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Strategic Perspectives

Delaware Corporate and Commercial Case Law Year in Review—2022

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This top ten list summarizes significant decisions of the Delaware Supreme Court and the Delaware Court of Chancery over the past calendar year. Our criteria for selection are that the decision either meaningfully changed Delaware law or provided clarity or guidance on issues relevant to corporate and commercial transactions or litigation in Delaware. We present the decisions in no particular order. The list does not include every significant decision, but offers practitioners an array of decisions on varied issues likely to affect business transactions or business litigation.

1. *Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, __ A.3d __, 2022 WL 17750348 (Del. Dec. 19, 2022).

With their favorable tax treatment and flexibility in limiting or eliminating fiduciary duties under Delaware law, master limited partnerships are a popular choice for public pipeline operators. Loews Corporation took advantage of this flexibility when taking Boardwalk Pipeline Partners, LP ("Boardwalk") public in the early 2000s. Boardwalk's partnership agreement disclaimed the general partner's fiduciary duties and included a contractual call right to purchase its publicly-held units under certain conditions. This opinion, which reversed a breach of contract finding and a nine-figure damages award of the Court of Chancery, reinforces longstanding canons of construction under Delaware law.

The underlying action arose when Boardwalk exercised its call right to repurchase its publicly-held units. The call right related to changes in federal energy regulations and had two conditions: (1) the general partner must receive "an Opinion of Counsel that the Partnership's status as an association . . . has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers"; and (2) the general partner had to determine that the opinion was acceptable. After the repurchase, former unitholders brought a slew of claims in the Court of Chancery ranging from breach of contract to unjust enrichment. After trial, the Vice Chancellor found that the Opinion of Counsel was results driven rather than *bona fide*, and that Boardwalk had not followed the partnership agreement by allowing the wrong party within the general partner to determine whether the Opinion of Counsel was acceptable. The Court reasoned that the partnership agreement was ambiguous as to who would make the acceptability determination between a sole member and a board, applied the doctrine of *contra proferentem*, and then interpreted the clause in a manner that was favorable to the former unit holder plaintiffs, requiring board approval. The partnership agreement also exculpated Boardwalk from liability absent bad faith, fraud, willful misconduct, or criminality, and provided a presumption of good faith if Boardwalk relied on an opinion of counsel. The Court refused to exculpate Boardwalk from damages after imputing scienter from various officer-level affiliates of Loews and Boardwalk. It further refused to apply the presumption of good faith reliance on an opinion of counsel, finding that the opinion given by outside counsel had not been rendered in good faith and the general partner was aware of that circumstance. The Court awarded damages of nearly $700 million.

Boardwalk appealed, arguing that the Court of Chancery: (1) erred when it found that counsel's opinion was not issued in good faith; (2) erred when it interpreted the acceptability determination; (3) should have exculpated the general partner and others from damages; and (4) exceeded its discretion when awarding damages. On review, the Supreme Court reversed, finding that the Court of Chancery should not have found the partnership agreement ambiguous. The Supreme Court reasoned that—when reading the partnership agreement with its other associated organizational documents—there was no ambiguity, and the sole member was the right party to make the acceptability determination. The Supreme Court also held that Boardwalk's reliance on a second legal opinion issued by another law firm that supported the acceptability of the first firm's opinion required the Court to enforce the exculpation provision's presumption of good faith. The Supreme Court observed that there were no allegations or findings that the second firm's opinion was not rendered in good faith. Notably, the Supreme Court's majority opinion did not reverse the Court of Chancery's factual determination that the first firm's opinion was not rendered in good faith. A concurrence, issued by Justice Valihura

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and Judge LeGrow (sitting by designation), argued that the Court of Chancery had applied the wrong standard in determining whether the opinion was issued in good faith. The net result of the Supreme Court's opinion is the liability decision, and its corresponding nine-figure award of damages, were reversed.

Key Takeaway: *Boardwalk Pipeline Partners* illustrates the application of well-established contract principles to the unique master limited partnership context. Left open for further debate is the appropriate standard to apply when determining whether a legal opinion was issued in good faith.

