GIBSON DUNN

Litigators of the Week: Delaware Supreme Court Upholds Controversial Changes to State's Corporate Law

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Our Litigators of the Week are Jonathan Bond of Gibson, Dunn & Crutcher and William Savitt of Wachtell, Lipton, Rosen & Katz, who secured a ruling from the Delaware Supreme Court upholding last year's closely watched changes to Delaware's corporate law.

The state's high court last week found that Senate Bill 21's safe harbor provisions for controlling stockholder transaction were constitutional, having neither divested the Court of Chancery of equity jurisdiction nor retroactively extinguished any vested plaintiff rights. The decision was a win for Gibson Dunn's client Clearway Energy, a company facing a shareholder lawsuit where the issue was taken up in an interlocutory appeal, and Wachtell's clients, the state and governor of Delaware, who intervened to defend SB 21.

Litigation Daily: Who are your clients and how would you characterize what was at stake here?

Jonathan Bond: We represent Clearway Energy Inc., a publicly traded energy infrastructure investor and one of the largest owners of clean energy generation assets in the United States. Clearway acquires assets from its controlling stockholder, Clearway Energy Group LLC, in the ordinary course of business, in transactions that are reviewed and approved by a committee of fully independent Clearway directors. As a result, this case challenged transactions that are at the core of Clearway's business model.

Bill Savitt: Our clients are the Governor and State of Delaware. For the state and its political branches, the stakes were high: At issue was whether the legislature and the governor had the authority to amend Delaware's world-leading corporate law in response to evolving commercial realities.

How did this matter come to you and your firms?

Bond: Clearway is a long-standing client of our firm. This case started in 2024 as a Section 220 books-and-records demand. After Clearway completed its document production in response to the Section 220 demand, the plaintiff filed a derivative action, and Clearway retained Gibson Dunn to represent it in that litigation.

Savitt: We were contacted by the governor's office.

Who was on your team and how did you divide the work in this interlocutory appeal?

Bond: Colin Davis and Brian Lutz, two of our preeminent Delaware Court of Chancery litigators, represented Clearway in connection with the Section 220 demand and the

Related People

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derivative litigation. After the Court of Chancery certified the plaintiff's constitutional challenge to SB 21 to the Delaware Supreme Court, Colin and Brian recognized this as a perfect opportunity to leverage the strengths of Gibson Dunn's world-class appellate practice. That's how Russell Balikian and I became involved in the case. Russell and I led the briefing and argument in the Supreme Court, with substantial assistance from Colin, Brian, the Gibson briefing team (including Giuliana Cipollone, Connor Mui, Zach Tyree and Hunter Mason) and our Delaware counsel, Elena Norman of Young Conaway Stargatt & Taylor. We also collaborated extensively with Srinivas Raju and his firm, Richards, Layton & Finger, representing codefendants Clearway Energy Group and Christopher Sotos.

Savitt: Our firm's core team included partners Anitha Reddy and Ryan McLeod, counsel Alexander Mackler and associates Daniel Listwa and Stephen Levandoski. We approached the appeal as we approach all our projects—on a task force basis, attacking the issues from first principles.We had the good luck to work with a spectacular team at Potter Anderson led by Peter Walsh and Callan Jackson.

What was the level of coordination between your two teams?

Bond: We coordinated substantially with the state's counsel at Wachtell and Potter Anderson. From the outset, it was apparent that Clearway—as the real party in interest—was best positioned to address how SB 21 affects the particular transaction at issue, while the state could offer a broader perspective on the policy arguments in play. We worked to develop distinct but complementary briefs and delivered mutually reinforcing arguments to the Supreme Court. Bill Savitt and the Wachtell and Potter Anderson teams were exemplary partners and a genuine pleasure to work with.

Savitt: We and the superb team at Gibson Dunn and Young Conaway were in good touch and pursued complementary approaches reflecting our clients' respective interests.

Opposing counsel, Greg Varallo of Bernstein Litowitz, conceded at the beginning of his oral argument that his cause was "extremely unpopular." He had the burden of overcoming the presumption that statute was valid and constitutional. Did that take any pressure off you?

Bond: Not for me, because the court clearly is committed to getting the law right and following the state constitution and its precedents where they lead. What's popular or not doesn't come into it. Although we argued, and strongly believe, that the plaintiff's challenge couldn't surmount the high bar for invalidating an act of the Delaware legislature exercising its own constitutional authority over corporate law, we knew the court had taken the case on certified questions and took these issues very seriously.

