [the controller]."

Director Independence:

BGC Partners

Match Group (IAC)

Carvana

Goldstein v. Denner

City Pension Fund v. The Trade Desk

BGC Partners. In *BGC Partners*, the Court of Chancery found that outside directors serving on the special committee that approved the merger between two companies controlled by Howard Lutnick may not have been independent of Lutnick. The court found, at the pleading stage (albeit based on evidence that the court stated was "not overwhelming"), that one of the outside directors may not have been independent because his director compensation constituted a majority of his total household income, and that another of the outside directors may not have been independent because in his testimony he had very lavishly and emotionally praised Lutnick as being a good man (in respect of his actions relating to the loss of his employees in the 9-11 terrorist attack). Also of note, the court explained that independence for demand futility purposes is not dispositive of the independence issue for purposes of determining if a non-exculpated (*i.e.*, duty of loyalty) claim has been pled. The demand inquiry is "hypothetical," the court explained, while the duty of loyalty inquiry, by contrast, is focused on the director's "real-world actions (or inactions) in the context of [the director's] lack of independence." (See the discussion of *BGC Partners* above under "Entire Fairness"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Match Group (IAC). In *Match Group (IAC)*, the Court of Chancery found that one of the three directors on a special committee that approved a spinoff championed by the company's controller, Barry Diller, may not have been independent of Diller. That director (the lead negotiator for the committee) had worked for Diller's companies as an employee or director for over 20 years, and had relied on those positions as his primary employment, receiving at least $58 million in compensation. The court found that the committee was independent, however, as there were no allegations that this director controlled the information flow to the other members, undermined the committee's process, or exerted undue influence or control over the other members. One of the committee members the court found was independent was a retired Wachtell Lipton partner. The plaintiff claimed she was not independent based on her having acted as outside counsel for Diller's companies from 1994 until her retirement from law practice in 2015; and then having served as a director of Diller's companies (for which she received more than $2 million in compensation). The plaintiff's allegations established only a relationship between this director and Diller's companies as "an arms' length service provider, and no more," the court wrote, emphasizing that the plaintiff "[did] not allege a friendship between [her] and anyone, let alone one strong enough to create...lack of independence." (See the discussion of Match Group above under "*MFW*"; and see the Fried Frank M&A/PE Quarterly article discussing the decision and offering related practice points here.)

Carvana. In *Carvana*, the Court of Chancery held that company directors who (at the outset of the COVID-19 pandemic, when the company's stock price had declined) had approved a $600 million direct stock offering that was limited to certain "hand-picked" investors, may not have been independent of the company's CEO-Chairman and his father, who together allegedly controlled the company. The court found that the alleged business and personal relationships were so extensive as to make it reasonably conceivable that the directors felt beholden to the alleged controllers. One director had a relationship of over 30 years with the CEO's father—allegedly, he had been employed by the father; had been involved with the father in bank activities that led to the father's felony conviction (with the father allegedly having "saved [the director's] career"); had been censured by the NYSE for actions he took on the father's behalf; and had been involved in business ventures in which the father was a co-owner or significant investor. The court characterized this as an "unusual thick-as-thieves narrative." Another director had been the relationship banker for the CEO's and his father's companies for decade; had served on the boards of three of their companies (for which he received more than $1 million in recent years); and had been offered investment opportunities (not offered to the other directors) in Carvana affiliates, from which he had realized tens of millions of dollars.

Goldstein. In *Goldstein* (as discussed above under "Activists and Other 'Short-Term' Investors"), the Court of Chancery, albeit in the context of a particularly egregious alleged fact situation, suggested that directors appointed by activist funds, or by other "repeat players" with a short-term investment horizon, may inherently be non-independent. The court held that two such outside directors may not have been independent based on the likelihood of their gratitude for their board seats, as well as the likelihood that they expected to be provided with "future benefits" in the form of

board seats on other portfolio companies of the alleged controller's fund, as the fund was a "repeat player" in locating directors for its portfolio companies. The court also clarified that a director may have a disabling conflict based on a significant change-in-control entitlement *even if* the entitlement arises pursuant to a pre-existing agreement. The court characterized its previous decisions holding otherwise as going "a step too far" in purportedly establishing a "rule of law" that change-in-control benefits cannot create a conflict of interest when they are paid out pursuant to a pre-existing agreement. Under all scenarios, the court stressed, whether a conflict exists depends on the facts and circumstances. The court found that the $72.3 million severance that, pursuant to a pre-existing agreement, would be payable to the CEO-director on a sale, was sufficiently material that it was reasonable to infer that he may have supported the near-term sale of the company based on his self-interest in receiving the severance. (See the discussion of *Goldstein* above under "Activists and Other 'Short-Term' Investors" and "Officer Liability" and below under "Board Minutes"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Trade Desk. *In Trade Desk*, the Court of Chancery found that special committee directors—who approved a charter amendment that extended the sunset of the company's dual class voting structure (which in turn extended the founder-CEO-controller's majority voting power)—were independent of the controller. At the pleading stage, the court rejected the plaintiff's argument that no independent fiduciary acting in good faith would have taken affirmative action to perpetuate a dual class structure when the company and its minority stockholders had an imminent opportunity to eliminate a super-voting class of stock. The court noted that a director could in good faith believe that such a governance structure is value-maximizing; and, moreover, that there were no allegations that the controller tried to interfere with or pressure the committee and, in fact, the committee obtained concessions (such as a final sunset provision for the structure) that a director could have viewed as favorable. The court emphasized that the plaintiff's disagreement with the committee's strategy and the result reached did not support a claim that the members lacked independence. (See the discussion of *Trade Desk* above under "*MFW*"; and see the Fried Frank M&A/PE Quarterly article discussing the decision and offering related practice points here.)

