

HOW RECENT FIDUCIARY DUTY CASES AFFECT ADVICE TO DIRECTORS AND OFFICERS OF DELAWARE AND TEXAS CORPORATIONS

By

BYRON F. EGAN
Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, TX 75202-3797
began@jw.com



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Byron F. Egan
Biographical Information

Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202

Phone: (214) 953-5727
Email: began@jw.com
www.jw.com

Practice: Byron F. Egan is a partner of *Jackson Walker L.L.P.* in Dallas. He is engaged in a corporate, partnership, securities, mergers and acquisitions (“M&A”) and financing practice. Mr. Egan has extensive experience in business entity formation and governance matters, M&A and financing transactions in a wide variety of industries including energy, financial and technology. In addition to handling transactions, he advises boards of directors and their audit, compensation and special committees with respect to fiduciary duty and other corporate governance issues, the Sarbanes-Oxley Act, special investigation and other issues.

Involvement: Mr. Egan is Senior Vice Chair and Chair of Executive Council of the M&A Committee of the American Bar Association and served as Co-Chair of its Asset Acquisition Agreement Task Force, which wrote the *Model Asset Purchase Agreement with Commentary*. He is Chair of the Texas Business Law Foundation; is a former Chair of the Business Law Section of the State Bar of Texas and former Chair of that section’s Corporation Law Committee; and on behalf of these groups, has been instrumental in the drafting and enactment of many Texas business entity and other statutes. He is also a member of the American Law Institute.

Publications: Mr. Egan writes and speaks about the areas in which his law practice is focused, and is a frequent author and lecturer regarding M&A, governance of corporations, partnerships and limited liability companies, securities laws, and financing techniques. Mr. Egan has written or co-authored the following law journal articles: Corporate Governance: *Fiduciary Duties of Corporate Directors and Officers in Texas*, 43 Texas Journal of Business Law 45 (Spring 2009); *Responsibilities of Officers and Directors under Texas and Delaware Law*, XXVI Corporate Counsel Review 1 (May 2007); Entity Choice and Formation: *Joint Venture Formation*, 44 Texas Journal of Business Law 129 (2012); *Choice of Entity Decision Tree After Margin Tax and Texas Business Organizations Code*, 42 Texas Journal of Business Law 171 (Spring 2007); *Choice of Entity Alternatives*, 39 Texas Journal of Business Law 379 (Winter 2004); *Choice of State of Incorporation – Texas Versus Delaware: Is it Now Time to Rethink Traditional Notions*, 54 SMU Law Review 249 (Winter 2001); M & A: *Private Company Acquisitions: A Mock Negotiation*, 116 Penn St. L. Rev. 743 (2012); *Asset Acquisitions: Assuming and Avoiding Liabilities*, 116 Penn St. L. Rev. 913 (2012); *Asset Acquisitions: A Colloquy*, X U. Miami Business Law Review 145 (Winter/Spring 2002); Securities Law: *Major Themes of the Sarbanes-Oxley Act*, 42 Texas Journal of Business Law 339 (Winter 2008); *Communicating with Auditors After the Sarbanes-Oxley Act*, 41 Texas Journal of Business Law 131 (Fall 2005); *The Sarbanes-Oxley Act and Its Expanding Reach*, 40 Texas Journal of Business Law 305 (Winter 2005); *Congress Takes Action: The Sarbanes-Oxley Act*, XXII Corporate Counsel Review 1 (May 2003); and Legislation: *The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law*, 41 Texas Journal of Business Law 41 (Spring 2005).

Education: Mr. Egan received his B.A. and J.D. degrees from the University of Texas. After law school, he served as a law clerk for Judge Irving L. Goldberg on the United States Court of Appeals for the Fifth Circuit.

Honors: For over ten years, Mr. Egan has been listed in *The Best Lawyers in America* under Corporate, M&A or Securities Law. He won the Burton Award for Legal Achievement in 2005, 2006, 2008 and 2009. Mr. Egan has been recognized as one of the top corporate and M&A lawyers in Texas by a number of publications, including *Corporate Counsel Magazine*, *Texas Lawyer*, *Texas Monthly*, *The M&A Journal* (which profiled him in 2005) and *Who’s Who Legal*. In 2009, his paper entitled “*Director Duties: Process and Proof*” was awarded the Franklin Jones Outstanding CLE Article Award and an earlier version of that article was honored by the State Bar Corporate Counsel Section’s Award for the Most Requested Article in the Last Five Years.

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.	1
II. Corporate Fiduciary Duties Generally.	3
A. General Principles.	3
B. Applicable Law; Internal Affairs Doctrine.	5
C. Fiduciary Duties in Texas Cases.	7
1. Loyalty.	8
a. Good Faith.	8
b. Self-Dealing Transactions.	8
c. Oversight.	9
d. Business Opportunities.	10
e. Candor.	11
2. Care.	11
a. Business Judgment Rule; Gross Negligence.	11
b. Reliance on Reports.	13
c. Charter Limitations on Director Liability.	13
3. Other (obedience).	13
D. Fiduciary Duties in Delaware Cases.	14
1. Loyalty.	14
a. Conflicts of Interest.	14
b. Good Faith.	16
c. Waste.	18
d. Oversight/Caremark.	18
e. Business Opportunities.	30
f. Confidentiality.	32
g. Candor/Disclosure in Proxy Statements and Prospectuses.	35
h. Candor/Disclosure in Business Combination Disclosures.	38
i. Candor/Disclosure in Notices and Other Disclosures.	45
j. Special Facts Doctrine/Private Company Stock Purchases.	49
2. Care.	53
a. Business Judgment Rule; Informed Action; Gross Negligence.	53
b. Business Judgment Rule Not Applicable When Board Conflicted.	54
c. Inaction.	56
d. Reliance on Reports and Records.	56
e. Limitation on Director Liability.	57
3. Aiding and Abetting.	57
E. Officer Fiduciary Duties.	61
F. Preferred Stock Rights and Duties.	63
1. Nature of Preferred Stock.	63
2. Generally No Special Fiduciary Duty to Preferred Stock.	64
3. Conflicting Interests of Common and Preferred in M&A Transaction.	64
4. Voting Rights of Preferred Stock.	75

