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Judges

Appointments

When he served on the Delaware Court of Chancery, new Delaware Supreme Court Chief Justice Leo E. Strine, Jr. showed a zeal for corporate ethics, deference to the business judgment of corporate directors, and a tendency to promote and protect Delaware as a source of substantive corporate law. According to Arnold & Porter attorneys Veronica E. Rendon, James W. Thomas, Jr. and Mary E. Sylvester, how he expresses these traits on the Delaware Supreme Court remains to be seen.

What to Expect from Chancellor Strine's Appointment To the Delaware Supreme Court



BY VERONICA E. RENDON, JAMES W. THOMAS, JR.,
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On Feb. 28, 2014, Delaware Court of Chancery Chancellor Leo E. Strine, Jr. was sworn in to the position of Chief Justice of the Delaware Supreme Court. Chief Justice Strine served on the Delaware

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Court of Chancery from 1998 until his installation as Chief Justice, and has a reputation among practitioners as a razor sharp jurist, although his sometimes irreverent style led one detractor to describe him as “a smart aleck who wields a lot of power.”¹

While Delaware Chancery Court judges, like other trial court judges, act individually and have broad control over the litigants and disposition of cases before them, the Delaware Supreme Court is a five-person court that traditionally rules unanimously. In his new role, Chief Justice Strine's opinions will have to be mindful of his fellow Supreme Court judges. Some may wonder whether his unique approach to matters of eq-

¹Weidner, David, *Writing on the Wall: Is Leo Strine Serious?*, WSJ.com (Mar. 8, 2012).

uity will be suited to the Delaware Supreme Court, but Chancellor Strine's decisions and academic writings give some sense as to how he will approach matters as Chief Justice. Several themes that run through Chief Justice Strine's decisions as a member of the Court of Chancery demonstrate at bottom a fundamental respect for the core tenets that run through Delaware jurisprudence, including: a zeal for corporate ethics and fairness, particularly in the context of enforcing the duties of corporate officers and directors; due deference to the business judgment of corporate directors; and the promotion and protection of Delaware as a source of substantive corporate law and forum for the resolution of corporate disputes involving Delaware law.

Zeal for Ethics and Fairness

Chief Justice Strine is known for advocating ethics and fairness in corporate citizenship, and particularly in the realm of the fiduciary duties owed by directors and officers to their corporation.² This is reflected in several of his decisions as a member of the Court of Chancery.

Then-Chancellor Strine prominently sided with shareholder plaintiffs seeking to hold a corporation's CEO and financial advisor liable for breaches of fiduciary duty—although denying their motion for injunctive relief delaying a proposed merger—in *In re El Paso Corp. Shareholder Litigation*, 41 A.3d 432 (Del. Ch. 2012). The *El Paso* litigation arose from Kinder Morgan Inc.'s proposed acquisition of El Paso Corp. The plaintiffs alleged conflicts of interest, including that Goldman Sachs & Co. was serving as a financial advisor to El Paso but owned a substantial percentage of Kinder Morgan's outstanding shares, and that El Paso's CEO had approached Kinder Morgan about separately buying certain assets that Kinder Morgan planned to sell to finance the acquisition.

Then-Chancellor Strine concluded that a number of parties, including the CEO and Goldman Sachs engaged in the "kind of furtive behavior [that] engenders legitimate concern and distrust." The parties ultimately settled the matter, with Goldman Sachs agreeing to forfeit its \$20 million fee.

Similarly, as Chancellor, Chief Justice Strine held that a share-for-share merger failed to meet the entire fairness standard where the proposed merger was with a subsidiary of the company's controlling shareholder in *In re Southern Peru Copper Corp. Shareholder Derivative Litigation*, 52 A.3d 761 (Del. Ch. 2011). The plaintiffs were awarded \$1.347 billion in damages and later plaintiffs' counsel were awarded \$304 million in attorneys' fees. The Delaware Supreme Court upheld this judgment in August 2012. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

Chief Justice Strine as Chancellor also notably granted a shareholder plaintiff's motion for an injunction prohibiting an incumbent corporate board from impeding plaintiff's proxy solicitation effort to approve a proposed slate of new directors, where the Chancellor found the incumbent board breached its fiduciary duty by relying on the threat of a proxy put—acceleration of the corporation's repayment of debt upon a specified change in corporate leadership—to fend off efforts to

replace incumbent board members. See *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013).