Entire Fairness:

Tesla Motors (SolarCity)

BGC Partners

Cellular Telephone Partnership

SolarCity. In *Tesla Motors (SolarCity)*, Elon Musk, the controller of Tesla Motors and the chairman and largest stockholder of SolarCity, allegedly engineered a self-serving sale to Tesla of the financially struggling SolarCity. The Court of Chancery found that the transaction satisfied the entire fairness standard even though there were flaws in the sale process. The alleged flaws included that Musk allegedly engaged in undisclosed communications with SolarCity's management and Tesla's financial advisor; assisted in selecting Tesla's outside deal counsel; and was present for part of a Tesla board meeting in which Tesla's revised offer for SolarCity was discussed. The court concluded that, although Musk's involvement had been problematic, the special committee, guided by its financial advisor, nonetheless had engaged in a thorough and effective process that resulted in a fair price. The court noted that the committee had repeatedly rejected the expedited timetable favored by Musk; the board had provided extensive disclosure to stockholders about SolarCity's difficult financial condition; and Tesla's business plan had long included a possible acquisition of SolarCity, which contradicted the plaintiffs' contention that SolarCity had no (or very little) value to Tesla. (See the Fried Frank M&A/PE Briefing discussing *Tesla Motors (SolarCity)* and offering related practice points here.)

BGC Partners. In *BGC Partners*, Howard Lutnick, though his control of Cantor Fitzgerald, was the controller of both the buyer (Berkeley Point Financial) and the target (BGC Partners). Allegedly, he had an incentive to cause the buyer to overpay based on his larger ownership stake in the target. The Court of Chancery found that the transaction satisfied the entire fairness standard notwithstanding process flaws. The flaws included that Lutnick allegedly initiated the deal; identified the advisors for the special committee; asked the co-chairs of the committee to serve as such; and engaged in one-off discussions with one of the co-chairs. The court viewed these sale process flaws as problematic, but concluded that they were alleviated after the special committee became fully empowered. At that point, the court observed, Lutnick largely separated himself from the process and the committee could have chosen different advisors if it had wanted to. Importantly, the court concluded that the committee "worked tirelessly," performed diligently, and obtained meaningful concessions on behalf of the minority stockholders; and that the deal price was within the range of fairness determined by the committee's advisors. (See the discussion of *BGC Partners* above under "Director Independence"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Cellular Telephone Partnership. In *Cellular Telephone Partnership*, the Court of Chancery held that AT&T's freeze-out of minority partners of the Salem Cellular Telephone partnership did *not* meet the entire fairness standard—notwithstanding that the minority partners were paid out based on a valuation of the partnership by a major national valuation firm. The decision thus indicates that valuation by an outside firm is not necessarily sufficient to establish fairness of price under an entire fairness analysis—at least where (as was the case here) the court views the controller's timing of the transaction as having been potentially opportunistic; the controller selected the valuation firm (and then relied at trial on an expert witness rather than the valuation firm to establish fair price); and the court views the valuation firm's analysis as seriously flawed. The court also viewed the sale process as unfair in light of AT&T's having refused to negotiate with the minority partners; having provided the minority partners with false information in order to keep them in the dark; and having created a coercive, two-tiered offer that pressured the minority partners to accept a 5% premium or be cashed out at a lower price. The court stated that the fact that so many minority partners rejected the offer (notwithstanding the 5% premium) was strong evidence that the price was unfair. Notably, the court's own DCF analysis yielded a valuation that was more than three times the valuation firm's result—largely because the court appraised the partnership *as part of* AT&T's integrated holdings, rather than determining its value as a stand-alone company; the court included in the value of the partnership its litigation asset from AT&T's past breaches of its management agreement with the partnership; and AT&T's own contemporaneous documents indicated a value much higher than the freeze-out price. (See the Fried Frank M&A/PE Quarterly article discussing the decision here.)

SPACs:

Amo v. MultiPlan

In *MultiPlan*, the first Delaware decision to address fiduciary duties and related principles in the SPAC context, the plaintiffs, who were initial public stockholders of a SPAC, brought fiduciary duty claims against the SPAC's sponsor and directors in connection with a $5.8 billion de-SPAC merger with MultiPlan, a data analytics company. The Court of Chancery principally focused on the claims regarding adequacy of the disclosures made in the proxy statement issued to seek the SPAC stockholders' approval of the merger. The proxy indicated that roughly 35% of MultiPlan's revenues came from a single customer—but did not indicate that this customer was planning to build its own data analytics platform and move its business away from MultiPlan. Soon after the merger closed, an equity research firm report discussed these plans, immediately following which the price of the combined company's shares dropped. The plaintiffs then filed suit. At the pleading stage, the court rejected the defendants' motion to dismiss the claims. The court held that: (i) the de-SPAC merger was a "conflicted controller" transaction (as between the SPAC's sponsor and its public stockholders) and, therefore, that the entire fairness standard of review, rather than the deferential business judgment rule, applied; (ii) due to the sponsor's and directors' conflicts that were inherent in the SPAC structure, it was "reasonably conceivable" (the standard for non-dismissal of claims at the pleading stage) that the sponsor and the directors had "purposefully" provided materially misleading disclosure about MultiPlan (a breach of the duty of loyalty to the stockholders); (iii) the alleged disclosure violation "impaired" the stockholders' right to redeem their SPAC shares prior to the de-SPAC closing, as the decision whether to redeem could not be made on a fully informed basis; and (iv) based on the alleged materially inadequate disclosure, the de-SPAC may not have satisfied the "fair process" aspect of entire fairness. In November 2022, the *MultiPlan* litigants agreed to a settlement pursuant to which the company and its insurers will pay the SPAC's former public stockholders $33.75 million. (See the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Limited Liability Entity Conflicted-Controller Transactions:

Boardwalk Pipeline v. Bandera

In *Boardwalk Pipeline*, the Delaware Supreme Court reversed the Court of Chancery decision that ordered the general partner of Boardwalk (a master limited partnership) to pay the former public unitholders almost $700 million in damages in connection with the general partner's $1.56 billion take-private of Boardwalk. The Supreme Court did not overturn the Court of Chancery's factual findings that the General Partner and its affiliates had (i) opportunistically timed the take-private to occur during a temporary period of regulatory uncertainty and declining prices for Boardwalk's units, and (ii) manipulatively pressured their law firm to deliver a "contrived," "sham" opinion to satisfy the sole condition to the general partner's exercise of its call right to acquire the public units. *Nonetheless*, the Supreme Court overturned the Court of Chancery's legal ruling that the general partner was liable for willful misconduct.