G.	Derivative Actions.	79
1.	Delaware and Texas Authorize Derivative Actions.....	79
2.	Delaware Derivative Actions.....	84
a.	Demand; Demand Futility.....	84
b.	Delaware Double Derivative Actions.	88
3.	Texas Derivative Actions.....	93
4.	Federal Rules of Civil Procedure.....	95
5.	Effect of Merger on Derivative Claims.	96
6.	Special Litigation Committees.....	99
H.	Effect of Sarbanes-Oxley Act of 2002 on Common Law Fiduciary Duties.	100
1.	Overview.....	100
2.	Shareholder Causes of Action.....	100
3.	Director Independence.....	101
a.	Power to Independent Directors.....	101
b.	Audit Committee Member Independence.....	106
c.	Nominating Committee Member Independence.....	110
d.	Compensation Committee Member Independence.....	110
e.	State Law.	111
4.	Compensation.	116
a.	Prohibition on Loans to Directors or Officers.	116
b.	Stock Exchange Requirements.	119
c.	Fiduciary Duties.....	119
5.	Related Party Transactions.	119
a.	Stock Exchanges.....	119
b.	Interested Director Transactions—TBOC § 21.418 and DGCL § 144.....	120
I.	Contractual Limitation of Corporate Fiduciary Duties.....	120
1.	Limitation of Director Liability—TBOC § 7.001 and DGCL § 102(b)(7).	121
2.	Renunciation of Corporate Opportunities.....	122
3.	Interested Director Transactions.....	123
III.	Duties When Company on Penumbra of Insolvency.	126
A.	Insolvency Can Change Relationships.....	126
B.	When is a Corporation Insolvent or in the Vicinity of Insolvency?	129
C.	Director Liabilities to Creditors.....	131
D.	Business Judgment Rule—DGCL § 102(b)(7) During Insolvency.	141
E.	Deepening Insolvency.....	144
F.	Conflicts of Interest.....	148
G.	Fraudulent Transfers.	148
IV.	Executive Compensation Process.....	148
A.	Fiduciary Duties.....	148
B.	Specific Cases.	149
1.	Walt Disney.	149
a.	Facts.	150
b.	May 28, 2003 Chancery Court Opinion.....	150

	c.	September 10, 2004 Chancery Court Opinion (Ovitz' Fiduciary Duties Regarding His Employment Agreement).....	150
	d.	August 9, 2005 Chancery Court Post Trial Opinion.....	151
	e.	June 8, 2006 Supreme Court Opinion.....	153
	2.	Integrated Health.....	157
	3.	Sample v. Morgan.....	160
	4.	Ryan v. Gifford.....	164
	5.	In re Tyson Foods, Inc. Consolidated Shareholder Litigation.....	167
	6.	Desimone v. Barrows.....	171
	7.	Teachers' Retirement System of Louisiana v. Aidinoff.....	173
	8.	Valeant Pharmaceuticals v. Jerney.....	174
	9.	In re Citigroup Inc. Shareholder Derivative Litigation.....	176
	10.	In re The Goldman Sachs Group, Inc. Shareholder Litigation.....	177
	11.	Freedman v. Adams.....	178
	C.	Non-Profit Corporations.....	178
V.		Standards of Review in M&A Transactions.....	181
	A.	Texas Standard of Review.....	181
	B.	Delaware Standard of Review.....	182
	1.	Business Judgment Rule.....	183
	2.	Enhanced Scrutiny.....	184
	a.	Defensive Measures.....	184
	b.	Sale of Control.....	185
	3.	Entire Fairness.....	189
	C.	Action Without Bright Lines.....	198
VI.		M&A Transaction Process.....	199
	A.	Statutory Framework: Board and Shareholder Action.....	199
	1.	Texas Law.....	199
	2.	Delaware.....	200
	B.	Management's Immediate Response.....	201
	C.	The Board's Consideration.....	202
	1.	Matters Considered.....	202
	2.	Being Adequately Informed.....	203
	a.	Investment Banking Advice.....	203
	b.	Value of Independent Directors, Special Committees.....	205
	3.	Significant Process Cases.....	212
	a.	In re Tele-Communications, Inc. Shareholders Litigation.....	212
	b.	Gesoff v. IIC Indus. Inc.....	215
	c.	Oliver v. Boston University.....	216
	d.	In re SS&C Technologies, Inc. Shareholders Litigation.....	217
	e.	In re Netsmart Technologies, Inc. Shareholders Litigation.....	218
	f.	In re Topps Company Shareholders Litigation.....	226
	g.	In re Lear Corporation Shareholder Litigation.....	232
	h.	In re Loral Space and Communications Inc. Consolidated Litigation.....	237
	i.	McPadden v. Sidhu.....	240

	j.	In Re Southern Peru Copper Corporation Shareholder Derivative Litigation.....	241
	k.	Lyondell and Progeny.....	245
	l.	C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employee's Retirement Trust.	258
	m.	In re Family Dollar Stores, Inc. Stockholder Litigation	261
	n.	In re Novell, Inc. Shareholder Litigation.	262
D.		Value of Thorough Deliberation.....	265
E.		The Decision to Remain Independent.....	267
	1.	Judicial Respect for Independence.....	267
	2.	Defensive Measures.....	269
F.		The Pursuit of a Sale.....	270
	1.	Value to Stockholders.....	270
	2.	Ascertaining Value.....	271
	3.	Confidentiality and Standstill Agreements.....	277
	4.	Exclusivity Agreement.....	282
	5.	Process Changes.....	283
	6.	Investment Banker Conflicts.....	289
	7.	Disparate Treatment of Stockholders.....	297
	8.	Protecting the Merger.....	302
	a.	No-Shops.....	303
	b.	Lock-ups	305
	c.	Break-Up Fees.....	306
	9.	Specific Cases Where No-Shops, Lock-ups, and Break-Up Fees Have Been Invalidated.....	307
	10.	Specific Cases Where No-Shops, Lock-ups and Break-Up Fees Have Been Upheld.....	309
	11.	Post Signing Market Check/"Go-Shop".	312
G.		Dealing with a Competing Acquiror.....	313
	1.	Fiduciary Outs.....	314
	a.	Omnicare, Inc. v. NCS Healthcare, Inc.	315
	b.	Orman v. Cullman.....	318
	c.	Optima International of Miami, Inc. v. WCI Steel, Inc.	320
	d.	In re OPENLANE, Inc. Shareholders Litigation.	321
	e.	Energy Partners, Ltd. v. Stone Energy Corp.....	322
	f.	Johnson & Johnson v. Guidant Corp.	324
	g.	NACCO Industries, Inc. v. Applicia Incorporated.....	325
	2.	Level Playing Field.....	326
	3.	Match Rights.....	327
	4.	Top-Up Options.....	328
	5.	Best Value.....	330
H.		Postponement of Stockholder Meeting to Vote on Merger.	331
VII.		Responses to Hostile Takeover Attempts.....	332
	A.	Certain Defenses.....	332
	B.	Rights Plans.....	332
	C.	Fiduciary Duties Applicable to Rights Plans.....	338

	D.	Change in Control Provisions in Loan Documents.....	349
	E.	Business Combination Statutes.....	353
	1.	DGCL § 203.....	353
	2.	Texas Business Combination Statutes.	354
VIII.		Going Private and Other Transactions	355
	A.	In re Pure Resources, Incorporated, Shareholders Litigation	355
	B.	In re Emerging Communications, Inc. Shareholders Litigation	359
	C.	In re PNB Holding Co. Shareholders Litigation.....	361
	D.	Landry’s Restaurants, Inc.	363
	E.	Activision Blizzard, Inc. v. Hayes	365
IX.		M&A During the Credit Crunch.....	366
	A.	General.....	366
	B.	Pre-Crunch Sensitivity to Target Financial Stress.	367
	C.	Bear Stearns.	367
	D.	Merrill Lynch.....	373
	E.	Wachovia.	374
	F.	National City.....	379
	G.	Observations from Merrill Lynch, Bear Stearns, Wachovia and National City.....	382
X.		Governing Documents.....	383
	A.	Charter.....	383
	1.	Primacy of Charter.	383
	2.	Adoption and Amendment of the Charter.....	383
	3.	Contents.	385
	4.	Reverse Splits.....	388
	B.	Bylaws.....	389
	1.	Power to Adopt or Amend Bylaws.	389
	2.	Effect of Bylaw Amendments on Director Terms and Removal of Directors.....	392
	C.	Forum Selection Provisions.	396
	D.	Advance Notice and Director Qualification Provisions.....	401
	E.	Fee-shifting Bylaws	406
XI.		Other Director Considerations.....	408
	A.	Enforceability of Contracts Violative of Fiduciary Duties	408
	B.	Director Consideration of Long-Term Interests.	410
	C.	Liability for Unlawful Distributions.	410
	D.	Reliance on Reports and Opinions.....	412
	E.	Inspection of Records by Directors.....	412
	F.	Inspection of Records by Shareholders.....	412
	G.	Director and Officer Liability for Corporate Debts Incurred If Charter Forfeited.....	416
	H.	Vote Buying.	417
	I.	Right to Resign.	419
	J.	Majority Vote Resignation Policies.	421
	K.	Ratification.....	422
XII.		Asset Transactions.....	424

