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Delaware Chancery Court broadens stockholder's rights to inspect a corporation's books and records

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In *Lebanon County Employees' Retirement Fund, et al. v. AmerisourceBergen Corp.*, No. 2019-0527-JTL, a Delaware Court of Chancery judge, Vice Chancellor J. Travis Laster, issued a potentially far-reaching decision that could allow Delaware stockholders easier access to a corporation's books and records.

AmerisourceBergen Corporation is one of the world's largest wholesale distributors of opioid pain medication, and is the target of numerous subpoenas, government investigations, and lawsuits related to its alleged role in America's opioid epidemic. Certain stockholders of AmerisourceBergen issued a demand for inspection "to inform themselves" regarding potential wrongdoing committed by the company's board of directors, "and to identify and evaluate their alternatives." No. 2019-0527-JTL, at 15.

Section 220(b) of the Delaware General Corporation Law grants any stockholder the right "to inspect for any proper purpose . . . [t]he corporation's stock ledger, a list of its stockholders, and its other books and records . . . ." 8 Del. C. § 220(b).

In our experience, litigation over a stockholder's entitlement to inspect books and records typically centers around whether or not the stockholder has "a proper purpose" for conducting the inspection. The statute states that "[a] proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder." Interpretation of this statutory provision is the subject of extensive court analysis in Delaware.

It is well established that a stockholder's desire to investigate wrongdoing is a "proper purpose," but the stockholder must "show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation . . . ." *Id.* at 16 (quoting *Seinfeld v. Verizon Commc'ns, Inc.* 909 A.2d 117, 122 (Del. 2006)). In this case, the court found that "the flood of government investigations and lawsuits relating to AmerisourceBergen's opioid-distribution practices is sufficient to establish a credible basis to suspect wrongdoing warranting further investigation." *Id.* at 20.

In reaching the court's decision, Vice Chancellor Laster addresses and potentially weakens a number of defenses that corporate defendants traditionally raise in such "books and records" suits. One common defense is an assertion that the plaintiff's sole objective in inspecting the books and records is to bring litigation. Under the court's interpretation of Delaware law in this case, however, inspection is permissible so long as the stockholder states that it may also use the fruits of the investigation for "other purposes," such as to seek an audience with the board to discuss proposed reforms, to prepare a stockholder resolution for the next annual meeting, or to mount a proxy fight to elect new directors.

More broadly, the court criticized and rejected "a line of authority in which this court has required stockholders who wanted to investigate mismanagement to state up-front what they planned to do with the fruits of the inspection." *Id*. at 25 (citing *W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp*., 914 A.2d 636, 646 (Del. Ch. 2006)). The court opined that this line of cases "turn[s] the purpose-plus-an-end concept into a requirement that goes beyond what Section 220 and the Delaware Supreme Court precedent require." *Id*. at 27. In essence, then, the court ruled that stating a proper purpose is sufficient, and the stockholder does not need to go further to state what it will do with the documents it receives.[1]

Moreover, the court declined to follow prior Court of Chancery decisions holding that to obtain books and records a stockholder must introduce evidence providing a credible basis to infer the existence of a so-called *Caremark* claim that would impose liability on directors.[2] *See, e.g*., *Beatrice Corwin Living Irrevocable Trust v. Pfizer, Inc*., No. 10425-JL, 2016 WL 4548101 at * 38 (Del. Ch. August 31, 2016). The court reiterated that, under *Seinfeld*, "the operative question is whether a stockholder has shown a credible basis to suspect possible mismanagement or wrongdoing at the corporation." *Id*. at 39. "This standard does not require tying the mismanagement or wrongdoing to the board." *Id*. The court concluded that, "[g]enerally speaking, when a corporation has suffered a trauma, and when there is a credible basis to suspect that the corporation has violated positive law or government regulations, then some level of investigation is warranted." *Id*. (citing *In re Facebook, Inc., Section 220 Litigation,* No. 2018-0661-JRS, 2019 WL 2320842 at *14-15 (Del. Ch. May 30, 2019).

