



Delaware Journal of Corporate Law

Message From Volume 37 External Managing Editor

We are pleased to present the Fall 2011 issue of the *Delaware Journal of Corporate Law's* semi-annual Alumni Newsletter. The purpose of the newsletter is to keep our alumnae informed of the state of the *Journal*, including upcoming events, announcements, and news. We encourage you to support the *Journal* with your participation in upcoming events.

The *Journal* has a number of events planned for the upcoming year. First, we will be having an alumni happy hour on December 2, 2011 at Public House in Wilmington. Second, the Ruby M. Vale Interschool Corporate Moot Court Competition will take place at Widener on March 15-18, 2012. Furthermore, we encourage you all to attend our Corporate & Bankruptcy Law Intersection Conference on April 16, 2012. Please reserve these dates on your calendars and support the *Journal* with your attendance. Keep in mind that our Alumni Panel Discussion will be in the spring of 2012 with more information to come.

In this issue you will find information regarding our upcoming online symposium, our latest volume 36:2 and upcoming volume 36:3, the 2011-2012 Wolcott Fellows, and recent law journal rankings. We also have included two interesting commentaries by two of our Business law professors: Professor Conaway and Professor Regan. If you have not yet updated your Alumni Contact Information, please click the link below <http://djcl.org/Alumni.html> so that you can stay in the loop for upcoming events and news. Remember to also add us on Facebook.

Finally, the *Journal* is proud to announce our tremendous recruiting year for student membership. Currently, we have 44 members with the addition of 16 staff members from our Summer Write-On and Superior Authorship competitions. With so many intelligent and hardworking members, we have secured a strong future for the *Journal* as we continue to strive for excellence. Please feel free to forward your comments or ideas on how to improve the newsletter, alumni relations, or the *Journal*. I look forward to seeing all of you next month at Public House.

Regards,

Aaron H. Stulman
External Managing Editor
ahstulman@mail.widener.edu

Upcoming Events

ALUMNI HAPPY HOUR

Date: Friday, December 2, 2011

Time: 5:30 – 7:30 p.m.

Location: Public House Wilmington
900 N. Market Street
Wilmington, DE 19801

RSVP by Friday, November 25, 2011

Please email djcl@widener.edu, call 302-477-2145 or sign up online at http://djcl.org/alumni_news/alumni_happyhour.html

RUBY R. VALE INTERSCHOOL CORPORATE MOOT COURT COMPETITION

Date: March 15-18, 2012

Location: Widener Law School
4601 Concord Pike
Wilmington, DE 19803

CORPORATE & BANKRUPTCY LAW INTERSECTION CONFERENCE

Date: April 16, 2012

Time: 9am – 5:30pm

Location: Widener Law School
4601 Concord Pike
Wilmington, DE 19803

ALUMNI HAPPY HOUR



The *Delaware Journal of Corporate Law* invites you to join us for our Alumni Happy Hour on **Friday December 2, 2011**. Come by and meet the current *Journal* members as well as talk with old and new *Journal* Alums. The Happy Hour starts at **5:30** pm at Public House Wilmington located at 900 N. Market Street, Wilmington, DE 19801 and will go until **7:30** pm. We have the Mezzanine section on the second floor reserved. Hors d'oeuvres and drinks will be served.

Please **RSVP** for this event by **November 25, 2011** by signing up online at http://djcl.org/alumni_news/alumni_happyhour.html or emailing us at djcl@widener.edu. We hope to see you there!



Ad Maiorem Gloriam Diurni

Online Symposium

In a 2009 article in the American Business Law Journal, Chief Justice Myron Steele of the Delaware Supreme Court asserted (for himself and not the Court, which has not definitively ruled on the question) that there are (and should be) no default fiduciary duties in Delaware LLCs. This assertion has generated a great deal of controversy, particularly since it appears to run counter to repeated recitations to the contrary in opinions of the Delaware Court of Chancery.

We hope to gather commentary from leading commentators in the pertinent fields on the assertion in Chief Justice Steele's article. We plan to post commentary on the web site of our Institute of Delaware Corporate and Business Law (www.delawarebuslawinstitute.com). In addition to specifically invited commentators, we hope that you too will be willing to contribute something to this approach to influencing and informing Delaware law on a topic of great current interest among the Delaware bench and bar.