A.	Shareholder Approval.....	424
1.	DGCL.....	424
2.	Texas Corporate Statutes.....	426
3.	Model Business Corporation Act.....	428
B.	De Facto Merger.....	428
XIII.	Dissent and Appraisal Rights.....	429
A.	Delaware Law.....	430
1.	When DGCL Appraisal Rights Are Triggered.....	430
2.	Who Is Entitled to DGCL Appraisal Rights.....	433
3.	Procedural Aspects of DGCL Appraisal.....	434
4.	Valuation under DGCL.....	435
B.	Texas Corporate Statutes.....	437
1.	When Texas Statutory Appraisal Rights Are Triggered.....	437
2.	Who Is Entitled to Texas Statutory Appraisal Rights.....	437
3.	Procedural Aspects of Texas Statutory Appraisal.....	438
4.	Valuation under Texas Corporate Statutes.....	440
C.	Model Business Corporation Act.....	441
XIV.	Oppression of Minority Shareholders.....	442
A.	Introduction.....	442
B.	Texas.....	443
1.	Ritchie v. Rupe.....	443
2.	Texas Statutes.....	445
3.	Shareholder Oppression Prior to Ritchie v. Rupe.....	448
4.	Relationship to Fiduciary Duties.....	451
C.	Delaware.....	454
1.	Oppression Generally Not Separate Cause of Action in Delaware.....	454
2.	Relationship to Fiduciary Duties.....	456
XV.	Alternative Entity Fiduciary Duties.....	458
A.	General Partnership.....	458
B.	Limited Partnership.....	461
C.	Limited Liability Company.....	473
XVI.	Conclusion.....	492

Appendix A – Summary of the Sarbanes-Oxley Act of 2002

Appendix B – Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Appendix C – Texas Business Organizations Code Table of Contents As of September 1, 2013

Appendix D – Business Leaders Must Address Cybersecurity Risk

Appendix E – Options Backdating Issues

Appendix F – Egan on Entities

HOW RECENT FIDUCIARY DUTY CASES AFFECT ADVICE TO DIRECTORS AND OFFICERS OF DELAWARE AND TEXAS CORPORATIONS

By
Byron F. Egan, Dallas, TX

TABLE OF CASES

<i>A. Copeland Enterprises, Inc. v. Guste</i> , 706 F. Supp. 1283 (W.D. Tex. 1989).....	5, 8, 79, 181, 182, 341, 342, 346
<i>AB Value Partners, LP v. Kreisler Manufacturing Corp.</i> , C.A. No. 10434-VCP (Del. Ch. Dec. 16, 2014).....	404
<i>In re Abbott Laboratories Derivative Shareholders Litigation</i> , 325 F.3d 795 (7th Cir. 2003)	19, 20
<i>Abraham v. Emerson Radio Corp.</i> , 901 A.2d 751 (Del. Ch. 2006).....	297, 456
<i>ABRY Partners V, L.P. v. F&W Acquisition LLC</i> , 891 A.2d 1032 (Del. Ch. 2006).....	277
<i>Accipiter Life Scis. Fund, L.P. v. Heifer</i> , 905 A.2d 115, 127 (Del. Ch. 2006)	403
<i>ACE Ltd. v. Capital Re Corporation</i> , 747 A.2d 95 (Del. Ch. 1999).....	303, 304, 314, 319, 408
<i>Activision Blizzard, Inc. v. Hayes</i> , No. 497, 2013, 2013 Del. Ch. LEXIS 580 (Del. Nov. 15, 2013)	365
<i>In re Affiliated Computer Services, Inc. Shareholders Litigation</i> , C.A. No. 2821-VCL, 2009 WL 296078 (Del. Ch. Feb. 6, 2009)	87, 420
<i>Agranoff v. Miller</i> , C.A. No. 16795, 1999 WL 219650 (Del. Ch. Apr. 12, 1999), aff'd as modified, 737 A.2d 530 (Del. 1999).....	32
<i>Air Products and Chemicals, Inc. v. Airgas, Inc., et al</i> , 16 A.3d 48 (Del. Ch. 2011)	343, 344
<i>Airgas, Inc. v. Air Products and Chemicals, Inc.</i> , 8 A.3d 1182 (Del. Nov. 23, 2010)	343, 395
<i>Allen v. Devon Energy Holdings, L.L.C. F/K/A Chief Holdings, L.L.C. and Trevor Rees- Jones</i> , 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2012, pet. granted)	451, 474
<i>Allen v. Encore Energy Partners, L.P.</i> , 72 A.3d 93 (Del. July 22, 2013).....	468, 490
<i>In re Alloy, Inc. Shareholder Litigation</i> , C.A. No. 5626-VCP, 2011 Del. Ch. LEXIS 159 (Del. Ch. Oct. 13, 2011).....	57, 115
<i>Amanda Acquisition Corp. v. Universal Foods Corp.</i> , 877 F.2d 496, (7th Cir. 1989), cert. denied, 493 U.S. 955 (1989)	332
<i>American International Group, Inc. Consolidated Derivative Litigation</i> ; <i>AIG, Inc. v. Greenberg, et al</i> , 965 A.2d 763 (Del. Ch. 2009).....	24, 28
<i>Americas Mining Corp. v. Theriault</i> , 51 A.3d 1213 (Del 2012).....	241, 244
<i>In re Ancestry.com Inc. Shareholder Litigation</i> , C.A. No. 7988-CS 2012 Del. Ch. LEXIS 294 (Del. Ch. Dec. 17, 2012)	280, 281
<i>Angelo, Gordon & Co., L.P. v. Allied Riser Communications Corporation</i> , 805 A.2d 221 (Del. Ch. 2002).....	131, 141, 142
<i>In re Appraisal of Ancestry.com, Inc.</i> , C.A. No. 8173-VCG (Del. Ch. Jan. 30, 2015).....	437
<i>In re Appraisal of Shell Oil Co.</i> , C.A. No. 8080, 1992 WL 321250 (Del. Ch. Oct. 30, 1992).....	437
<i>In re Aquila, Inc.</i> , 805 A.2d 184 (Del. Ch. 2002)	190, 357
<i>Argueta v. Banco Mexicano, S.A.</i> , 87 F.3d 320 (9th Cir. 1996)	398