2. In re GGP, Inc. S'holder Litig., 282 A.3d 37 (Del. 2022).

Section 262 of the Delaware General Corporate Law provides stockholders of Delaware corporations with a statutory appraisal remedy to seek the "fair value" of their shares following a merger rather than accepting the merger consideration. The statute has spawned a great deal of litigation. Claims alleging disclosure violations in connection with a merger also are ubiquitous. This case puts both of those well-worn causes of action on display, with a twist.

GGP Inc. was a real estate company that owned and operated a large number of shopping malls in the United States. Brookfield Property Partners, L.P. made an offer to acquire GGP, which after some negotiation was ultimately approved by GGP's board and submitted to GGP's stockholders for approval. In connection with these negotiations, GGP's board rejected an "appraisal rights closing condition" that would have allowed Brookfield to terminate the transaction if a certain number of shares demanded appraisal. The negotiations also produced an unusual form of merger consideration. Following shareholder approval of the transaction, GGP would pay large a pre-closing dividend funded by Brookfield, and the day after the dividend's issuance, the transaction would close and trigger the shareholders' rights to per share merger consideration. The dividend payment was mandatory, but the per share merger consideration would only be paid once the stockholder surrendered her shares.

Defendants prevailed before the Court of Chancery in the ensuing litigation and plaintiffs advanced two theories on appeal. Plaintiffs argued first that defendants' design of the merger consideration unlawfully diluted or denied appraisal rights to the company's stockholders by excluding from the company's fair value calculation the pre-closing dividend, which represented the vast majority of the merger's consideration. Plaintiffs also argued the defendants' disclosures regarding the consideration were materially deficient and dissuaded stockholders from seeking appraisal. On the appraisal-related claim, the Delaware Supreme Court affirmed the Court of Chancery's findings regarding the merger consideration's design and the appraisal statute. Specifically, the Supreme Court held that a dividend conditioned on the merger's consummation should be treated as merger consideration for appraisal purposes, meaning the fair value appraisal calculation would determine the company's value before the pre-closing dividend. The Supreme Court also held that the stockholders' receipt of such a dividend does not forfeit their appraisal rights. The transaction structure therefore did not dilute or deny the stockholders' appraisal rights in the manner plaintiffs contended. But the Supreme Court did reverse the trial court's dismissal of the disclosure claim. The Supreme Court found that the deal's proxy was materially misleading in suggesting that the stockholders' appraisal rights would be limited to the company's fair value following the pre-closing dividend. This was incorrect as a matter of Delaware law since the Supreme Court had just ruled that an appraisal would have determined the company's value before the pre-closing dividend.

Key Takeaway: Delaware courts will examine with care the structure of merger transactions, including the timing of dividend payments, when evaluating consideration in an appraisal context. Should a board of directors employ a similar merger consideration structure, they should carefully consider the proxy disclosures regarding appraisal.

3. Cox Communications, Inc. v. T-Mobile US, Inc., 273 A.3d 752 (Del. 2022).

Delaware courts frequently are tasked with enforcing the contracts of sophisticated commercial entities. One form of agreement they have addressed are preliminary agreements or "agreements to agree." Delaware law disfavors this form of agreement and will not enforce all alleged preliminary agreements. But when the necessary conditions exist, Delaware law enforces preliminary agreements requiring parties to negotiate open terms in good faith. This case provides another example of such an agreement.

This decision arose out of a settlement agreement between Cox Communications, Inc. and T-Mobile US, Inc. as successor-in-interest to Sprint Corporation. The agreement contemplated that Cox would negotiate with T-Mobile and enter into an agreement prior to Cox partnering with a mobile network provider. When Cox sought to partner with a mobile network provider, it took bids from and negotiated with both Verizon and T-Mobile, before ultimately accepting Verizon's proposal, which allegedly contained better economic terms. Litigation ensued with both parties advancing competing interpretations of the settlement agreement's operative language.

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The Court of Chancery ruled in T-Mobile's favor and enjoined Cox from partnering with Verizon until it had fulfilled its obligations to T-Mobile.