Then-Chancellor Strine expressed his views concerning the standards to which corporate fiduciaries will be held in *Huff v. Longview Energy Co.*, No. 8453, 2013 BL 210804, 2013 WL 4084077 (Del. Ch. Aug. 12, 2013). In that decision, the Chancellor granted a corporation's motion to dismiss indemnification claims brought by two of its directors who, per a prior jury verdict, had been found to breach their fiduciary duties by usurping a corporate opportunity. The directors sought indemnification for their litigation expenses under the company's directors and officers insurance policy, claiming that, because plaintiffs had prevailed on only one count brought against them, their defense was successful. Then-Chancellor Strine disagreed, stating: "Corporate fiduciaries who, unless they overturn a jury verdict, owe the corporation nearly \$100 million and must yield to the company's substantial property rights, because they have been adjudicated to have breached their fiduciary duties, are not in an equitable position to ask this court to allow them to prematurely seek a money damages claim from the corporation to which they owed a duty of loyalty." *Id.* at *2.

Deference to Business Judgment

Although exacting when enforcing the fiduciary duties of officers and directors, Chief Justice Strine has also been a consistent advocate for deference to valid exercises of business judgment by corporate fiduciaries. This is illustrated in a series of rulings:

On Aug. 16, 2013, in conjunction with the proposed transaction to take computer manufacturer Dell, Inc. private, then-Chancellor Strine ruled from the bench in *High River LP v. Dell Inc.*, No. 8762 (Del. Ch. 2013), dismissing investor Carl Icahn's breach of fiduciary duty claims against Dell's management. Icahn claimed that Dell's board violated its duties by changing voting rules, staggering meetings, and refusing to hold timely annual meetings.

Strine rejected all of Icahn's claims, despite concluding that Dell was technically not in compliance with the Delaware statute that mandates shareholder meetings must be held every thirteen months. Because there was no evidence of incumbent board entrenchment nor any evidence that the board was acting in a way adverse to the best interests of Dell shareholders, then-Chancellor Strine dismissed the claims. Icahn subsequently dropped his takeover attempt.

Similarly, in *In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013), shareholders brought breach of fiduciary duty claims against the controlling shareholder and corporate directors, alleging that a going private merger was unfair. Then-Chancellor Strine held that a corporate takeover by a controlling party would be subject to business judgment rule review as long as the transaction was approved by a special committee of independent directors and ratified by a majority of non-controlling shareholders. See *id.* at 503 ("[W]hen such stockholders are given a free opportunity to vote no on a merger negotiated by a special committee, and a majority of them choose to support the merger, it promises more cost than benefit to investors generally in terms of the impact on the overall cost of capital to have a standard of review other than the business judgment rule.").

² See, e.g., Strine, Leo E., Jr., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 Geo. L.J. 629 (Mar. 2010).

The more lenient standard of review of board decisions in the circumstances reviewed in *MFW* provides greater protection for directors than the entire fairness standard and makes shareholder suits challenging controlling-party buyout deals significantly more difficult. Then-Chancellor Strine's decision in *MFW* and rationale for application of the business judgment rule where there has been a special committee of independent directors and shareholder ratification was recently upheld by the Delaware Supreme Court in a decision in which he did not participate. See *Kahn v. M&F Worldwide Corp.*, 2014 BL 71689 (Del. March 14, 2014).

Applying similar reasoning, then-Vice Chancellor Strine upheld Barnes & Noble's adoption of a "poison pill." See *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. 2010). In response to Yucaipa's rapid acquisition of stock, Barnes & Noble adopted a provision prohibiting any single investor other than the board chairman and his family from owning more than 20 percent of outstanding shares—Vice Chancellor Strine held that the incumbent board's use of the poison pill provision was legitimate where shareholders voted to approve the pill and Yucaipa was still afforded the opportunity to prevail in a proxy contest. This decision was later affirmed by the Delaware Supreme Court. See *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 15 A.3d 218 (Del. 2011).

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Chief Justice Strine has long beaten the drum as a member of the Court of Chancery that plaintiffs' counsel should not neglect their investigatory duties in their haste to win the race to the courthouse. See *Biondi v. Scrusby*, 820 A.2d 1148, 1162 (Del. Ch. 2003) ("Too often judges of this Court face complaints filed hastily, minutes or hours after a transaction is announced, based on snippets from the print or electronic media. It is not the race to the courthouse door, however, that impresses the members of this Court when it comes to deciding who should control and coordinate litigation on behalf of the shareholder class. In fact, this Court and the Delaware Supreme Court have repeatedly emphasized the importance of plaintiffs' counsel taking the time to use the 'tools at hand' to develop a record sufficient to craft pleadings with particularized factual allegations necessary to survive the inevitable motions to dismiss." (quoting *TCW Tech. Ltd. P'ship v. Intermedia Comm'cns, Inc.*, 2000 BL 9675, 2000 WL 1654504, at *3 (Del. Ch. Oct. 17, 2000) (alterations omitted))).