<i>Arkansas Teacher Retirement System v. Countrywide Financial Corporation</i> , 75 A.3d 888 (Del. 2013)	96, 149
<i>Arnold v. Nat’l County Mut. Fire Ins. Co.</i> , 725 S.W.2d 165 (Tex.1987)	475, 477
<i>Arnold v. Society for Savings Bancorp, Inc.</i> , 650 A.2d 1270 (Del. 1994)	5, 187
<i>Aronson v. Lewis</i> , 473 A.2d 805 (Del. 1984)	25, 30, 79, 85, 87, 91, 113, 116, 135, 183, 184, 189, 208
<i>In re Art Technology Group, Inc. Shareholders Litigation</i> , C.A. No. 5955-VCL, 2010 Del. Ch. LEXIS 257 (Del. Ch. Dec. 21, 2010)	38
<i>ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC</i> , 50 A.3d 434 (Del. Ch. July 9, 2012), <i>aff’d</i> in part, <i>rev’d</i> in part on other grounds by <i>Scion Breckenridge Managing Member LLC v. ASB Allegiance Real Estate</i> , 68 A.3d 665 (Del. May 9, 2013)	471
<i>Askanease v. Fatjo</i> , No. H-91-3140, 1993 WL 208440 (S.D. Tex. April 22, 1993), <i>aff’d</i> 130 F.3d 657 (5th Cir. 1997)	128, 129, 141
<i>In re Atheros Communications Shareholder Litigation</i> , No. 6124-VCN, 2011 WL 864928 (Del. Ch. Mar. 4, 2011)	292
<i>In re Atlas Energy Resources LLC</i> , No. 4589-VCN, 2010 WL 4273122 (Del Ch. Oct. 28, 2010)	478
<i>In re Atmel Corp. S’holders Litig.</i> , C.A. No. 4161-CC (Del. Ch. May 19, 2009)	347, 348
<i>ATP Tour, Inc. v. Deutscher Tennis Bund</i> , 91 A.3d 554 (Del. May 8, 2014)	406
<i>Auriga Capital Corp. v. Gatz Properties, LLC</i> , 40 A.3d 839 (Del. Ch. 2012), <i>aff’d</i> , 59 A.3d 1206 (Del. 2012)	479, 482, 490
<i>Balias v. Balias, Inc.</i> , 748 S.W.2d 253 (Tex. App.—Houston [14th Dist.] 1988, writ denied);	447
<i>Barkan v. Amsted Indus., Inc.</i> , 567 A.2d 1279 (Del. 1989)	198, 203, 248, 252, 271, 272, 273, 326, 327, 330
<i>Baron v. Allied Artists Pictures Corp.</i> , 337 A.2d 653 (Del. Ch. 1975)	64
<i>Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC</i> , No. 3658-VCS, 2009 WL 1124451 (Del. Ch. April 20, 2009)	489
<i>Beam v. Martha Stewart</i> , 845 A.2d 1040 (Del. 2004)	116
<i>In re Bear Stearns Litigation</i> , 870 N.Y.S.2d 709 (N.Y. Sup. 2008)	366, 367, 371, 382
<i>In re The Bear Stearns Cos. S’holder Litg.</i> , C.A. No. 3643-VCP, 2008 WL 959992 (Del. Ch. Apr. 9, 2008)	369
<i>Beaumont v. American Can Co.</i> , 538 N.Y.S.2d 136 (N.Y. Sup. Ct. 1991)	299
<i>Benchmark Capital Partners IV, L.P. v. Juniper Fin. Corp.</i> , 822 A.2d 396 (Del. 2003)	77
<i>Benchmark Capital Partners IV, L.P. v. Vague</i> , No. 19719, 2002 Del. Ch. LEXIS 90 (Del. Ch. July 15, 2002), <i>aff’d sub nom. Benchmark Capital Partners IV, L.P. v.</i> <i>Juniper Fin. Corp.</i> , 822 A.2d 396 (Del. 2003)	77
<i>In re Bennett</i> , 989 F.2d 779 (5th Cir. 1993), <i>opinion amended on rehearing</i> , 1993 WL 268299 (5th Cir. July 15, 1993)	461
<i>Benson v. Braun</i> , 155 N.Y.S.2d 622	420
<i>Berg v. Ellison</i> , C.A. No. 2949-VCS (Del. Ch. June 12, 2007)	312, 327
<i>Berger v. Pubco Corp.</i> , 976 A.2d 132 (Del. 2009)	45
<i>Bigelow/Diversified Secondary P’ship Fund 1990 v. Damson/Birtcher Partners</i> , C.A. No. 16630-NC, 2001 WL 1641239 (Del. Ch. Dec. 4, 2001)	461, 472

<i>Binks v. DSL.net, Inc.</i> , C.A. No. 2823-VCN, 2010 Del. Ch. LEXIS 98 (Del. Ch. April 29, 2010)	80, 96
<i>In re BioClinica, Inc. Shareholder Litigation</i> , C.A. No. 8272-VCG, 2013 WL 5631233 (Del Ch. Oct. 16, 2013)	282
<i>Biondi v. Scrushy</i> , 820 A.2d 1148 (Del. Ch. 2003)	115
<i>Black v. Hollinger Int’l Inc.</i> , 872 A.2d 559 (Del. 2005).....	32, 408
<i>Blackmon-Dunda v. Mary Kay, Inc.</i> , No. 05-08-00192-CV, 2009 WL 866214 (Tex. App.—Dallas April 1, 2009, pet. denied).....	475, 477
<i>Blasius Industries, Inc. v. Atlas Corp.</i> , 564 A.2d 651 (Del. Ch. 1988)	17, 331, 371, 421
<i>Blaustein v. Lord Baltimore Capital Corp.</i> , C.A. No. 272, 2013, 2014 Del. LEXIS 30 (Del. Jan. 21, 2014).....	456
<i>BNS Inc. v. Koppers Co.</i> , 683 F. Supp. 458 (D. Del. 1988).....	349, 342
<i>Boilermakers Local 154 Retirement Fund v. Chevron Corporation, et al.</i> , 73 A.3d 934 (Del. Ch. 2013).....	398
<i>Boyer v. Wilmington Materials, Inc.</i> , C.A. No. 12549, 1997 Del. Ch. LEXIS 97 (Del. Ch. June 27, 1997)	207
<i>Bowers Steel, Inc. v. DeBrooke</i> , 557 S.W.2d 369, 371 (Tex. Civ. App.—San Antonio 1977).....	422
<i>Brandin v. Deason</i> , 941 A.2d 1020 (Del. Ch. 2007)	164
<i>Brazen v. Bell Atlantic Corp.</i> , 695 A.2d 43 (Del. 1997).....	183, 306
<i>Brazosport Bank of Tex. v. Oak Park Townhouses</i> , 837 S.W.2d 652 (Tex. App.—Houston [14th Dist.] 1992, writ granted), rev’d on other grounds, 851 S.W.2d 189 (Tex. 1993).....	459, 462
<i>Brehm v. Eisner</i> , 746 A.2d 244 (Del. 2000)	116, 135, 205, 412
<i>In re Brick</i> , 351 S.W.3d 601 (Tex. App.—Dallas 2011, no pet.)	87
<i>Bridgeport Holdings Inc. Liquidating Trust v. Boyer</i> , 388 B.R. 548 (U.S. Bkrpcy. D.Del., May 30, 2008)	137
<i>Brinckerhoff v. Enbridge Energy Co.</i> , 67 A.3d 369 (Del. May 28, 2013).....	468, 470
<i>Brophy v. Cities Service Co.</i> , 70 A.2d 5 (Del. Ch. 1949)	15, 97, 412
<i>Broz v. Cellular Info. Systems, Inc.</i> , 673 A.2d 148 (Del. 1996)	31
<i>Bulacher v. Enowa</i> , No. 3:10-CV-156-M, 2010 WL 1135958 (N.D. Tex. March 23, 2010)	442, 449
<i>Burk Royalty Co. v. Walls</i> , 616 S.W.2d 911 (Tex. 1981)	12
<i>Burks v. Lasker</i> , 441 U.S. 471 (1979).....	3
<i>Burton v. Cravey</i> , 759 S.W.2d 160, 162 (Tex. App. –Houston [1st Dist.] 1988, no writ, disapproved on other grounds.....	413
<i>C&J Energy Services, Inc. v. City of Miami General Employees’ and Sanitation Employees’ Retirement Trust</i> , C.A. No. 655/657, 2014 (Del. Dec. 19, 2014)	188, 258
<i>CA, Inc. v. AFSCME Employees Pension Plan</i> , 953 A.2d 227 (Del. 2008)	3, 390
<i>In re Caremark International, Inc. Derivative Litigation</i> , 698 A.2d 959 (Del. Ch. 1996).....	18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 114, 178, 185, 235, 236, 364, 420
<i>Cargill, Inc. v. JWH Special Circumstance LLC</i> , 959 A.2d 1096 (Del. Ch. 2008).....	472
<i>Cargo Partner AG v. Albatrans, Inc.</i> , 352 F.3d 41 (2d Cir. 2003).....	429
<i>Carl M. Loeb, Rhoades & Co. v. Hilton Hotels Corp.</i> , 222 A.2d 789, 793 (Del. 1966)	434
<i>Carmody v. Toll Brothers, Inc.</i> , 723 A.2d 1180 (Del. Ch. 1998)	346, 352
<i>Carrieri v. Jobs.com</i> , 393 F.3d 508 (5th Cir. 2004)	128

