Harvard Law School Forum on Corporate Governance

Delaware Supreme Court Affirms AmerisourceBergen Ruling that Company Must Produce Documents

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Editor's note: Lori Marks-Esterman, Steve Wolosky, and Andrew Freedman are partners at Olshan Frome Wolosky LLP. This post is based on their Olshan memorandum, and is part of the Delaware law series; links to other posts in the series are available here.

Last month, the Delaware Supreme Court issued an important decision regarding stockholders' rights to review the books and records of Delaware corporations. In *AmerisourceBergen Corporation v. Lebanon County Employees' Retirement Fund and Teamsters Local 443 Health Services & Insurance Plan*, No. 60, 2020 (Del. 10, 2020), the Delaware Supreme Court, on an interlocutory appeal from the Delaware Court of Chancery, upheld the Court of Chancery's memorandum opinion holding that the plaintiffs had demonstrated a proper purpose for conducting an inspection of AmerisourceBergen's books and records under Section 220 of the Delaware General Corporation Law ("Section 220"), and directing the production of the company's books and records. The Delaware Supreme Court decision contained three critical rulings: (i) when a Section 220 inspection demand states a proper investigatory purpose, the Section 220 demand need not identify the particular course of action the stockholder will take if the books and records confirm the suspicion of wrongdoing; (ii) a stockholder seeking a Section 220 inspection is *not* required to establish that the wrongdoing being investigated is actionable; and (iii) the Court of Chancery's allowance of a post-trial deposition to identify what types of records exist was not reversible error.

As detailed below, the Supreme Court's ruling in *AmerisourceBergen* is consistent with the court's long history of encouraging stockholders who suspect wrongdoing to use the 'tools at hand' to investigate such concerns. The decision is a critical win for stockholders, as it substantially cuts off many of the aggressive tactics some companies have employed recently to resist disclosure to stockholders.

By way of background, AmerisourceBergen was one of the country's largest opioid distributors, and during the opioid crisis, had been the subject of numerous law-enforcement and government inquiries. In May 2019, "amidst [a] 'flood of government investigations and lawsuits relating to AmerisourceBergen's opioid practices,'" a group of stockholders served a Section 220 demand on the company, seeking inspection of books and records for four purposes: (i) investigating possible wrongdoing in connection with distribution of opioids; (ii) pursing remedies for such wrongdoing; (iii) evaluating the independence of the board; and (iv) evaluating possible litigation and/or other corrective measures.

After the company rejected the books and records demand in its entirety, the stockholders ("Plaintiffs") filed a Section 220 complaint. The Court of Chancery, following a trial on a paper record, found that Plaintiffs had demonstrated a proper purpose and were entitled to inspection of "formal" board materials. The court further permitted Plaintiffs to take a 30(b)(6) deposition to determine what other books and records exist, and granted Plaintiffs leave to potentially request additional documents in addition to formal board materials. In so ruling, the Court of Chancery rejected the company's assertion that Plaintiffs' sole purpose was to investigate a potential *Caremark*[1] claim, and further rejected the company's assertion that Plaintiffs were only permitted to investigate actionable wrongdoing.

The Supreme Court accepted interlocutory appeal of the decision, and addressed three critical questions: (i) was the Court of Chancery's rejection of a "purpose-plus-an-end" requirement—i.e., that Plaintiffs must identify the planned use of information to establish a proper purpose—proper?; (ii) was the Court of Chancery's refusal to limit inspection to only investigating actionable wrongdoing proper?; and (iii) did the Court of Chancery act improperly in granting leave to conduct a deposition of a company representative? For each of these three questions, the Supreme Court answered no, in each instance affirming the Court of Chancery's ruling:

Stockholders need not identify their planned use of information obtained

The Supreme Court expressly rejected the company's assertion that in order to assess whether a stockholder has a proper purpose for inspection, a stockholder who wants to investigate wrongdoing must state up front what it plans to do with the fruits of its inspection. Though the Supreme Court recognized that a mere suspicion of wrongdoing is insufficient, and that the stockholder must present a credible basis from which one can infer wrongdoing or mismanagement, the Supreme Court then stated clearly: "where a stockholder meets this low burden of proof from which possible wrongdoing or mismanagement can be inferred, a stockholder's purpose will be deemed proper under Delaware Law." A stockholder "is not required to specify the ends to which it might use the books and records."

Stockholders' right to inspect books and records for the purpose of investigating possible wrongdoing is not limited to actionable wrongdoing

The Supreme Court next addressed the company's assertion that a stockholder seeking to investigate wrongdoing must establish that the wrongdoing it seeks to investigate is *actionable* wrongdoing. The Supreme Court flatly rejected this argument as well. In reaching this conclusion, the court noted that Section 220 proceedings are intended to be summary; they are not the place to interpose would-be merit-based defenses that may be raised in future plenary actions.

The Supreme Court referenced numerous prior decisions that could be interpreted to suggest that an inquiry into the merits of the anticipated litigation was proper in considering the Section 220

[1] *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (imposing liability on directors for, amongst other things, failure to oversee the company's legal compliance).

demand and held that, to the extent such decisions supported a suggestion that a stockholder must demonstrate actionable misconduct, such decisions are overruled.

A 30(b)(6) deposition can be used to identify company documents

Finally, the Supreme Court also affirmed the *sua sponte* ruling of the Court of Chancery directing that the company provide a 30(b)(6) witness for a deposition to explore what types of books and records exist and where they are maintained. In reaching this conclusion, the Supreme Court noted that the company had refused to answer interrogatory questions posed to the company to identify this information, and that a deposition to discover this information was thus "a sound exercise of the trial court's discretion."

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The Supreme Court's clear rejection of the more burdensome standard advocated by the company for those seeking inspection of company books and records is significant, as it level-sets the bar for the standards governing entitlement to inspection, which the Supreme Court itself has characterized as "the lowest possible burden of proof." This should have a chilling effect on the aggressive defenses interposed in response to books and records demands, and ideally minimize the need for stockholders to resort to litigation to obtain books and records.