Chief Justice Strine went so far as to hold that a plaintiff was not entitled to make a books and records request after filing suit, and that shareholders must pursue a books and records request, if at all, prior to filing derivative litigation. *King v. VeriFone Holdings, Inc.*, 994 A.2d 354 (Del. Ch. 2010). This decision was subse-

quently reversed by the Delaware Supreme Court. *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140 (Del. 2011).

Notwithstanding the reversal in *VeriFone*, as Chancellor, now Chief Justice Strine has continued to emphasize the importance of plaintiffs conducting an adequate investigation prior to filing. See, e.g., *In re Diamond Foods, Inc. Derivative Litig.*, 2013 BL 56269, 2013 WL 755673, at *4 (Del. Ch. Feb. 28, 2013) ("Although this court does not encourage races to the courthouse, the reality is that the Dual Forum Plaintiffs have not demonstrated that their later filings reflected more diligent research and investigation than the prior filed claims made in the California State Action.").

Advocacy for Delaware

Chief Justice Strine is also well-known for promoting the centrality of Delaware as a source of substantive corporate law and forum for resolution of corporate disputes.³ Chief Justice Strine has asserted that "the principal advantages of being a Delaware entity are access to efficient dispute resolution services and the ability to rely upon guidance from [Delaware] corporate law and precedent." Editor, *Chancellor Strine on Current Business Issues and Delaware's Preeminent Courts*, The Metropolitan Corporate Counsel, at 14 (July/August 2013). He admits that such advantages do not come without expense, i.e., substantial annual franchise taxes, but argues that Delaware is "Bergdorf Goodman, not the Dollar Store." *Id.*

Chief Justice Strine has further argued "that where lawsuits are filed contemporaneously in parallel forums, the courts should give effect to the parties' expressed choice of the law that is to govern their relationship—in the corporate context, the law of the chosen state of incorporation—by applying a rebuttable presumption that the litigation should proceed in the courts of that state." Strine, Hamermesh & Jennejohn, at 4. He has been willing to engage in turf battles with judges of other states when plaintiffs file substantially similar actions in another state and Delaware. In *In re Topps Co. Shareholders Litigation*, 924 A.2d 951 (Del. Ch. 2007), then vice-Chancellor Strine refused to stay or dismiss the action in light of first-filed New York litigation, opining:

In a representative action such as this one, the desire of an individual plaintiff to litigate in a forum other than the state of incorporation has no legal or equitable force, particularly when the plaintiff is not even a resident of the state in which he seeks to litigate. The paramount interest is ensuring that the interests of the stockholders in the fair and consistent enforcement of their rights under the law governing the corporation are protected. In a situation like this one, when all the actions are filed essentially simultaneously on the heels of the announcement of a transaction, the mere fact that one plaintiff won the filing Olympics by beating his competitors to court by a day also has no logical bearing on where the case should proceed.

Id. at 953.

³ See, e.g., Strine, Leo E., Jr., Hamermesh, Lawrence A. & Jennejohn, Matthew C., *Putting Stockholders First, Not the First-Filed Complaint*, 69 Bus. Law. 1 (2013); Strine, Leo E., Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673 (2005).

Judge Herbert Cahn of the New York Supreme Court similarly refused to dismiss or stay the parallel New York litigation, *See In re Topps Co., Inc. Shareholder Litigation*, 859 N.Y.S.2d 907 (N.Y. Sup. Ct. 2007), however, then vice-Chancellor Strine ultimately issued the controlling decision. *See In re Topps Co. S'holders Litig.*, 926 A.2d 58 (Del. Ch. 2007). *See also NYSE Euronext S'holder Litig.*, No. 8136 (Del. Ch. 2013); *NYSE Euronext S'holder/ICE Litig.*, 965 N.Y.S.2d 278 (N.Y. Sup. Ct. 2013) (dismissed by stipulation of parties after then-Chancellor Strine issued the controlling decision in the Delaware Court of Chancery). Consistent with this approach, Chief Justice Strine, as Chancellor, recently upheld corporate by-law provisions requiring that shareholder suits proceed only in Delaware courts, paving the way for companies to confine such litigation to

Delaware courtrooms. *See Boilermakers Local 145 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

Conclusion

Although it is too soon to predict how the themes that run through Chief Justice Strine's prior decisions on the Court of Chancery will translate to his new role as Delaware's Chief Justice, there seems little doubt that Chief Justice Strine will offer careful and efficient analysis of the varied legal issues that reach the Delaware Supreme Court, as well as intelligent and impassioned decision-making that will continue to leave a mark on the development of Delaware law.