The Supreme Court reversed, vacating the injunction and finding that the Court of Chancery had misinterpreted the provision in question. The Supreme Court first held that the provision left open material terms and, as a result, was not enforceable as a fully binding agreement. The provision, instead, contained major terms and an agreement to agree. It thus constituted a "Type II" preliminary agreement, which did not obligate the parties to make a deal but did require them to negotiate open terms in good faith. Next, based on a plain language reading of the contract, the Supreme Court disagreed with the trial court's finding that the provision included an additional prohibitory promise—a promise either to make a deal with T-Mobile or refrain from entering the relevant market. The Supreme Court therefore remanded to the Court of Chancery to make findings regarding whether the parties had fulfilled their obligations by negotiating in good faith.

Key Takeaway: This decision provides an important reminder to drafters of contracts under Delaware law. To be fully enforceable, a contract must reflect agreement on all material terms, while lesser agreements may give rise to an obligation to negotiate open terms in good faith.

4. *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784 (Del. Ch. 2022).

Special Purpose Acquisition Companies, or "SPACs", have become a popular investment vehicle for taking private companies public. A SPAC is managed and operated through a sponsor. The SPAC raises capital through an IPO, with that capital being reserved to merge with a private entity within a set time (usually two years), which then receives the SPAC's stock listing. Typically, the SPAC's sponsor receives "founder's shares" for a nominal investment of capital, which convert to common stock only if the merger is consummated within the requisite time. Should the SPAC fail to merge, its public stockholders receive back their capital investment plus interest, whereas the founder's shares may become worthless. It is with this backdrop of misaligned incentives that the Court of Chancery reviewed a recent SPAC transaction under the entire fairness standard and denied a motion to dismiss.

This particular transaction followed the form discussed above. The SPAC sponsor identified MultiPlan, Inc. as its merger target and proceeded to issue a proxy to solicit stockholder support. After the merger closed, the share price of the new company fell precipitously following a report detailing that MultiPlan's largest customer—accounting for 35% of MultiPlan's recent revenue—was creating an in-house platform alternative to MultiPlan's services. The proxy did not disclose this information and litigation ensued. Plaintiffs alleged that the company's directors, officers, and controlling stockholder (the former sponsor) had breached their fiduciary duties by issuing a false and misleading proxy that impaired the stockholders' informed exercise of their right to redeem their shares. Because SPAC stockholders have an opportunity to redeem their shares in lieu of participating in the merger, the plaintiffs argued that failing to disclose the customer information prevented the stockholders from making an informed decision when deciding whether to execute their redemption right.

The plaintiffs argued for entire fairness review on two grounds: first, the transaction was a conflicted controller transaction; and, second, a majority of the board was conflicted because the directors were self-interested or beholden to the controlling stockholder. The Court held that plaintiffs sufficiently pleaded both theories, finding that the directors and controlling stockholder were interested in the transaction by virtue of holding founder's shares—again, shares that would be worthless absent a merger during the two-year window. The Court further held that the directors were beholden to the controller because the sponsor had previously appointed those same directors to the boards of other SPACs the sponsor had controlled—providing benefits that would dissipate if the sponsor removed them. The Court also clarified that while it had relied on the misaligned incentives of the various stakeholders, that fact was not dispositive, as the public stockholders were aware of this misalignment from the start. What did guide the Court's decision was the allegedly faulty disclosures that potentially robbed the stockholders of their right to make a fully informed decision about redeeming their shares.

Key Takeaway: *MultiPlan* represents the Court of Chancery's first time applying Delaware fiduciary principles in the SPAC context and is an important read for practitioners, particularly those advising SPAC sponsors.

5. *In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022).

Transactions involving majority stockholders, or substantial and allegedly controlling stockholders, frequently face challenges in the Court of Chancery. Tesla's acquisition of SolarCity was no different. Elon Musk, Tesla's CEO and largest stockholder, also was the board chair and largest stockholder of SolarCity. When Tesla announced a SolarCity acquisition, numerous suits ensued. In the Court of Chancery, stockholder plaintiffs alleged that Tesla had overpaid for SolarCity, thereby bailing out and benefitting Musk at the expense of Tesla's unaffiliated stockholders.

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The Court of Chancery held a closely followed 10-day trial. In its post-trial opinion, the Court assumed for the sake of analysis that Musk was Tesla's controlling stockholder and applied the entire fairness standard, implicating that standard's two prongs: fair process and fair price. The Court ultimately found for Musk, the lone remaining defendant by the time of trial. It observed that while the process was "far from perfect," the Tesla board "meaningfully vetted" the deal. While Musk was "more involved in the process than a conflicted fiduciary should be," he did not "stand in the [board's] way" and the process was fair as a result. Moreover, and most critically, the Court found that Tesla had paid a fair price.