The Supreme Court viewed the general partner as simply having made "full use" of the broad "flexibility" a controller is permitted under Delaware law when its fiduciary duties have been contractually eliminated and the absence of

those duties has been fully disclosed. "The Partnership Agreement allowed Boardwalk to exercise the call right to its advantage—and to the disadvantage of the minority unitholders—free from fiduciary duties," the Supreme Court wrote. The Supreme Court also held that the opinion of counsel the general partner obtained satisfied the condition to exercise of the call right. The Supreme Court stated that the "proper focus" for the court was not on the validity of the methodology used or the conclusions reached in the opinion but on whether the general partner had acted reasonably in relying on it. The general partner had acted reasonably in relying on it, the Supreme Court concluded, because it obtained and relied on a second opinion from another law firm—which was not challenged—that opined that it would be within the general partner's reasonable judgment to decide to rely on the first opinion. In addition, as the partnership agreement provided a conclusive presumption of good faith for the general partner when relying on advice of counsel, the general partner was presumed not to have engaged in willful misconduct and was entitled to exculpation from damages. (See the Fried Frank M&A/PE Briefing discussing the Court of Chancery's decision here, and the Supreme Court decision here.)

Proxy Contests:

Totta v. CCSB Financial

In *Totta*, in a post-trial opinion (issued on a paper record), the Court of Chancery ruled that directors' new interpretation (adopted in the midst of a proxy fight) of a charter provision that limited stockholder voting was impermissible, notwithstanding that the charter stated that the board's interpretation of plan provisions would be "conclusive and binding." The charter provision (which had never before been invoked) stated that no stockholder could exercise more than 10% of the company's voting power. The board's new interpretation of that limitation allowed it to aggregate the shares of stockholders it determined to be acting in concert. Based on this interpretation, the board aggregated the dissident stockholder's votes with the votes of certain other stockholders, and then limited their aggregate vote to 10% of the outstanding voting power—as a result of which the dissident lost the proxy fight. The court found, first, that the aggregation rules in the charter provision did not support the board's new interpretation (thus, as a legal matter, the interpretation was invalid); and, second, that the interpretive authority the charter granted to the board could not modify the equitable standards by which the court reviews director actions. Applying the *Blasius* standard of enhanced scrutiny review in light of the disenfranchising effect of the new interpretation, the court held that the board needed—and did not have—a "compelling justification" to adopt the "new, self-serving interpretation that was outcome-determinative in the election." (See the Fried Frank M&A/PE Quarterly note discussing *Totta* here.)

***Caremark*:**

City of Detroit Pol. & Fire Rtmt. Syst. v. Hamrock (NiSource)

Constr. Indst. Laborers v. Bingle (SolarWinds)

Lebanon Cty. Employees' Rtrmt. Fund v. Collis (AmerisourceBergen)

NiSource. In *NiSource*, the plaintiff claimed that directors of the company faced liability, under *Caremark*, in connection with catastrophic fires and explosions that occurred at one of the company's former gas distribution subsidiaries. The plaintiff alleged that the company had ignored red flags consisting of, allegedly, a history of noncompliance with relevant regulations and a history of similar events. The Court of Chancery dismissed the claims at the pleading stage. The court held that the alleged history did not constitute red flags that would have put the board on notice of the risk of the explosion at issue. A board's knowledge of "general risks," the court wrote, cannot be a red flag of "a specific corporate trauma." Notably, the court emphasized that, under *Caremark*, the board's obligation is only to "make a good faith effort"—that is, simply "to try"—to put in place a board-level system to oversee the critical risks the company faces. It is not required that the system was *effective* in addressing risks and preventing corporate harm. The court noted that the company had a board committee specifically tasked with overseeing safety risks; and that the committee actually received information from management, met several times during the year, and reported to the full board. Even if the board had (as alleged) only had a "one-time discussion" about the relevant safety risks, that was sufficient to establish that the board had not (as would be required for liability under *Caremark*) "utterly failed" (*i.e., completely* failed) to implement an oversight system. The court reaffirmed that directors have "a wide berth" to exercise their discretion with respect to business risks. We note that the company's regulatory noncompliance was not alleged to have been deliberate or part of a general anti-regulation stance by the company; the company had been trying to take steps to address regulatory noncompliance and meet industry standards; and the corporate trauma occurred in the context of the company taking a positive action (to replace an old pipe that it and the public knew was problematic).

