# Securities Regulation Daily Wrap Up, TOP STORY—Del. Ch.: Failed inversion plan doesn't amount to corporate wrongdoing, (Apr. 16, 2015)

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By Anne Sherry, J.D.

AbbVie, Inc., the Abbott Laboratories spinoff, does not need to turn over records to shareholders disappointed by an inversion deal that went bust. AbbVie had reached a deal with an overseas company to effect the inversion, but Treasury closed the tax loophole that would have made the deal worthwhile, leaving AbbVie on the hook for a $1.635 billion breakup fee. The court denied the shareholders inspection rights, finding it inappropriate to second-guess the board's judgment in approving the deal and breakup fee despite the risks (*Southeastern Pennsylvania Transportation Authority v. AbbVie, Inc.*, April 15, 2015, Glasscock, S.).

**Background.** The proposed inversion deal with Shire plc, a Jersey-based biopharmaceutical company, would have allowed AbbVie to reduce its effective tax rate to approximately 13 percent by changing its country of residence. In September 2014, Treasury and the IRS announced their intent to close the inversion loophole through regulations that would apply retroactively to any transaction completed after the announcement. AbbVie and Shire entered into a termination agreement, wherein AbbVie agreed to pay the $1.635 billion breakup fee.

**Inspection demand.** The two shareholder plaintiffs separately demanded inspection of documents to inspect possible breaches of fiduciary duties and other corporate wrongdoing. Investigation of potential corporate wrongdoing is a proper purpose for an inspection under Section 220 of the Delaware General Corporation Law, but the stockholder must state a reason behind the purpose. The court concluded from the plaintiffs' statements at oral argument that they were both seeking an investigation to aid in future derivative litigation. However, in light of a provision in AbbVie's certificate of incorporation exculpating directors from liability for breach of the duty of care, this purpose would be proper only to investigate whether AbbVie's directors breached their fiduciary duty of loyalty. In turn, that imposed on the plaintiffs only the light burden of developing a credible basis from which the court could infer actionable corporate wrongdoing.

Nevertheless, the record did not establish a credible basis to doubt that AbbVie's directors acted in good faith in connection with the approval and then the termination of the proposed inversion. While the breakup fee was indeed "enormous" in the abstract, as 3 percent of the value of the transaction itself it was not intrinsically unusual, much less an indication of bad faith. Furthermore, the hostile political environment for inversions at the time of negotiations was not news to the board; they were informed of the risk and had factored it into their decision to approve the deal. The simple fact that the risk accepted by the directors came to fruition does not create a credible basis to infer that they intended for the loophole to close or knew but were indifferent to its possibility.

As to the argument that the board committed corporate waste by paying the breakup fee, the Delaware Supreme Court's *Brehm v. Eisner* decision establishes that there should be no finding of waste where there was substantial consideration received by the corporation and a good-faith judgment that in the circumstances the transaction is worthwhile, even if the factfinder would conclude after the fact that the transaction was unreasonably risky. Here, the proposed inversion would have created value for AbbVie's stockholders were it not for the change in tax law, and the breakup fee induced a reluctant Shire to agree to the deal. It would be inappropriate for the court to judge in retrospect whether the breakup fee was appropriate given the risks or whether paying the fee was better than going ahead with the inversion without the tax benefit.

The case is No. 10374-VCG.

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Companies: Southeastern Pennsylvania Transportation Authority; AbbVie Inc.

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