Savitt: Not at all. Greg is a skilled advocate. This was his attempt to suggest that he was invoking constitutional principles where they matter most, in support of a position that was unpopular but right. The only trouble is that his position was unpopular and wrong.

The court included an overview of the evolutions of Delaware law government controlling-stockholder transactions aimed at a reader "not steeped in the arcana of Delaware corporate law." Did the amount of attention this case was receiving from the broader corporate law world in any way shape how you approached your own arguments?

Bond: I think everyone involved recognized the stakes of the case for Delaware corporate law, and the gravity of the constitutional moment unavoidably affected how the parties presented their arguments and their implications. As advocates we all strive to be helpful to the court, and when you know a court is grappling with really weighty issues—where its decision will be an inflection point however it rules—you try to put yourself in their shoes, anticipate the concerns they're confronting and offer ways to help the court work through them, cognizant of the potential ripple effects of their decision. We understood that the

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court would ultimately need to explain its ruling in an opinion for multiple audiences—corporations, the Delaware bar and the public—and we tried to present our position in a way that makes sense to legal and non-lawyer audiences alike: The Delaware legislature writes the laws that govern corporations. The state constitution sets which cases courts can hear, but at the end of the day, courts are applying the law the people's representatives have made.

Savitt: Ultimately we rooted our arguments in legal history, the separation of powers and the relevant precedents. Though the case had very broad implications, the appeal needed to be and was prosecuted for the erudite judges on the court.

What do you think this decision means for shareholder litigation in Delaware moving forward? How do you expect the plaintiff's bar and others who opposed SB 21 to react in light of this decision?

Bond: To me the biggest takeaway is that corporations and investors alike can trust that Delaware's corporate law means what it says and that when the legislature changes the law—including in the wake of judicial decisions interpreting it—Delaware courts will give effect to that law. The court wasn't deciding what Delaware law should be going forward—just that the legislature can exercise its own constitutional authority and responsibility to make the law. I don't know how plaintiffs will respond, but what I hope everyone takes from the decision is that the constitutionally mandated process of revising corporate law in Delaware—which requires supermajorities in both houses to make a change—is working and that Delaware's courts give due respect to the laws the legislature makes.

Savitt: The plaintiffs' bar is resourceful and effective. There will be much litigation to decide what SB 21 means in practice. The Supreme Court's affirmation of its constitutionality is a pivotal point of departure, but the impacts of the law will be worked out in the traditional way of common law, case by case.

What else is important here in the court's decision?

Bond: The decision reinforces the legislature's important role in shaping Delaware's corporate law. In enacting SB 21, the legislature addressed an area of the Delaware common law that many perceived as having become unpredictable. The court's decision confirms that response was an appropriate exercise of the legislature's authority, subject to constitutional limits.

Savitt: In addition to validating an important corporate law reform, the decision reaffirms the right of the political branches to make the law and the flexibility of Delaware in addressing the evolving commercial needs of its corporations and their investors.

Mr. Bond, what comes next in this case? How will litigating it back at the Court of Chancery for Clearway be different than it would have been had the SB 21 safe harbors been found to violate the state's constitution?

Bond: The Supreme Court's decision changes significantly how this case will be litigated in the Court of Chancery. Before SB 21, this case likely would have been subject to entire fairness review under the Supreme Court's decision in *Match*, which required approval by both an independent special committee and a majority of disinterested stockholders to trigger business judgment review. Now, following the Supreme Court's decision, this transaction falls squarely within SB 21's safe harbor for controlling stockholder transactions that are approved by a fully informed committee of independent directors acting in good faith.

What will you remember most about this matter?

Bond: Two things stand out to me. First is getting to play a part, however small, in a

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dispute about state constitutional law with such far-reaching implications. I had the tremendous good fortune to clerk for Judge Sutton on the Sixth Circuit, who instilled in me and countless others the critical but often-underappreciated importance of state constitutional law. This case illustrates how central state constitutional law is to issues that can affect everyone. We all interact with Delaware corporations every day, and the law that governs them ultimately affects everyone. The court's decision here not only upheld SB 21, but also confirmed and clarified the legislature's authority to write those rules.

Second, this case was one of the most joyfully collaborative matters I've worked on. Our Gibson Dunn team led by Colin, Brian and Russell worked seamlessly with Elena and her colleagues at Young Conaway and Srini and his team at Richards Layton. Their expertise and insight into Delaware corporate law are really unparalleled and were invaluable in this case. It's so rewarding to team up with experts like that and so reassuring to walk to the lectern knowing that the best minds in the business have thought through every angle, looked around every corner and armed you with the best answers to the hardest questions.

Savitt: The honor of representing the state and the governor.

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