SolarWinds. In *SolarWinds* (as in last year's *Fireman's Rtrmt. Syst. v. Sorenson (Marriott)*), the Court of Chancery addressed claims of failure of board oversight to prevent cyberhacking that resulted in the massive leaking of the company's private customers' information. The court (as it did in *Marriot*), at the pleading stage, rejected potential liability of the directors under *Caremark*, notwithstanding its findings that cybersecurity was a "mission-critical" risk and that the board's oversight system for cybersecurity was seriously flawed. In *SolarWinds*, the board, allegedly: did not receive any information from the committees with responsibility for cybersecurity; did not discuss cybersecurity even once in the two years leading up to the cybersecurity attack at issue; and ignored internal and external warnings the company received about its cybersecurity deficiencies. The court emphasized that bad faith (i.e., scienter) by a majority of the directors is required for liability under *Caremark*. The court found that the board's inattention to cybersecurity issues and the "subpar reporting system" on cybersecurity risk did not, without more, indicate bad faith by the board. Indeed, the court emphasized that the board's specific charge to two committees to oversee cybersecurity risk was sufficient to establish that the board had done *something* and the company had "at least a minimal reporting system." Further, the court found that the board did not "ignore sufficient 'red flags' of cyber threats to imply a conscious disregard of a known duty, indicative of scienter." The court stressed that oversight of cybersecurity involves considerations about a "business risk" (the typical context for deference to board decisions), rather than implicating risks relating to compliance with laws. Notwithstanding dismissal of the case, the opinion underscores that boards should implement appropriate systems to monitor and address cybersecurity risk—as the court expressly acknowledged the growing and consequential risks posed by cybersecurity threats and characterized cybersecurity as a "mission critical" risk for online providers (as they rely on customers sharing with them access to their personal information). (See the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

AmerisourceBergen. In *AmerisourceBergen*, a case of first impression regarding a timeliness defense to *Caremark* claims, the Court of Chancery, at the pleading stage, rejected the defendants' defense that the claims were not timely made. The plaintiff alleged that the directors of the company (one of the largest opioid distributers in the U.S.) breached their fiduciary duties in connection with the company's role in the national opioid crisis (which led, among other things, to the company making over $6 billion in payments to resolve various litigations). The plaintiff claimed that the defendant directors, over a five-year period, (i) adopted and continued to implement a wrongful business strategy to prioritize profit over legal and regulatory compliance (the "*Massey* theory") and (ii) consciously ignored red flags that the company was violating federal and state laws and regulations regarding opioid distribution (the "red flags theory"). In this decision, the court addressed only the defendants' timeliness defense to the *Caremark* claims. The court held that the doctrine of laches (rather than the statute of limitations) is the framework under which timeliness is to be evaluated (as claims of fiduciary breaches sound in equity). Following an extensive analysis of various methodologies for determining when *Caremark* claims accrue in the context of allegations of continued board disregard of various types of red flags over an extended period of time, the court determined to view each incident of disregard as establishing its own, separate limitations period (a "separate accrual" approach) and concluded that the plaintiff in this case sued within a reasonable time and that there was no prejudice to the defendants from the amount of time that passed before the plaintiff sued. The court thus rejected dismissal of the plaintiff's *Caremark* claims, on the basis of non-timeliness, at the pleading stage.

Board Minutes:

Goldstein v. Denner

Hightower v. SharpSpring

Goldstein. In *Goldstein*, the Court of Chancery interpreted silence in the board minutes about alleged sale process developments as creating a reasonable inference at the pleading stage that the events did not actually occur. Specifically, the minutes did not reflect anything about "updates" that, according to the company's Schedule 14D-9, certain directors had provided to the board about sale process developments. Based on this (and other alleged disclosure flaws), the court ruled that *Corwin* (which would have "cleansed" any sale process fiduciary breaches) did not apply and therefore the applicable standard of review for the challenged transaction would be enhanced scrutiny under *Revlon*. See the discussion of *Goldstein* above under "Activists," "Controller Conflict Based on Desire for Liquidity," "Officer Liability," and "Director Independence"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Hightower. In *Hightower*, the Court of Chancery permitted inspection of corporate books and records under a Section 220 demand in light of apparent inconsistencies between the company's proxy description of certain sale process events and the description of those events in the board minutes. The sale process was extensive, but yielded only one

indication of interest, which was at $17 to $19 per share. The deal was agreed at $17.10 per share. The stockholder asserted that the process was tainted by conflicts of the CEO, who had negotiated the transaction. The company had produced some formal board materials in response to the stockholder's Section 220 demand but declined to produce additional requested documents. The stockholder filed a Section 220 action and, at trial, demonstrated that the descriptions of key events relating to the merger as described in the board minutes did not "match up" with the proxy statement's description of those events "in important ways." In a post-trial decision, the court granted the stockholder inspection under Section 220, limited to those books and records that concerned the key events at issue. The court stated that the information needed to resolve the inconsistences relating to those events likely would be found in the directors' and/or officers' emails.

The inconsistencies between the minutes and the proxy disclosure, that the court found were the proper subject of a Section 220 investigation, included the following: (i) *Who came up with the terms of the company's counterproposal to the buyer* (which involved a small price increase and a large executive bonus pool)? The minutes stated that the CEO proposed these terms and that the independent board members expressed concern about them; while the proxy stated only that the directors discussed the terms of a counterproposal in executive session. (ii) *Was the counterproposal actually conveyed to the buyer?* The minutes stated that the banker mistakenly counter-proposed to the buyer a price of $17.10 instead of $17.25 as the board had instructed, and that the board then, based on the CEO's recommendation, decided not to correct the mistake and the deal was agreed at $17.10; while the proxy stated only that the buyer offered $17.10 and the banker later made a demand for $17.25 which the buyer rejected. (iii) *Why were the company's projections lowered?* The minutes stated that the CEO fielded a number of questions from the board regarding the status of the company's projections used by its banker; while the proxy stated that the board determined that the budget adopted six months earlier, on which the projections were based, no longer accurately reflected the likely performance of the company and accordingly the board instructed management to update the projections. (See the discussion of *Hightower* below under "Section 220"; and see the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Disclosure:

Menora v. Frutarom

In *Menora v. Frutarom*, a panel of the United States Court of Appeals for the Second Circuit, affirming a decision of the United States District Court for the Southern District of New York, determined that purchasers of a security of an acquiring company do not have standing under Section 10(b) under the Exchange Act of 1934 (or SEC Rule 10b-5 promulgated thereunder) to sue the target company for alleged misstatements the target made about itself prior to the merger of the two companies. The court stated that, in so holding, it was answering a question that had been left open in its 2004 decision in *Ontario Public Service Employees Union Pension Trust Fund v. Nortel Networks Corp*. The decision establishes a bright-line test for bringing Rule 10b-5 disclosure claims, limiting standing to plaintiffs who "bought or sold shares" of *the company about which the alleged misstatements were made*. Because the alleged misstatements in this case had been made by the target company about itself prior to the merger, investors who, after announcement of the planned merger had purchased shares of the acquiror (but not shares of the target company), did not have standing to bring Rule 10b-5 disclosure claims against the target. The court rejected the plaintiffs' argument that, based on precedent, it had standing given the "significant" and "direct" relationship between the acquiror and the target (including the acquiror's incorporation of the misstatements into its press releases and registration statement relating to the merger, as well as the direct impact of the misstatements on the acquiror's stock price). (See the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.) (On Delaware disclosure, see our article, "Recent Developments in Delaware M&A Disclosure," in *The Review of Securities & Commodities Regulation*, Mar. 23, 2022, here.)

Discovery of Emails:

Twitter v. Musk

In the *Twitter v. Musk* litigation over whether Musk was entitled to terminate his agreement to acquire Twitter, the Court of Chancery, in one discovery ruling, granted Twitter broad access ("beyond emails"—to other communications such as IMs, work chats, and previously encrypted messages) to determine whether an anonymous whistleblower (whose claims supported Musk's assertions about breaches of Twitter's representations and warranties based on lack of security on the Twitter platform) had any connections to (*i.e.*, that he may have been instigated by) Musk or his team. In another ruling in the case, however, the court denied Twitter access to Musk's emails relating to his desire to terminate the transaction that were on email accounts at two other companies that he controlled. Although those

companies had general, written corporate policies permitting corporate access to and monitoring of all employee emails, the court relied on testimony by Musk and other executives at those companies that, in practice, there was a Musk-only exception to the policy. Based on that policy, his emails could not be accessed without his permission (unless required by law); therefore, the court ruled, he had an objectively reasonable expectation of privacy in the emails, which accordingly supported the attorney-client privilege. (See the Fried Frank M&A/PE Briefing discussing these decisions and offering related practice points here.)

Section 220:

NVIDIA v. City of Westmoreland Police & Fire

Rivest v. Hauppauge Digital

Hightower v. SharpSpring

Wei v. Zoox

Lordstown

NVIDIA. In *NVIDIA*, the Delaware Supreme Court established that reliable hearsay evidence can be used to demonstrate a "proper purpose" for a Section 220 demand (although in this case the hearsay evidence offered was *not* admissible due to misleading litigation tactics by the plaintiffs that deprived the company of the opportunity to cross-examine the hearsay witness to test the stockholders' stated purpose is making the demand). (See the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Rivest. In *Rivest*, the Court of Chancery reinforced that there is no presumption of confidentiality for Section 220 documents (finding that the imposition of confidentiality restrictions based on the company's generic concerns about potential use of the information by competitors, which could be asserted by any company in a competitive industry, was improper as it would be the "functional equivalent of a presumption of confidentiality" for Section 220 productions). (See the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Hightower. In *Hightower*, the Court of Chancery confirmed that Section 220 can be used for the purpose of resolving inconsistencies in a company's public disclosures (granting access to certain directors' and officers' emails to enable the stockholder to resolve inconsistencies where the proxy disclosure about key events in the company's sale process did not "match up" with the board minutes). (See the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Zoox and Lordstown. Also of note, in certain cases this year *not* involving a demand under Section 220, the court, citing policy considerations, has provided stockholders with access to Section 220 books and records when the stockholders would not have been eligible to have obtained the information in a Section 220 action—notwithstanding that the court typically has applied strictly the standing requirements for Section 220 actions. In *Zoox*, an appraisal action, the court granted access to Section 220 books and records to stockholders to investigate possible wrongdoing in connection with the challenged merger because the stockholders lost standing under Section 220 when the company rushed the closing of the merger so that it occurred before the statute's five-day deadline for the company to respond to a demand had expired. The court emphasized that stockholders in private companies should not be disadvantaged by the company's ability to cause a closing to occur very quickly and thus cut off Section 220 standing. The court warned, however, that the decision should not be interpreted as indicating that the court generally will grant Section 220 access to appraisal petitioners whose actual purpose is obtaining such access rather than appraisal of their shares. In litigation challenging the Lordstown de-SPAC merger (*Cormier v. Burns* and *Lordstown*), the court lifted confidentiality restrictions on information in court documents that had been obtained in other litigation by other litigants under Section 220. In one of these cases, the court permitted the access to plaintiffs in a federal securities action, under Chancery Court Rule 5.1 (which permits public access to court documents), notwithstanding Delaware's longstanding rule that Section 220 cannot be used to circumvent an automatic stay on discovery under federal law. The court reasoned that the lifting of confidentiality restrictions on redacted information in court documents was "not tantamount to discovery" although the information had been obtained under Section 220.

Appraisal:

BCIM v. HFF

Ramcell v. Alltel

Wei v. Zoox

BCIM. In *BCIM*, the Court of Chancery found the sale process sufficient for reliance on the deal-price-less-synergies methodology to determine appraised fair value, although the negotiations were led by two employee-directors who may have had differing interests from stockholders generally (particularly, a focus on ongoing leadership positions in the post-merger company); deal price negotiations were delayed while executives negotiated governance terms; and the company ran a single-bidder process. The court found that the lead negotiators' focus on employee retention would have been important to an acquiror that was buying a "people business"; and that the merger agreement's bifurcated termination fee was not preclusive of other bids (even accounting for the possible need to top-up executives' retention agreements in addition to payment of the termination fee). The court deducted the value of expected synergies, based on the buyer having carefully documented the expected synergies and having limited its estimates to amounts that could be deemed certain. The court also adjusted the fair value determination to reflect changes at the company that occurred between signing and closing.