Regarding the process, the Court found that the board effectively replicated an arm's-length negotiation. The Court observed that, among other things, the board had negotiated a lower price, hired "independent" and "top-tier advisors," conditioned the transaction's approval on a majority of disinterested stockholders voting to approve, and insisted on a walkaway right in the event SolarCity breached a debt covenant. From these findings the Court concluded that Musk did not dominate the board and the process was fair. To determine fair price, the Court considered several valuation methodologies employed by the parties and determined that market price and other evidence, like the financial advisor's fairness opinion and potential synergies, supported a finding that the price Tesla paid was fair. With the transaction held to be entirely fair, the Court ruled in Musk's favor.

Key takeaway: Lawsuits resulting from control transactions can be costly and time consuming, even if the defendants ultimately are vindicated in court. This case reminds controlling stockholders that following the *MFW* framework, by instituting both an independent committee to negotiate the transaction (an element not present in this case) and conditioning approval on majority approval of the disinterested stockholders, can save them a great deal of time and expense in post-closing litigation.

6. *Arwood v. AW Site Servs., LLC,* 2022 WL 705841 (Del. Ch. Mar. 9, 2022).

Many disputes arise out of alleged breaches of representations and warranties in sophisticated commercial transactions. This case addresses so-called "sandbagging" by buyers of sellers—meaning situations where the buyer advances a post-closing breach of contract claim based on a contractual misrepresentation, when the buyer knew or should have known the representation was false pre-closing.

This case involved the sale of a waste disposal business. The business's principal had a promising business plan, but lacked financial sophistication. He did not know how to value his business, nor had he kept financial records. Thus, when a private equity firm approached him about buying his business, he gave the buyer unfettered access so that it could perform the value analysis necessary to develop an offer. The parties ultimately executed an asset purchase agreement and the sale closed. When the business did not perform as well as expected, litigation ensued with each side bringing several claims. After trial, the Court found all claims failed but one—the buyer's claim for breach of contract based on false contractual representations.

The seller had raised a "sandbagging" defense to this claim, but the Court of Chancery found it unavailing. "Sandbagging" in this context refers "to a buyer who is or becomes aware that a specific representation and warranty made by the seller is false, yet instead of alerting the seller to this fact, the buyer consummates the transaction, despite its knowledge of the breach, and seeks post-closing damages against the seller for the breach." The Court rejected the defense in this instance. Citing Delaware's strong contractarian propensities, the Court held that Delaware is a "pro-sandbagging" jurisdiction. The Court further held that even if Delaware were an "anti-sandbagging" jurisdiction, a sandbagging defense would apply only where a buyer *knows* a representation is false pre-closing, but seeks post-closing indemnification based on the misrepresentation anyway. Here, the buyer and its principals only were recklessly indifferent to the truthfulness of the representations, and therefore the defense could not operate.

Key Takeaway: *Arwood* clarifies the status of "sandbagging" under Delaware law. Transaction counsel should consider whether and how to address sandbagging in their agreements in light of its teachings.

7. *Coster v. UIP Companies, Inc.*, 2022 WL 1299127 (Del. Ch. May 2, 2022).

Delaware common law has developed several standards of review from which to determine compliance with fiduciary duties. Some, like the business judgment rule or entire fairness standard, the Court regularly deploys. Others, less so. This decision involved two of the more sparingly implicated standards—the *Schnell* and *Blasius* standards—and illuminates their contours.

The case involved a control dispute over UPI Companies following the death of one of its two equal co-owners. The plaintiff—the deceased co-owner's spouse—desired a buy-out of her shares at a price that would have been injurious to the company. To exert leverage to obtain a higher price, she blocked stockholder action, leaving the company in deadlock. Without meaningfully trying to resolve the deadlock, the plaintiff filed a petition to appoint a custodian over the company. While the custodian action was pending, the defendants sold shares

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to a long-serving company employee. The stock sale was made as part of a succession plan, and had the effect of breaking the deadlock between the co-owners and mooting the custodian action. The plaintiff then sued to invalidate the stock sale.