<i>Carson v. Lynch Multimedia Corp.</i> , 123 F. Supp. 2d 1254 (D. Kan. 2000).....	489
<i>Cates v. Sparkman</i> , 11 S.W. 846 (Tex. 1889).....	12, 448
<i>Cede & Co. v. Technicolor, Inc.</i> , 634 A.2d 345 (Del. 1993).....	14, 16, 54, 186, 202, 204, 205, 266, 270, 271
<i>In re Celera Corp. Shareholder Litigation</i> , C.A. No. 6304-VCP, 2012 Del. Ch. LEXIS 66 (Del. Ch. Mar. 23 2012) (Transcript), <i>aff'd in part rev'd in part on other grounds</i> , 59 A.3d 418 (Del. Dec. 27, 2012).....	280
<i>Chaffin v. GNI Group, Inc.</i> , C.A. No. 16211, 1999 Del. Ch. LEXIS 182 (Del. Ch. Sept. 3, 1999)	116
<i>In re CheckFree Corp.</i> , C.A. No. 3193-CC, 2007 WL 3262188 (Del. Ch. Nov. 1, 2007).....	36, 88, 221
<i>Chien v. Chen</i> , 759 S.W.2d 484 (Tex. App.—Austin 1988, no writ).....	9
<i>Cirrus Holding v. Cirrus Ind.</i> , 794 A.2d 1191 (Del Ch. 2001)	271, 304
<i>Citadel Holding Corp. v. Roven</i> , 603 A.2d 818 (Del. 1992)	63
<i>In re Citigroup Inc. Shareholder Derivative Litigation</i> , 964 A.2d 106 (Del. Ch. 2009).....	18, 25, 27, 28, 29, 30, 57, 84, 87, 176
<i>Citron v. E.I. Du Pont de Nemours & Co.</i> , 584 A.2d 490 (Del. Ch. 1990)	206, 209
<i>Citron v. Fairchild Camera & Instrument Corp.</i> , 569 A.2d 53 (Del. 1989)	116, 197, 201, 202, 204, 330, 364
<i>City Capital Assocs. Ltd. P'ship v. Interco. Inc.</i> , 551 A.2d 787 (Del. Ch. 1988).....	33, 340
<i>City of Midland v. O'Bryant</i> , 18 S.W.3d 209 (Tex. 2000)	475, 477
<i>City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.</i> , 1 A.3d 281 (Del. 2010)	414, 421
<i>In re CITX Corp. Inc.</i> , 448 F.3d 672 (3d Cir. 2006).....	144
<i>Clements v. Rogers</i> , 790 A.2d 1222 (Del. Ch. 2001).....	209, 211
<i>C.M. Asfahl Agency v. Tensor, Inc.</i> , 135 S.W.3d 768 (Tex. App.—Houston [1st Dist.] 2004, no pet.)	429
<i>CML V, LLC v. Bax</i> , 6 A.3d 238 (Del. Ch. 2010).....	131
<i>In re CNET Networks Inc. Derivative Litig.</i> , 483 F. Supp. 2d 947 (N.D. Cal. 2007).....	173
<i>In Re CNX Gas Corp. S'holders Litig.</i> , C.A. No. 5377-VCL, 2010 Del. Ch. LEXIS 139 (Del. Ch. July 5, 2010)	349, 358
<i>In re Cogent, Inc. Shareholder Litigation</i> , 7 A.3d 487 (Del. Ch. 2010).....	306, 307, 311, 328
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	3
<i>In re Complete Genomics, Inc. Shareholder Litigation</i> , C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012).....	280
<i>In re CompuCom Sys., Inc. Shareholders Litigation</i> , No. 499-N, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005)	456
<i>In re Converge, Inc. Shareholders Litigation</i> , 2014 WL 6686570 (Del. Ch. Nov. 25, 2014).....	58, 307, 328
<i>Connolly v. Gasmire</i> , 257 S.W.3d 831 (Tex. App.—Dallas 2008, no pet.)	20, 93
<i>Conrad v. Blank</i> , 940 A.2d 28 (Del. Ch. 2007)	164
<i>Conrad v. Judson</i> , 465 S.W.2d 819 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.)	459
<i>Continuing Creditors' Committee of Star Telecommunications Inc. v. Edgecomb</i> , 385 F. Supp. 2d 449 (D. Del. 2004).....	139, 144
<i>Conway v. Bonner</i> , 100 F.2d 786 (5th Cir. 1939).....	128