Previously, the court has been reluctant to make such an adjustment, citing a lack of reliable evidence submitted by petitioners to establish the value of the alleged changes during the interim period. In this case, the petitioners submitted and the court relied on the opinion of the acquiror's financial advisor as to the standalone equity value of the target company at closing, taking the interim period changes into account. The court noted that the advisor's opinion was based on material, nonpublic information that had been shared with the acquiror. The facts of the case were unique in that the change between signing and closing was an unexpected, extraordinary, and sustained outperformance by the company. Of note, at the same time, there was a significant (13%) decline in the acquiror's stock price (which formed part of the fixed cash-and-stock merger consideration). Notably, the court's adjusted fair value determination in BCIM was still significantly below the deal price at the time of signing, but, due to the decline in the acquiror's stock price, it was modestly (about 1.6%) above the deal consideration paid at closing. (See the Fried Frank M&A/PE Quarterly note discussing *BCIM* here.)

Ramcell. *Ramcell* provides a reminder that in appropriate cases the court still may rely on a discounted cash flow (DCF) analysis to determine appraised fair value—and that, when it does, the result may significantly exceed the deal price. Both parties in this case agreed that a DCF analysis should be utilized to determine fair value, but they disagreed on the inputs to the analysis. While the merger consideration paid in the challenged short-form merger was almost $3,000 per share, the court, based on its determination of the appropriate inputs for the DCF analysis, reached a fair value result of almost $11,500 per share.

Zoox. *Zoox* is notable for the court's holding that the appraisal petitioner's discovery would be limited to what they could have obtained under a Section 220 demand if they had standing to bring such an action. The court concluded that, based on the miniscule amount of shares held by the petitioners and the fact that they had lost standing to bring a Section 220 action when the challenged merger closed (after the company rushed the closing), their true reason for bringing the appraisal action was not to obtain appraisal of their shares but to conduct pre-suit investigation for evidence of fiduciary breaches in connection with the merger. The decision raises the issue whether the petitioner's motivation for seeking appraisal may be used in other appraisal actions to limit discovery—and the further issue whether the same principle conceivably could be applied in non-appraisal contexts. (See the discussion of *Zoox* above under "Section 220"; and the Fried Frank M&A/PE Quarterly note discussing the decision here.)

Advance Notice Director Nominations:

Lee Enterprises

In *Lee Enterprises*, the Court of Chancery reviewed the decision by a board to reject the director nominations notice provided by its dissident stockholder which was an affiliate of the hedge fund that was in the midst of a hostile takeover bid for the company. The court found, first, that the nomination notice plainly did not comply with the technical requirements of the company's advance notice bylaw. The court then applied an enhanced scrutiny standard of review to determine whether the directors had breached their fiduciary duties by not waiving, or allowing the stockholder to cure, the technical defects in the nomination notice. The court found that the directors' actions had been "reasonable

and appropriate" under the circumstances and upheld their rejection of the nominations. Reaffirming long-standing principles relating to the validity of advance notice bylaws, the court stressed that the advance notice bylaw had been adopted on a "clear day," far in advance of the takeover bid and the nomination notice; that the bylaw requirements were unambiguous and reasonable; and that the company itself had not interfered with the stockholder's ability to comply. (See the Fried Frank M&A/PE Briefing discussing the decision and offering related practice points here.)

Non-Competes:

Kodiak Building Partners v. Adams

ARKO/GPM Invstmts.

Importantly, the Court of Chancery, in *Kodiak*, and the FTC, in *ARKO/GPM*, took the view that a non-compete agreed in the context of the sale of a business can extend only so far as protecting the goodwill of the business that was acquired, and not the goodwill of the buyer's other businesses. Also of note, in *Kodiak*, the court indicated a reluctance to blue-pencil non-competes and instead held the overbroad non-compete entirely unenforceable; the FTC brought its action against ARKO almost a year after the transaction (which was not reportable under the HSR Act) had closed, and the FTC, as part of the settlement order, also invalidated similar, already-existing non-competes that ARKO had obtained in other transactions.

Sandbagging:

Arwood v. AW Site Services

Sandbagging, in the context of an M&A transaction, refers to the situation in which a buyer, prior to closing, knows that the seller's representations and warranties in the parties' acquisition agreement are false, but nevertheless closes the transaction and then seeks to hold the seller liable for that breach. Commentary by the Delaware Supreme Court in its 2018 *Eagle Force v. Campbell* decision had cast doubt on Delaware's stance on sandbagging. In *Arwood*, the Court of Chancery, in a post-trial decision, noting the absence of definitive guidance from the Supreme Court, declared that Delaware "is, or should be, a pro-sandbagging jurisdiction." The court emphasized Delaware's strongly contractarian approach and held that, as a matter of contract, the buyer was entitled to rely on the truth of the seller's representations and warranties for which it had bargained; and therefore was entitled to be indemnified for false representations—irrespective of whether the buyer, pre-closing, knew that the representations were false. Further, the court clarified that sandbagging is only implicated when the buyer, pre-closing, *actually knew* of the falsity of representations and warranties—even if any lack of knowledge was due to the buyer's own "reckless disregard" for the truth. In this case, the court held, the doctrine was not implicated, as the seller proved only that the buyer *should have known* that the representations were false—therefore, the court explained, the buyer would have been entitled to indemnification even if Delaware were an anti-sandbagging state. (See the Fried Frank Briefing discussing *Arwood* and offering related practice points here.)