Current Volume 36-2

Articles

- The Perils of Shareholder Voting on Executive Compensation**.....*Minor Myers* [SSRN Link](#)
- Secondary Liability for Securities Fraud: Gatekeepers in State Court**.....*Jennifer J. Johnson* [SSRN Link](#)
- The Corporation as Imperfect Society**.....*Brian M. McCall* [SSRN Link](#)
- "Latchkey Corporations": Fiduciary Duties in Wholly Owned, Financially Troubled Subsidiaries**.....*J. Haskell Murray* [SSRN Link](#)

Notes

- The Ever-Evolving Poison Pill: The Pill in Asset Protection and Closely-Held Corporation Cases**.....*Joseph M. Grieco* [SSRN Link](#)
- Stub Rent Under Section 365(D)(3): A Call for a Unified Approach**.....*Aaron H. Stulman* [SSRN Link](#)

Comment

- Matrixx Initiatives, Inc. v. Siracusano*: Rejection of the Statistically Significant Standard Reopened the Door to Securities Fraud Strike Suits**.....*Benjamin A. Leisawitz* [SSRN Link](#)

Upcoming Volume 36:3 – Symposium

FORM OVER SUBSTANCE? THE VALUE OF CORPORATE PROCESS AND MANAGEMENT BUY-OUTS
MATTHEW CAIN & STEVEN M. DAVIDOFF

CHANGE OF CONTROL SPECIAL COMMITTEE: BREATHING LIFE INTO CNX
SAMUEL C. THOMPSON, JR.

**RE-EVALUATING THE EMERGING STANDARD OF REVIEW FOR
MATCHING RIGHTS IN CONTROL TRANSACTIONS**
BRIAN JM QUINN

**STANDARDS OF REVIEW IN CONFLICT TRANSACTIONS ON MOTIONS TO DISMISS:
LESSONS LEARNED IN THE PAST DECADE**
LEWIS H. LAZARUS, ESQUIRE & BRETT M. MCCARTNEY, ESQUIRE

SANDBAGGING: DEFAULT RULES AND ACQUISITION AGREEMENTS
CHARLES K. WHITEHEAD

EXAMINING DATA POINTS IN MINORITY BUY-OUTS: A REPORT FROM PRACTITIONERS
SUNEELA JAIN, ETHAN KLINGSBERG & NEIL WHORISKEY

SANITIZING INTERESTED TRANSACTIONS
CLAIRE HILL & BRETT MCDONNELL

2011-2012 Wolcott Fellows

We would like to congratulate our *Journal* members chosen as the 2011-2012 Wolcott Fellows:

Eric M. Sable, Editor-In-Chief
Kyle F. Dunkle, Articles Editor
Jeremy J. Riley, Articles Editor
Traci Marie Cosby, Staff Member

Recent Rankings

Since 1975, the *Journal* has published articles, student comments, unreported opinions of the Delaware Court of Chancery and other material addressing issues in corporate and business law. Its contributors have included judges and professors from a wide range of institutions, whose stature has contributed to the *Journal's* current ranking as **12th out of 434** specialized student-edited law reviews, and **1st** among such journals specializing in “Corporations and Associations” and “Commercial Law,” based upon citations in federal and state court opinions over the course of the most recent eight years.

Professor Conaway on the CML Opinion

In a case of first impression, the Delaware Supreme Court in *CML V LLC v. Bax*, (Del. Sept. 2, 2011,) has held that creditors do not have derivative standing to bring a fiduciary duty claim against present or former managers of an insolvent Delaware LLC under statutory provisions of the Delaware Limited Liability Company Act (DLLCA). The statutory preclusions on which the Supreme Court relied are found at 6 Del. Code §§ 18-1001-1002. In its opinion, the Delaware Supreme Court set forth the language of § 18-1002, stating that: “the plain language [of the statutory provisions] is unambiguous and limits derivative standing to “member[s] or assignee[s]” and that exclusive limitation is constitutional.” (Emphasis in the original). Indeed, § 18-1002 defines a “Proper plaintiff” as: “ In a derivative action, a plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action....” (Emphasis added)

CML had entered a loan transaction with JetDirect at a time when the company’s finances were uncertain and the company’s financial situation somewhat unclear. However, CML was always free to contract for any terms it desired if greater financial security was sought. Shortly after the loan agreement by CML, JetDirect became insolvent and failed to pay CML. CML brought suit in the Court of Chancery for derivative and direct claims, including breach of the duty of care. The Court of Chancery dismissed the derivative claims and the case was appealed to the Delaware Supreme Court.

On appeal, the Vice Chancellor’s interpretation of DLLCA §§ 18-1001-1002 was disputed. In addition, counsel for CML argued that the Vice Chancellor’s interpretation rendered the statutory provisions of DLLCA unconstitutional on the grounds that they stripped the Court of Chancery of its traditional power to do “equity.” The Supreme Court quickly disposed of the constitutionality argument on the basis that the equitable derivative suit for stockholders from English common law was grounded in corporate – not LLC law. The Supreme Court continued that the Delaware General Assembly was free to legislate exceptions from the common law and did so with the enactment of the DLLCA in 1992.