<i>Cook v. Hewlett-Packard Co.</i> , C.A. No. 8667-VCG, 2014 Del. Ch. LEXIS 6 (Del. Ch. Jan. 24, 2014)	414
<i>Cooper v. Pabst Brewing Co.</i> , C.A. No. 7244, 1993 WL 208763 (Del. Ch. June 8, 1993)	436
<i>In re Cornerstone Therapeutics Inc. S'holder Litig.</i> , Consol. C.A. No. 8922-VCG (Del. Ch. Sept. 10, 2014)	190
<i>Cotten v. Weatherford Bancshares, Inc.</i> , 187 S.W.3d 687 (Tex. App.—Fort Worth 2006, no pet.)	61
<i>County of York Employees Retirement Plan v. Merrill Lynch & Co., Inc.</i> , C.A. No. 4066-VCN, 2008 WL 4824053 (Del. Ch. Oct 28, 2008)	366, 373
<i>Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.</i> , C.A. No. 12150 Mem. Op., 1991 Del. Ch. LEXIS 215 (Del. Ch. 1991)	130, 131
<i>Crenshaw v. Swenson</i> , 611 S.W.2d 886 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.)	459, 461, 462
<i>Crescent/Mach I Partners, L.P. v. Turner</i> , 846 A.2d 963 (Del. Ch. 2000)	15
<i>In re Crimson Exploration Inc. Stockholder Litigation</i> , No. CV 8541-VCP, 2014 WL 5449419 (Del. Ch. Oct. 24, 2014)	189
<i>Crown EMAK Partners, LLC v. Kurz</i> , 992 A.2d 377 (Del. 2010)	392, 394, 395, 405, 417
<i>CRTF Corp. v. Federated Department Stores, Inc.</i> , 683 F. Supp. 422 (S.D.N.Y. 1988)	340, 342
<i>CTS Corp. v. Dynamics Corp. of America</i> , 481 U.S. 69 (1987)	332
<i>Daniel v. Falcon Interest Realty Corp.</i> , 190 S.W.3d 177 (Tex. App.—Houston [1st Dist.] 2005, no pet.)	463
<i>Davis v. Sheerin</i> , 754 S.W.2d 375 (Tex. App.—Houston [1st Dist.] 1988, writ denied), overruled by <i>Ritchie v. Rupe</i> , 443 S.W.3d 856 (Tex. 2014)	442, 448, 449, 450, 451, 453, 454
<i>Decker v. Mitchell (In re JTS Corp)</i> , 305 B.R. 529 (Bankr. N.D. Cal. 2003)	129
<i>In re Dehon, Inc.</i> , 334 B.R. 55 (Bank. D. Mass. 2005)	141
<i>In re Del Monte Foods Company Shareholders Litigation</i> , 25 A.3d 813 (Del. Ch. 2011)	278, 289, 291, 292, 297
<i>In re Delphi Financial Group Shareholder Litigation</i> , C.A. No. 7144-VCG, 2012 Del. Ch. LEXIS 45 (Del. Ch. Mar. 6, 2012)	38, 188, 297
<i>Delta Holdings, Inc. v. Nat'l Distillers & Chem. Corp.</i> , 945 F.2d 1226 (2d Cir. 1991), cert. denied, 503 U.S. 985 (1992)	147
<i>DePinto v. Landoe</i> , 411 F.2d 297 (9th Cir. 1969)	420
<i>Desert Partners, L.P. v. USG Corp.</i> , 686 F. Supp. 1289 (N.D. Ill. 1988)	202, 259, 269, 270, 339 342
<i>Desimone v. Barrows</i> , 924 A.2d 908 (Del. Ch. 2007)	171, 172, 173
<i>In re Digex, Inc. Shareholders Litigation</i> , 789 A.2d 1176 (Del. Ch. 2000)	206, 210, 211, 354, 458
<i>Disney v. Walt Disney Co.</i> , C.A. No. 234-N (Remand Opinion June 20, 2005)	32
<i>District 65 UAW v. Harper & Roe Publishers</i> , 576 F. Supp. 1468 (S.D.N.Y. 1983)	421
<i>In re Dollar Thrifty S'holder Litig.</i> , 14 A.3d 573 (Del. Ch. 2010)	312
<i>In re the Dow Chemical Company Derivative Litigation</i> , No. 4349-CC, 2010 Del. Ch. LEXIS 2 (Del. Ch. Jan. 11, 2010)	183
<i>Dubroff v. Wren Holdings, LLC</i> , C.A. No. 3940-VCN, 2009 Del. Ch. LEXIS 89 (Del. Ch. May 22, 2009) (“ <i>Dubroff I</i> ”)	46, 47

<i>Dubroff v. Wren Holdings, LLC</i> , C.A. No. 3940-VCN, 2011 Del. Ch. LEXIS 164 (Del. Ch. Oct. 28, 2011) (“ <i>Dubroff IP</i> ”)	46, 47, 456
<i>Dunagan v. Bushey</i> , 152 Tex. 630, 263 S.W.2d 148 (1953)	444
<i>Duncan v. Lichtenberger</i> , 671 S.W.2d 948 (Tex. App.—Fort Worth 1984, writ ref’d n.r.e.).....	442, 450
<i>Dunnagan v. Watson</i> , 204 S.W. 3d 30 (Tex. App.—Ft. Worth 2006, pet. denied)	463
<i>eBay Domestic Holdings, Inc. v. Newmark</i> , 16 A.3d 1 (Del. Ch. 2010).....	339
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982)	5
<i>Edgen Grp. Inc. v. Genoud</i> , C.A. No. 9055-VCL (Del. Ch. Nov. 5, 2013) (Trans.).....	400
<i>Ehrenhaus v. Baker</i> , C.A. No. 08 CVS 22632, 2008 NCBC 20, 2008 WL 5124899 (N.C. Super. Ct. Dec 05, 2008).....	366, 374, 378, 379
<i>In re El Paso Corporation Shareholder Litigation</i> , 41 A.3d 432 (Del. Ch. 2012).....	289, 292, 297
<i>Elliott Associates, L.P. v. Avatex Corp.</i> , 715 A.2d 843 (Del. 1998).....	63, 76
<i>Elloway v. Pate</i> , 238 S.W.3d 882 (Tex. App.—Houston [14th Dist.] 2007, no pet.)....	96, 171, 270
<i>Emerald Partners v. Berlin</i> , 787 A.2d 85 (Del. 2001).....	122
<i>In re Emerging Communications, Inc. Shareholders Litigation</i> , C.A. No.16415, 2004 WL 1305745 (Del. Ch. May 3, 2004).....	359, 360
<i>Emerson Radio Corp. v. International Jensen Inc.</i> , No. 15130, 14992, 1996 WL 483086 (Del. Ch. 1996)	300, 313
<i>Energy Partners, Ltd. v. Stone Energy Corp.</i> , C.A. Nos. 2374-N, 2402-N, 2006 Del. Ch. LEXIS 182 (Del. Ch. Oct. 11, 2006).....	201, 322
<i>In re Enivid, Inc.</i> , 345 B.R. 426 (Bankr. D. Mass. 2006)	141
<i>Equity Corp. v. Milton</i> , 221 A.2d 494 (Del. 1966)	10
<i>Equity-Linked Investors LP v. Adams</i> , 705 A.2d 1040 (Del. Ch. 1997).....	64, 129, 131
<i>Esopus Creek Value LP v. Hauf</i> , 913 A.2d 953 (Del. Ch. 2006).....	426
<i>In re Exide v. Credit Suisse First Boston</i> , 299 B.R. 732 (Bankr. D. Del. 2003)	144
<i>Express Scripts, Inc. v. Crawford</i> , 918 A.2d 1172 (Del. Ch. 2007)	87, 432
<i>Express Scripts, Inc. v. Crawford</i> , C.A. No. 2663-N, 2007 WL 707550 (Del. Ch. Feb. 23, 2007)	205
<i>Express Scripts, Inc. v. Crawford</i> , 2007 WL 2768805 (Del. Ch. Mar. 8, 2007)	432
<i>In Re: F5 Networks Derivative Litigation</i> , No. C-06-794RSL, 2007 U.S. Dist. LEXIS 56390 (W.D. Wash., Aug. 1, 2007)	173
<i>Fagan v. La Gloria Oil & Gas Co.</i> , 494 S.W.2d 624 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).....	127, 128
<i>In re Family Dollar Stores, Inc. Stockholder Litigation</i> , C.A. No. 9985-CB (Del. Ch. Dec. 19, 2014).....	261
<i>Fanning v. Barrington Condominium Association, Inc.</i> , No. 04-09-00752-CV, 2010 WL 1984070 (Tex. App.—San Antonio, Jan. 21, 2010)	442
<i>Fanning v. Barrington Condominium Association, Inc.</i> , No. 2009-CI-10922, 2010 WL 1984070 (Tex. App.—San Antonio, Mar. 26, 2010).....	446
<i>Faour v. Faour</i> , 789 S.W.2d 620 (Tex. App.—Texarkana 1990, writ den.).....	61, 63, 451
<i>Farnsworth v. Massey</i> , 365 S.W.2d 1 (Tex. 1963).....	438
<i>FDIC v. Benson</i> , 867 F. Supp. 512 (S.D. Tex. 1994)	12
<i>FDIC v. Brown</i> , 812 F. Supp. 722 (S.D. Tex. 1992)	12
<i>FDIC v. Harrington</i> , 844 F. Supp. 300 (N.D. Tex. 1994)	7, 9, 12
<i>FDIC v. Schreiner</i> , 892 F. Supp. 869 (W.D. Tex. 1995).....	12