Ordinary Court Covenants:

Level 4 Yoga v. CorePower Yoga

In *Level 4 Yoga*, the target company, after signing and before closing of the merger agreement pursuant to which it was to be acquired by CorePower Yoga, closed all of its yoga studios (its only business) in response to the COVID-19 pandemic. The buyer claimed that that action breached the target's merger agreement covenant to operate, pending closing, "only in the ordinary course of business, consistent with past practice," and the buyer sought to terminate the merger agreement. The court held that the covenant was not breached and the buyer had to close. The court emphasized that, in this case, the target's pandemic responses were directed by the buyer itself and the target was contractually obligated to follow those directions (and this was consistent with its past practice of following them), as the buyer was the target's franchisor of the business. Further, based on the unusual history of the transaction (including the target's insistence on and the buyer's agreement to staggered closings), the parties structured the merger agreement to contain to closing condition that the representations and warranties had to be true or that there could have been no breaches of the covenants. The court viewed the agreement as creating a "one-way gate to inevitable closings," with the only recourse, even assuming a breach of the ordinary course covenant, being through post-closing indemnification. (See the discussion of *Level 4 Yoga* below in "MAEs"; see the Fried Frank Briefing discussing the decision and offering related practice points here; and see the Fried Frank article, "A Proposed Post-Pandemic Framework for Ordinary Course and MAE Provisions in Merger Agreements," in the *Yale Law Journal*, Apr. 26, 2022, here.)

MAEs:

Level 4 Yoga v. CorePower Yoga

In *Level 4 Yoga*, the Court of Chancery held that the COVID-19 pandemic was not at MAE on the target. The parties' asset purchase agreement, unusually, specified no exceptions to the MAE definition (such as for pandemics, calamities or natural disasters). The court, applying its traditional MAE analysis, found that the pandemic did not constitute an MAE because, at the time the buyer asserted it had a right not to close, it had no basis to believe that the effects of the pandemic would have "durational significance." Contemporaneous evidence introduced at trial indicated that the buyer believed at that time that the studios would be closed for only six weeks. (See the discussion of *Level 4 Yoga* above in "Ordinary Course Covenants"; see the Fried Frank Briefing discussing the decision and offering related practice points here; and see the Fried Frank article, "A Proposed Post-Pandemic Framework for Ordinary Course and MAE Provisions in Merger Agreements," in the *Yale Law Journal*, Apr. 26, 2022, here.)

Cyber-Risk in the Payment of Merger Consideration:

Sorenson Impact Fdtn. v. Continental Stock Transfer Trust

In *Sorenson Impact*, cyberhackers, posing as target company stockholders, sent emails to the company's legal counsel, which counsel in turn forwarded to the paying agent, containing false payment instructions that redirected payment to the hackers' accounts. The buyer argued that it had fulfilled its obligations with respect to payment of the merger consideration when, as the merger agreement required, it had paid the merger consideration over to the paying agent. The court held, at the pleading stage, that it was reasonably conceivable that the merger agreement provision requiring payment to the paying agent could be interpreted to impose an obligation on the buyer to ensure ultimate payment to the stockholders. The court expressly left open for a future ruling the issue whether the law firm that dealt directly with the hackers (which was not a named defendant) was a necessary party to the action. (See the Fried Frank M&A/PE Quarterly article discussing *Sorenson Impact* and offering relating practice points here.)

Contract Interpretation:

Manti v. Carlyle

XRI Invstmt. v. Holifield

ITG Brands v. Reynolds American

Weinberg v. Waystar

Menn v. ConMed

Manti. In *Manti*, the Court of Chancery interpreted a stockholders' agreement requiring that the parties "consent to" and "not object to" any future merger as *not* constituting a waiver of their right to bring fiduciary claims with respect to a merger.

XRI. In *XRI*, the Court of Chancery interpreted a provision stating that an impermissible transfer would be "void" as meaning that it was "void *ab initio*" rather than "voidable" (even though the court acknowledged that the result was "inequitable" and urged the Delaware Supreme Court to overrule precedent requiring this interpretation).

ITG Brands. In *ITG Brands*, the Court of Chancery interpreted an assumption of liability that was "subject to" the buyer using best efforts to obtain third party consent as requiring the buyer to indemnify the seller with respect to that liability when the consent could not be obtained despite the buyer's efforts.

Weinberg. In *Weinberg*, the Court of Chancery interpreted "and" effectively to mean "or" when used in a "permissive sentence" (specifically, a stock option agreement stating that the company had a call right if the employee grantee (x) was terminated for any reason "and" (y) had violated a restrictive covenant—where both parties agreed that the employee had not violated a restrictive covenant).

ConMed. In *ConMed*, the Court of Chancery reinforced that it views the various standards of best and reasonable efforts, as set forth in M&A agreements, as essentially imposing the same level of obligations.

Agreements to Agree:

Cox Communications v. T-Mobile US

In *Cox Communications*, the agreement to agree that the Court of Chancery interpreted was entered into as a settlement of pending patent infringement lawsuits between Cox and Sprint. The agreement included a provision requiring that, before Cox offered wireless mobile service, it would enter into a definitive mobile virtual network operator (MVNO) agreement with Sprint "on terms to be mutually agreed upon between the parties." Subsequently, Cox requested proposals for a mobile network operator so that Cox could become an MVNO. T-Mobile (which had purchased Sprint) and Verizon responded with proposals. T-Mobile's terms were significantly ($90 million) more expensive and it refused to negotiate. Cox chose Verizon and, in the face of threats from T-Mobile, sought a declaration from the Court of Chancery that the MVNO provision was only an "agreement to agree" and not binding. T-Mobile countersued for breach of the provision, arguing that it required Cox to enter into an MVNO agreement exclusively with T-Mobile if Cox decided to enter the mobile wireless market.