The Supreme Court’s opinion in *CML v. Bax* is a beacon of hope for the law of Delaware unincorporated entities for its uncontroverted stance in line drawing between Delaware corporations and LLCs. In this opinion, the Supreme Court refuses, through the doctrine of equity, to infuse corporate principles into Delaware’s unambiguous, contractually based alternative entity statutes. With this opinion comes greater clarity and lower agency costs in the law of Delaware LLCs. Hopefully, the opinion will serve as a harbinger for the abandonment of corporate principles to define the rights of members, managers and other parties to a Delaware operating agreement. Five stars to the Delaware Supreme Court!

- [Professor Ann Conaway](#)

Professor Regan on the Goldman Sachs Decision

Newly installed Vice Chancellor Sam Glasscock has issued an opinion dismissing a shareholder derivative action that the shareholders of Goldman Sachs attempted to bring on behalf of the company against its directors and officers arising from the company's compensation plan during the recent mortgage crisis and its aftermath. In *In re The Goldman Sachs Group, Inc. Shareholder Litig.*, C.A. No. 5215-VCG (Del. Ch. Oct. 12, 2011), the shareholders of Goldman Sachs alleged that the company's directors breached their fiduciary duties by establishing a compensation structure that assertedly encouraged highly "risky trading practices and over-leveraging of the company's assets." The plaintiffs also alleged a Caremark claim, asserting the Goldman directors failed to fulfill their oversight responsibilities with regard to the firm's compensation plan which in turn, according to the plaintiffs, led to unethical and illegal business practices as well as overly-risky business decisions.

The defendants successfully moved to dismiss the complaint under Court of Chancery Rule 23.1 for failure of the plaintiffs to allege with particularity that pre-suit demand was excused. With regard to the decision of the Goldman board to approve the firm's compensation structure, Vice Chancellor Glasscock applied a straightforward Aronson analysis and concluded that the complaint failed to allege (1) that the board was interested or lacked independence when it approved the compensation scheme or (2) that the board did not otherwise validly exercise its business judgment in this regard. On the Caremark claim, the Court applied the Rales test and ruled that the complaint failed to allege with particularity that the Goldman directors faced a substantial likelihood of personal liability on their asserted failure to fulfill their oversight responsibilities. Thus demand was not excused because the plaintiffs did not allege facts creating a reasonable doubt that the Goldman directors would be deemed personally interested in responding to a demand that such an oversight claim be brought.

As noted the Court's application of the Aronson test was fairly straightforward. Of note here is the Court's Caremark analysis. The plaintiffs asserted that the Goldman directors failed to fulfill their fiduciary duty of oversight both with regard to monitoring compliance with applicable law and the company's business performance and risk. The Court's rejection of the complaint's legal compliance/oversight claim conventionally followed Caremark and *Stone v. Ritter*. On the issue of monitoring business risk (as opposed to legal compliance), Vice Chancellor Glasscock noted that "this Court has not definitively stated whether a board's Caremark duties include a duty to monitor business risk." *Goldman Sachs*, slip op. at 60. Ultimately however, the Court declined to reach this interesting legal issue, ruling that the complaint failed to allege that the Goldman directors "acted in bad faith or consciously disregarded their oversight responsibilities in regards to Goldman's business risk." *Id.* at 64. As in the Citigroup case decided in 2009 by then Chancellor William Chandler, Vice Chancellor Glasscock signaled very little patience for the plaintiffs' attempt to recast a claim attacking a business judgment over employee compensation into an oversight claim concerning business risk. Emphasizing the traditional judicial inquiry into the process but not the substance of board decision-making, the Court in *Goldman Sachs* emphasized: "If an actionable duty to monitor business risk exists, it cannot encompass any substantive evaluation by a court of a board's determination of the appropriate amount of risk." *Id.* at 62.

Following the Court of Chancery's decisions in *Goldman Sachs* and of course *Citigroup*, it remains unsettled whether Caremark's early reference to the possibility of an oversight claim arising from a board's monitoring of business risk is viable. Outside of Delaware, the Model Business Corporation Act suggests such a possibility, at least with regard to "major risks" facing a publicly owned company. See MODEL BUSINESS CORPORATION ACT, Section 8.01(c)(2) ("In the case of a public corporation, the board's oversight responsibilities include attention to ... major risks to which the corporation is or may be exposed".) The early returns from Delaware case law suggest a different emphasis in policy on the question of director accountability for business risk — i.e., protecting the board's managerial authority under our director-centric model of corporate governance; encouraging entrepreneurial risk taking; encouraging qualified directors to serve; avoiding the unfairness of hindsight bias for decisions that turn out badly; and avoiding second guessing of business decisions by ill-equipped members of the judiciary. Thus far at least, the Delaware Court of Chancery has concluded that a conventional business judgment rule analysis should apply to such "oversight" business risk claims. Diversified stockholders who are unhappy with what they regard as unreasonable levels of business risk can always exit by selling their shares or otherwise seek to replace the directors in a contested election.

- [Professor Paul L. Regan](#)

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Delaware Journal of Corporate Law

VOLUME XXXVII
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