<i>FDIC v. Wheat</i> , 970 F.2d 124 (5th Cir. 1992)	421
<i>Fed. United Corp. v. Havender</i> , 11 A.2d 331, 342 (Del. 1940)	431
<i>Feeley v. NHAOCG, LLC</i> , No. 7304-VCL, 2012 WL 5949209 (Del. Ch. Nov. 28, 2012).....	482
<i>Feldman v. Cutaia</i> , 951 A.2d 727 (Del. 2008)	47, 80, 96
<i>Ferguson v. Williams</i> , 670 S.W.2d 327 (Tex. App.—Austin 1984, writ ref’d n.r.e.)	462
<i>Field v. Allyn</i> , 457 A.2d 1089 (Del. Ch. 1983), <i>aff’d</i> 467 A.2d 1274 (Del. 1983)	431
<i>In re First Boston, Inc. Shareholders Litigation</i> , C.A. No. 10338, 1990 Del. Ch. LEXIS 74, Fed. Sec. L. Rep. (CCH) 95322 (Del. Ch. June 7, 1990)	210, 211
<i>First Marblehead Corp. v. House</i> , 473 F.3d 1 (1st Cir. 2006)	165
<i>First Nat’l Bank v. Wu</i> , 167 S.W.3d 842 (Tex. App.—Houston [14th Dist.] 2005, pet. granted)	422, 423
<i>First Union Corp. v. SunTrust Banks, Inc.</i> , 2001 NCBC 9A ¶ 32 (N.C. Super. Ct. Aug. 10, 2001)	377, 378
<i>Fisk Ventures, LLC v. Segal</i> , No. 3017-CC, 2008 WL 1961156 (Del. Ch. 2008), <i>aff’d</i> 984 A.2d 124 (Del. 2009).....	484
<i>Fitzgerald v. Cantor</i> , C.A. No. 16297-NC, 1999 WL 182573 (Del. Ch. Mar. 25, 1999)	489
<i>Flanary v. Mills</i> , 150 S.W.3d 785 (Tex. App.—Austin 2004, pet denied).....	7
<i>Fleet Nat. Bank v. Boyle</i> , C.A. No. 04CV1277LDD, 2005 WL 2455673 (E.D. Pa. 2005)	141
<i>Fletcher International Ltd. v. Ion Geophysical Corp.</i> , C.A. No. 5109-VCS, 2011 Del. Ch. LEXIS, at *2 (Del. Ch. March 29, 2011)	63
<i>Fliegler v. Lawrence</i> , 361 A.2d 218 (Del. 1976).....	123, 125
<i>Floyd v. Hefner</i> , C.A. No. H-03-5693, 2006 WL 2844245 (S.D. Tex. Sept. 29, 2006)	3, 7, 12, 128, 129, 141
<i>In re FLS Holdings, Inc. S’holders Litigation</i> , 1993 WL 104562 (Del. Ch. Apr. 21, 1993), <i>reprinted in</i> 19 Del. J. Corp. L. 270 (1993)	212
<i>Fogel v. U.S. Energy Systems Inc.</i> , No. 3271-CC, 2007 WL 4438978 (Del. Ch. 2007)	4
<i>Forest Oil Corp. v. McAllen</i> , 268 S.W.3d 51 (Tex. 2008).....	453
<i>In re Fort Howard Corp. Shareholders Litig.</i> , C.A. No. 9991, 1988 WL 83147 (Del. Ch. Aug. 8, 1988).....	208, 209, 261, 271, 311
<i>Frantz Manufacturing Co. et al. v. EAC Industries</i> , 501 A.2d 401 (Del. 1985).....	408, 419
<i>Freedman v. Adams</i> , 58 A.3d 414 (Del. 2013)	178
<i>Friese v. Superior Court of San Diego County</i> , 36 Cal. Rptr. 3d 558 (Cal. Ct. App. 2005)	6
<i>Frontier Oil Corp. v. Holly Corp.</i> , C.A. No. 20502-VCN, 2005 WL 1039027 (Del. Ch. Apr. 29, 2005)	201
<i>Gagliardi v. Trifoods Intl</i> , 683 A.2d 1049, 1051 (Del. Ch. 1996).....	443, 454, 455, 456
<i>Galaviz v. Berg</i> , 10-cv-3392, slip op. (N.D. Cal. Jan. 3, 2011)	396, 397, 398
<i>Gantler v. Stephens</i> , 965 A.2d 695 (Del. 2009).....	36, 50, 54, 56, 61, 124, 185, 423
<i>Garner v. Wolfinbarger</i> , 430 F.2d 1093 (5th Cir. 1970), <i>cert denied</i> , 401 U.S. 974 (1971).....	166, 167, 416
<i>Garza v. TV Answer, Inc.</i> , No. 12784, 1993 WL 77186 (Del. Ch. Mar. 11, 1993)	455
<i>Gatz Properties, LLC v. Auriga Capital Corp.</i> , 59 A.3d 1206 (Del. 2012), <i>aff’g</i> 40 A.3d 839	479, 482, 490
<i>Gearhart Industries, Inc. v. Smith International, Inc.</i> , 741 F.2d 707 (5th Cir. 1984)	3, 4, 5, 7, 8, 9, 11, 12, 13, 98, 111, 127, 128, 181, 182, 340, 341, 443, 444, 448, 454
<i>In re General Homes Corp.</i> , 199 B.R. 148 (S.D. Tex. 1996)	128