The Court of Chancery initially analyzed the stock sale under the entire fairness standard. After determining that the process and price were fair, the Court ruled in favor of the defendants and plaintiff appealed. The Supreme Court adopted the Court of Chancery's findings of fact, but held that it had erred by not analyzing the stock sale under the *Schnell* and *Blasius* standards. The Supreme Court then remanded the action so that the trial court could make findings consistent with those standards.

The *Schnell* standard requires a determination as to whether an action was taken for an "inequitable" purpose. The *Blasius* standard asks whether the "primary purpose" of an action was to thwart the vote of the stockholders and demands a "compelling justification" for any such action. On remand, the Court of Chancery found both standards satisfied and entered judgment in defendants' favor. The Court reasoned that the stock sale did not lack a good faith basis and was motivated to advance the company's interests because it sought to reward and retain an essential employee and mooted the custodian action, which in turn avoided the risk of default under certain key company contracts. The sale therefore satisfied *Schnell.* For similar reasons, the Court also found that the sale was not primarily motivated by thwarting the co-owner's vote. And, regardless, the sale had a compelling justification and an appropriately tailored response. The sale therefore satisfied *Blasius* as well.

Key Takeaway: *Coster* serves as a reminder of *Schnell* and *Blasius* and an illustration of when board action may satisfy their heightened standards.

8. *Shareholder Representative Services LLC v. DC Capital Partners Fund II, L.P.,* 2022 WL 439011 (Del. Ch. Feb. 14, 2022).

The Court of Chancery is a court of equity and one of limited subject matter jurisdiction. That means that the Court can only hear certain types of cases. Over time, Delaware's legislature has gradually expanded this jurisdiction to encompass disputes that traditionally would have been adjudicated in Delaware's court of law—the Superior Court. Section 111 of the Delaware General Corporate Law is one such legislative expansion—granting the Court of Chancery concurrent, non-exclusive jurisdiction in cases involving the interpretation of certain corporate instruments. This case examines whether the Court can decline jurisdiction over non-equitable claims brought pursuant to Section 111 and answers the question in the negative.

The case in question involved a dispute over indemnification holdbacks in connection with a stock purchase agreement. When the purchaser refused to release the funds, the seller sued in the Court of Chancery. The seller brought legal claims (as opposed to equitable) and contended for subject matter jurisdiction under Section 111 because the claims involved the interpretation of a stock purchase agreement. The buyer defendants moved to dismiss, arguing that the Court had discretion to decline jurisdiction over the claims because Section 111 only provides that non-equitable claims falling under its ambit "*may* be brought in the Court of Chancery." The Court rejected this argument—agreeing with the plaintiff's interpretation that the statute did not provide the Court with discretion. Rather, Section 111 provides that a litigant may bring a claim in the Court of Chancery pursuant to Section 111 that also could have been brought in the Superior Court under its traditional subject matter jurisdiction. That is, the statute provides litigants, not the Courts, with the choice of venues.

The Court based its interpretation on Section 111's plain language. It observed that plaintiffs bring actions and courts do not. The Court also looked to the Court of Chancery's interpretation of a similar statute relating to non-discretionary Court of Chancery subject matter jurisdiction over certain LLC disputes. Finally, the Court referred to the traditional canons of statutory construction and found that to adopt defendants' interpretation would violate the canon that statutes be read with a presumption against changes to common law. The common law affords great weight to plaintiff's choice of forum and reading Section 111 to give courts' discretion would deviate from that paradigm.

Key Takeaway: Litigators should take note that Section 111 provides another avenue for invoking the Court of Chancery's jurisdiction over non-equitable claims that fall within the statute's scope.

9. *Garfield v. Allen,* 277 A.3d 296 (Del. Ch. 2022).

Often a threshold question in derivative litigation is whether the board of a defendant corporation has wrongfully rejected a demand. Traditionally, the result of that inquiry determines who has control over a derivative claim—the stockholder plaintiff or the board of the defendant company. This case analyzes whether the wrongful rejection of a demand can, standing alone, support a claim for breach of fiduciary duty. Here, the Court of Chancery held that, under the right circumstances, the wrongful refusal of a demand can support a claim for breach.

