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Lessons From the Most Cited Chancery Court Decisions of 2015

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Editor's note: Gibson Dunn represented Dole Food in In re Dole Food.

The new year presents an opportunity to reflect on the Delaware Court of Chancery's very active 2015. In its first full year under the leadership of Chancellor Andre G. Bouchard, the court produced over 250 written decisions. The Court of Chancery—in addition to adjudicating numerous fast-moving and high-stakes corporate governance and control disputes—also clarified key areas of Delaware law, from standing requirements in appraisal and creditor derivative suits to the defenses of in pari delicto and shareholder ratification.

This article highlights five Chancery opinions from 2015 already making a significant impact on Delaware corporate law. We took an empirical approach to selecting these "top five" opinions. Specifically, we added the number of cases and secondary sources (such as treatises and statutory supplements) citing each 2015 Delaware Chancery decision available through LexisNexis Advance's Shepard's service and WestlawNext's KeyCite service.

As of the beginning of January, the most cited cases under this methodology were:

- *Calma v. Templeton*, 114 A.3d 563 (Del. Ch. 2015) 45.
- *Quadrant Structured Products v. Vertin*, 115 A.3d 535 (Del. Ch. 2015) 38.
- *Stewart v. Wilmington Trust SP Services*, 112 A.3d 271 (Del. Ch. 2015) 30.

James L. Hallowell and Ari S. Ruben

- *In re Appraisal of Ancestry.com*, 2015 Del. Ch. LEXIS 2 (Del. Ch. Jan. 5, 2015) 27.
- *In re Dole Food*, 2015 Del. Ch. LEXIS 223 (Del. Ch. Aug. 27, 2015) 27.

Of course, many other Chancery decisions, particularly those decided in the last months of the year, have yet to be fully analyzed by scholars, practitioners and judges, but will be in due course. Nonetheless, we found our study revealing. These top five decisions address current developments confronting corporate boardrooms, such as the increasing prevalence of going-private transactions and appraisal arbitrage. Taken together, they foretell the hot-button legal issues likely to be confronted by the Chancery bench and bar going forward. They also reflect the diversity of the Chancery's docket and the active role played by each member of the court.

In the most widely cited decision, *Calma*, Bouchard offered a treatise-like review of the law of shareholder ratification in a derivative suit brought by a Citrix Systems stockholder. The plaintiff challenged a compensation plan consisting of restricted stock units for non-employee Citrix directors. Notwithstanding shareholder approval of the plan, the chancellor applied entire fairness review and denied the ratification defense, because the compensation plan did not specify or meaningfully limit the compensation that the

non-employee directors would ultimately receive. Based on the attention it has already garnered (see, e.g., "Corporate Governance: Law and Practice," Section 16:01, Amy L. Goodman and Steven M. Haas), this decision will likely shape future jurisprudence involving shareholder ratification and non-employee director compensation.

Vice Chancellor J. Travis Laster used the second most frequently cited opinion, *Quadrant*, to further develop the procedural and substantive rules governing derivative suits by creditors of insolvent corporations. Two of the holdings in *Quadrant* are particularly noteworthy: First, as a matter of first impression, the court held that a creditor-plaintiff must show that the corporation had been insolvent at the time the suit was filed to have standing. The court thus rejected the defendants' argument that the corporation remain continuously insolvent to maintain suit. The court also recognized that creditors may establish insolvency through a "traditional balance sheet" rather than the more exacting "irretrievable insolvency" test. Leading treatises are already heavily relying on Laster's distillation of standing law, as in "Treatise on the Law of Corporations," Section 10:18, James D. Cox and Thomas Lee Hazen.

Just prior to his retirement from the Chancery Court, Vice Chancellor Donald F. Parsons Jr. weighed in on the ever-important in pari delicto defense in *Stewart*. The key question in *Stewart* was whether the Delaware state insurance commissioner, suing on behalf of four insolvent insurance corporations, could maintain aiding and abetting claims against the insolvent insurers' auditors and administrative management company. While the court barred contract and negligence claims against the third parties, Parsons sustained most of the claims for aiding and abetting breach of fiduciary duty. The decision represents, in at least one treatise's view, a "heightened risk of aiding and abetting liability for directors' breaches" for "gatekeepers" like auditors and third-party advisers and recognizes a "new exception to" in pari delicto. (See, e.g., "Takeover Defense: Mergers and Acquisitions," Section 14.09, Arthur Fleischer Jr.)

A case decided at the start of the year, *Ancestry.com*, afforded Vice Chancellor Sam Glasscock III the opportunity to clarify the law of standing under Delaware's appraisal statute. Petitioning shareholder Merion Capital L.P. purchased stock in Ancestry.com following the corporation's acquisition in a cash-out transaction in 2012, with the shares held in fungible bulk by Cede & Co., its record owner. The decision reaffirmed that, even after the 2007 amendment to the appraisal statute, "it remains the record holder," rather than the beneficial owner, "who must not have voted the shares for which appraisal is sought." In the alternative, even if the beneficial owner's actions were relevant to the standing inquiry, the beneficial owner in this case, Merion, had not voted its shares for the sale. As commenters have noted, the decision was a victory for investors seeking "appraisal arbitrage," who purchase a target corporation's shares after a merger's record date in order to seek a higher return in an appraisal proceeding. (See, e.g., "Delaware Corporation Law and Practice," Section 36.04.)

The last of the top five, Laster's opinion in *Dole*, raises serious questions regarding fiduciary liability in going-private transactions. The plaintiffs alleged, and the court found, that certain of the defendants had taken measures to inhibit Dole's share price prior to a going-private transaction. Due to the nature of the claims at issue and the large damages ordered—nearly $150 million—this decision has already been widely covered in the press and will likely remain an important Chancery precedent.

Each of these decisions clarifies the rules governing challenges to officers' and directors' actions in ways broadly favorable to shareholder and creditor plaintiffs. *Calma* embraces more exacting rules for shareholder ratification. *Quadrant* rejects proposed hurdles that would have undermined creditors' ability to maintain derivative suits. *Stewart* likely opens the door to more suits against auditors and other third-party "gatekeepers" for aiding and abetting fiduciary breaches. *Ancestry.com* eases the path of investors seeking appraisal arbitrage in establishing standing. *Dole* will likely trigger increased scrutiny of going-private transactions. Thus, the five opinions provide a useful cross-section of issues parties will continue to litigate before the Chancery Court in the years to come.

These five decisions also reflect the vibrancy and breadth of the Delaware Court of Chancery's work. In fact, four of the five decisions listed above were written by different members of the court, yet another illustration of the active role each Chancery member plays in shaping Delaware corporate law. With the addition in December 2015 of new Vice Chancellor Tamika Montgomery-Reeves and the expected addition of another new member early this year, the bench's accomplishments will certainly continue in 2016 and beyond.

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