The Court of Chancery found that the provision was unambiguous in containing *two* promises by Cox—one, either not to enter the wireless mobile service market or to negotiate exclusively with T-Mobile to be the MVNO; and, the other, if Cox decided to enter the market, then to negotiate the remaining open terms in good faith. The Court of Chancery noted that the provision served as consideration for Sprint's agreement to drop its patent lawsuits against Cox and that an agreement only to negotiate in good faith would have been "nearly worthless to Sprint." A majority of the Supreme Court, in an *en banc* opinion, disagreed, holding that the provision unambiguously contained just *one* promise—to negotiate open issues in good faith. The Supreme Court viewed the provision as a typical "Type II agreement" under *SIGA Technologies v. PharmAthene*—that is, as a preliminary agreement that requires that the parties negotiate open terms in good faith but does not require them to reach agreement. (Two of the Justices dissented in part, finding that both the Court of Chancery's and the Supreme Court's interpretations were reasonable, meaning that the provision was ambiguous and that the case should have been remanded so that extrinsic evidence could be considered to determine the parties' intent.)

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Fried Frank RoundUp

2022 Fourth Quarter Highlights

Matters

- Counsel to **Grindrod Shipping Holdings** in its $506 million acquisition by Taylor Maritime Investments.
- Counsel to **Kimco Realty Corporation** in connection with the $24.6 billion definitive merger agreement between Kroger and Albertsons.
- Counsel to **Infinite Reality, Inc.**, an immersive virtual experience provider, in its $1.7 billion definitive business combination agreement with Newbury Street Acquisition Corporation.

Awards

- Associate Whitney Dumeng named to The National Black Lawyers: Top 40 Under 40 List and Associate Vincent Fuller II named to Lawyers of Color's 2022 Law Firm Hot List.
- Fried Frank named a finalist in the M&A Team of the Year (Medium Deal - Less than £1bn) category for Legal Week's 2022 British Legal Awards.

2022 Recent Fried Frank M&A Quarterlies

(click to access)

- Fall 2022
- Summer 2022
- Spring 2022
- Winter 2021

(continued on next page)

Decisions Discussed in this Quarterly

Amo v. MultiPlan (Del. Ch. Jan. 3, 2022)

ARKO/GPM Invstmts. (FTC Aug. 5, 2022)

Arwood v. AW Site Services (Del. Ch. Mar. 24, 2022)

BCIM v. HFF (Del. Ch. Feb. 2, 2022)

In re BGC Partners (Del. Ch. Aug. 19, 2022)

Blue v. Fireman (Del. Ch. Feb. 28, 2022)

In re Carvana (Del. Ch. June 30, 2022)

In re Cellular Telephone Partnership (Del. Ch. Mar. 9, 2022)

City of Detroit Pol.& Fire Rtmt. Sys. v. Hammond (Del.Ch.June 30, 2022)

City Pension Fund v. The Trade Desk (Del. Ch. July 29, 2022)

Constr. Indst. Laborers v. Bingle (SolarWinds) (Del. Ch. Sept. 6, 2022)

Cormier v. Burns (Del. Ch. Jan. 24, 2022)

Cox Communications v. T-Mobile US (Del. March 3, 2022)

Garfield v. Allen (Del. Ch. May 24, 2022)

Goldstein v. Denner (Del. Ch. May 26, 2022)

Hightower v. SharpSpring (Del. Ch. Aug. 31, 2022)

ITG Brands v. Reynolds American (Del. Ch. Sept. 30, 2022)

Kodiak Building Partners v. Adams (Del. Ch. Oct. 27, 2022)

Lebanon Cty. Empl. v. AmerisourceBergen (Del.Ch. Dec. 15, 2022)

Level 4 Yoga v. CorePower Yoga (Del. Ch. Mar. 1, 2022)

In re Lordstown (Del. Ch. Feb. 28, 2022)

Manti v. Carlyle (Del. Ch. Feb. 14, 2022)

In re MPM Holdings (Del. Ch. Jan. 13, 2022, transcript ruling)

In re Match Group (IAC) (Del. Ch. Sept. 22, 2022)

Menn v. ConMed (Del. Ch. June 30, 2022)

Menora v. Frutarom (2d Cir. Sept. 30, 2022)

NVIDIA v. City of Westmoreland Police (Del. July 19, 2022)

In re P3 Health Group (Del. Ch. Oct. 26, 2022)

Ramcell v. Alltell (Del. Ch. Oct. 31, 2022)

Rivest v. Hauppauge Digital (Del. Ch. Sept. 1, 2022)

Smart Local v. BridgeBio Pharma (Del. Ch. Dec. 29, 2022)

Sorenson Impact Fdtn. v. Cont'l. Stock (Del. Ch. Apr. 1, 2022)

Strategic Inv. Opp. v. Lee Entprs. (Del. Ch. Feb. 14, 2022)

In re Tesla Motors (SolarCity) (Del. Ch. April 27, 2022)

Totta v. CCSB Financial (Del. Ch. May 31, 2022)

Twitter v. Musk (Del. Ch. Sept. 13, 2022 and Oct. 3, 2022)

Wei v. Zoox (Del. Ch. Jan. 31, 2022)

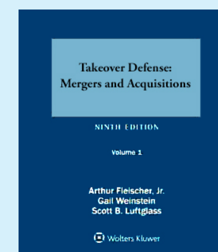
Weinberg v. Waystar (Del. Ch. July 6, 2022)

XRI Invstmt. v. Holifield (Del. Ch. Sept. 13, 2022)

Fried Frank RoundUp (cont.)

Takeover Defense: Mergers and Acquisitions

The Ninth Edition of Fried Frank's "Takeover Defense: Mergers and Acquisitions," a one-of-a-kind resource by corporate senior counsel Arthur Fleischer, Jr. and Gail Weinstein and partner Scott B. Luftglass, has recently been published. The treatise is a comprehensive, must-have resource for practitioners representing any participant in M&A activity, including bidders, sellers, senior management, sponsors, and investment banks.



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