This case concerned compensation issued to an officer of a Delaware corporation under an equity compensation plan. The awards provided that the company's CEO (who also sat on the board of directors) would receive a variable number of shares based upon the company's performance

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over a three-year period. The awards had a problem—if the company performed well, the number of shares awarded would exceed the maximum amount allowable under the company's equity compensation plan. An enterprising stockholder identified this issue and sent a demand to the board asking that it modify the award to conform with the company's stock incentive plan. The company's board rejected the demand, stating that the award did not violate the stock incentive plan based on its interpretation. After the board's refusal, the plaintiff brought this action alleging that the board had breached its duty by failing to fix the stock award in response to the plaintiff's demand. The defendants moved to dismiss the claim and the Court of Chancery denied the motion. The Court observed "that Delaware law recognizes that conscious inaction represents as much of a decision as conscious action." Here, both parties to the challenged transaction had a fiduciary duty to fix the violation, and the problem had a readily available fix—modify the award so it complied with the company's equity compensation plan. By failing to enact that "easy fix" in the face of a facial deficiency, the Court could infer bad faith conduct from the board's inaction.

The Court noted the legitimate policy concerns recognizing this type of claim would present, such as exposing a new director to litigation risk by presenting them with a problem they did not create and asserting they failed to fix it. However, the plaintiffs had "pled what seems like one of the strongest possible scenarios for such a claim" and, given the obvious issues with the stock award, the claim survived dismissal. The Court did counsel that "future decisions must consider carefully any attempts by plaintiffs to follow a similar path" and "approach with caution."

Key Takeaway: Under *Garfield*, boards should assume that, under certain factual circumstances, a demand refusal and inaction theoretically could support a claim for breach of fiduciary duty.

10. *In re VBR Agency, LLC*, 274 A.3d 1068 (Del. Ch. 2022).

The Court of Chancery frequently hears cases requesting a receiver appointment for allegedly defunct Delaware companies. Often these actions are one-sided, with the entity unrepresented and the Court forced to rely on "scant records" offered by the petitioner in making its determination. As this decision observes, the historical practice has had mixed results: "[I]n some of those situations, the custodian or receiver has taken action that caused the court to question whether the appointment should have been made, or the court has learned information which might have caused the court to decline to make the appointment in the first instance." Dissatisfied with this state of affairs, the Court in this case required fulsome disclosures before making its determination that good cause exists for appointing a receiver.

Here, the petitioner sought to be appointed receiver of a defunct Delaware LLC for purposes of addressing litigation targeting the company. The Court observed that the petition and its accompanying papers provided little detail to support meaningful consideration. For example, it did not identify any other members of the company, discuss its former governance structure in any detail, or disclose how the petitioner intended to address the litigation targeting the company. More importantly to the Court, the petition lacked information regarding the proposed receiver.

As a result, the Court denied the relief sought, but gave the petitioner the option to submit additional information and renew his request. The Court requested that the petitioner submit his curriculum vitae along with an affidavit containing three categories of information. The first category concerned whether the petitioner or his associates had run afoul of any regulatory agency for bad faith conduct. The second concerned whether the petitioner or his associates had been charged with a felony or a misdemeanor involving fraud or dishonesty. The third concerned whether the petitioner had any conflicts with other stakeholders of the company. The Court also ruled that the affidavit must include information regarding the petitioner's plans for the receivership. The Court stressed that it was not requesting this information because it suspected the petitioner of untoward behavior, but rather because "the disclosures represent an important prophylactic step to protect the integrity of Delaware's role as a chartering jurisdiction."

The Court also listed certain actions that should be taken in connection with future petitions for a receiver. The petitioner should seek to identify applicable adverse authority and provide it to the Court. The order for the appointment must provide for ongoing reporting regarding the receivership, and also appoint an agent in Delaware for service of process. The petitioner also must provide for service of process of the company and its stakeholders, which the Court explained could be accomplished by filing a motion for service by publication. Once all of these informational and procedural safeguards are in place, the Court could rule on the petition.

Key-Takeaway: *In re VBR Agency, LLC* gives attorneys a road map as to what information to include and what filings to make when pursuing a petition for the appointment of a receiver. Litigants will do well to heed the Vice Chancellor's advice and ensure that petitions contain these hallmarks going forward.

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