Non-exculpated claims

One other striking aspect of this decision is that the court notes, in dicta, that the issues that plaintiffs sought to investigate "could well lead to non-exculpated claims" against the directors. No. 2019-0527-JTL, at 41. In doing so, the court rejected another line of defense raised by the company, which had asserted that the books and records demand was unwarranted because it could not lead to breach of loyalty claims or other grounds for imposing personal liability on directors in light of broad exculpatory provisions. The court instead outlined a number of ways in which the alleged wrongdoing could amount to breaches of the duty of loyalty. For example, if the plaintiffs can prove their claims that the directors took "an ostrich-like approach" to their fiduciary obligations

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[1] However, the court did note, in dicta, that [i]f a stockholder cannot identify a credible potential end use [for the information sought], then the court may infer that the stockholder's stated purpose is not its actual purpose." *Id*. (citing *Marathon P'rs v. M & F Worldwide Corp*., 2004 WL 1728604, at *8 (Del. Ch. July 30, 2004)).

[2] A *Caremark* claim typically arises after a corporation suffers a major corporate trauma resulting in loss or harm, and stockholders seek to hold the board of directors liable. *See In re Caremark International Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

by failing to monitor the reporting system and oversight controls put in place by the Company. *Id.* at 42-48.

Types of documents covered

The court discussed three categories of documents often sought in a books and records demand: (1) "formal board materials" (documents that formally evidence the directors' deliberations and decisions and comprise the materials that directors formally received and considered), (2) "informal board materials" (including e-mails and communications between the directors), (3) and "officer-level materials" (materials that were only shared among or received by officers and employees). The court noted that formal board materials will often be sufficient, and whether a stockholder is entitled to a particular category of documents is "fact specific and will necessarily depend on the context in which the shareholder's inspection demand arises." *Id.* at 54 (citing *Wal-Mart*, 96 A.3d at 1271). Here, as described more fully below, the Court ordered production of more than just "formal board materials."

The court made clear that parties are entitled to obtain discovery regarding what types of books and records exist within the corporation and who has them. The court stated: "Just as a defendant can serve interrogatories or depose a plaintiff about its proper purpose, so too can a plaintiff serve interrogatories or notice a Rule 30(b)(6) deposition to understand what books and records exist and who has them." No. 2019-0527-JTL, at 56.

In this case, both parties agreed that plaintiffs were entitled to inspect documents pertaining to certain subjects, including: applicable company policies, the board's creation of a committee to review the board's oversight risks regarding the company's role as a distributor; the company's duty to conduct due diligence with respect to its compliance with certain laws, lawsuits, and investigations relating to the company's distribution of prescription opioids; and the company's anti-diversion compliance program.

However, the court also allowed inspection of a wide range of additional documents, over the company's objection, including documents related to: a 2007 settlement with the DEA, the company's acquisition of another company, the company's participation in certain trade associations, and a decision to task a board committee with preparing a report on the oversight risks associated with opioid distribution. The court reasoned that the plaintiffs are entitled to inspect these documents because they are necessary to investigate certain aspects of the plaintiff's concerns about wrongdoing.

The court did allow for production to take place pursuant to a mutually agreeable confidentiality agreement and a forum selection provision requiring any suit to be filed in Delaware. The court declined to rule on whether the company is permitted to redact non-responsive material, noting that redactions should be limited, but can be warranted. The court indicated that it will resolve any disputes regarding redactions or privilege as they arise.

Key takeaways

Although this decision appears far-reaching, it is worth noting that the decision is made in the context of a company besieged by litigation and heavily investigated by federal agencies, which provided the plaintiffs with a sufficient factual showing (a "credible basis") to gain access to books and records. Other Chancery Court judges may not view stockholder rights as broadly as Vice Chancellor Laster, particularly with different factual circumstances. It is also possible this decision

may be appealed to the Delaware Supreme Court, particularly due to what may be seen as a split in the Delaware Courts of Chancery regarding whether the purpose-plus-an-end requirement is part of the Section 220 analysis. Still, this decision will likely embolden aggressive stockholders to seek Section 220 discovery whenever significant events occur, including where a company is contemplating significant corporate transactions.

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