<i>Gentile v. Rossette</i> , 906 A.2d 91 (Del. 2006)	47, 80, 456
<i>Gerber v. Enter. Prods. Hldgs., LLC</i> , 67 A.3d 400 (Del. June 10, 2013)	97, 468, 471, 472, 490
<i>Gerdes v. Reynolds</i> , 28 N.Y.S.2d 622 (N.Y. S.Ct. 1941)	420
<i>Gesoff v. IIC Indus. Inc.</i> , 902 A.2d 1130 (Del. Ch. 2006)	215
<i>Geyer v. Ingersoll Pub. Co.</i> , 621 A.2d 784 (Del. Ch. 1992)	128, 129, 130, 144
<i>Gibney v. Culver</i> , No. 13-06-112-CV, 2008 WL 1822767 (Tex. App.—Corpus Christi Apr. 24, 2008, pet. denied).....	442, 450
<i>Gilbert v. El Paso Co.</i> , 490 A.2d 1050 (Del. Ch. 1984), <i>aff'd</i> 575 A.2d 1131 (Del. 1990)	73
<i>Gimbel v. The Signal Companies, Inc.</i> , 316 A.2d 599 (Del. Ch. 1974).....	424
<i>Gimpel v. Bolstein</i> , 477 N.Y.S.2d 1014 (1984)	455
<i>Global Asset Capital, LLC vs. Rubicon US REIT, Inc.</i> , C.A. No. 5071-VCL (Del. Ch. Nov. 16, 2009) (transcript).....	314
<i>Globis Partners, L.P. v. Plumtree Software, Inc.</i> , C.A. No.1577-VCP, 2007 WL 4292024 (Del. Ch. Nov. 30, 2007)	185, 221
<i>Goggin v. Vermillion, Inc.</i> , C.A. No. 6465-VCN, 2011 Del. Ch. LEXIS 80 (Del. Ch. June 3, 2011)	339, 396, 404
<i>Golden Cycle, LLC v. Allan</i> , 1998 WL 892631 (Del. Ch. December 10, 1998)	202
<i>Golden Telecom, Inc. v. Global GT LP</i> , 11 A.3d 214 (Del. 2010)	436
<i>In re The Goldman Sachs Group, Inc. Shareholder Litigation</i> , C.A. No. 5215-VCG, 2011 Del. Ch. LEXIS 151 (Del Ch. Oct. 12, 2011).....	27, 87, 177
<i>Goodrich Capital, LLC and Windsor Sheffield & Co., Inc. v. Vector Capital Corporation</i> , 11 Civ. 9247 (JSR) (S.D.N.Y. June 26, 2012).....	278
<i>Goodwin v. Live Entertainment, Inc.</i> , C.A. No. 15765, 1999 WL 64265 (Del. Ch. Jan. 25, 1999)	115, 203, 204, 306, 309, 330
<i>Grand Metropolitan Public, Ltd. v. Pillsbury Co.</i> , 558 A.2d 1049 (Del. Ch. 1988)	340, 342
<i>In re Greater Southeast Community Hospital Corp.</i> , 333 B.R. 506 (Bankr. Dist. Colo. 2005).....	141, 144
<i>In re Greater Southeast Community Hospital Corp. I v. Tuft</i> , 353 B.R. 324 (Bankr. D. Col. 2006)	141
<i>Green v. State</i> , 324 S.W.3d 276, 279 (Tex. App.—Austin 2010, no pet.)	417
<i>Grider v. Boston Co., Inc.</i> , 773 S.W.2d 338 (Tex. App.—Dallas 1989, writ denied).....	464
<i>Grimes v. Donald</i> , 673 A.2d 1207 (Del. 1996).....	208
<i>Grobow v. Perot</i> , 539 A.2d 180 (Del. 1988)	208
<i>Grosset v. Wenaas</i> , 175 P.3d 1184 (Cal. 2008)	96
<i>Grove v. Bedard</i> , 2004 WL 2677216 (D. Me. 2004)	141
<i>Guth v. Loft</i> , 5 A.2d 503 (Del. 1939)	14, 16, 31
<i>Hammond v. Hammond</i> , 216 S.W.2d 630 (Tex. Civ. App.—Fort Worth 1949, no writ)....	442, 446
<i>Harbor Finance Partners v. Huizenga</i> , 751 A.2d 879 (Del. Ch. 1999)	116, 458
<i>Hariton v. Arco Elecs., Inc.</i> , 182 A.2d 22 (Del. Ch. 1962).....	431
<i>Healthco International, Inc. v. Hicks, Muse & Co. (In re Healthco Intern. Inc.)</i> , 195 B.R. 971 (Bank. D. Mass. 1966).....	142
<i>In re Hechinger Inv. Co. of Del.</i> , 327 B.R. 537 (D. Del. 2005).....	141
<i>Heilbrunn v. Sun Chem. Corp.</i> , 150 A.2d 755 (Del. 1959)	431
<i>Heineman v. Datapoint Corp.</i> , 611 A.2d 950 (Del. 1992).....	116

<i>In re Heritage Organization, LLC</i> , No. 04-35574-BJH-11, 2008 WL 5215688 (Bankr. N.D. Tex. Dec. 12, 2008).....	478, 479
<i>Hixson v. Pride of Texas Distributing Co.</i> , 683 S.W.2d 173 (Tex.App.—Fort Worth 1985, no writ)	128
<i>Hochberg v. Schick Investment Company</i> , 469 S.W.2d 474, 476 (Tex. Civ. App.—Fort Worth 1971, no writ).....	438
<i>Hoggett v. Brown</i> , 971 S.W. 2d 472, 488 (Tex. App—Houston [14th Dist.] 1997, pet. denied).....	127
<i>Holdgreiwe v. Nostalgia Network, Inc.</i> , C.A. No. 12914, 1993 WL 144604 (Del. Ch. April 29, 1993)	412
<i>Holloway v. Skinner</i> , 898 S.W.2d 793 (Tex. 1995)	62
<i>Hollinger Inc. v. Hollinger International, Inc.</i> , 858 A.2d 342 (Del. Ch. 2004), appeal <i>ref'd</i> , 871 A.2d 1128 (Del. 2004).....	424, 425, 433
<i>Hollinger Int'l Inc. v. Black</i> , 844 A.2d 1022 (Del. Ch. 2004), <i>aff'd sub. nom.</i> , <i>Black v. Hollinger Int'l Inc.</i> , 872 A.2d 559 (Del. 2005).....	32, 408
<i>Hollis v. Hill</i> , 232 F.3d 460 (5th Cir. 2000).....	5
<i>In re Holly Farms Corp. Shareholders Litigation</i> , 564 A.2d 342 (Del. Ch. 1989)	308, 340, 342
<i>Huff Fund Investment Partnership v. CKx, Inc.</i> , C.A. No. 6844-VCG, 2013 Del. Ch. LEXIS 262 (Del. Ch. Oct. 31, 2013)	437
<i>Huffington v. Upchurch</i> , 532 S.W.2d 576 (Tex. 1976).....	459, 461, 462
<i>Hughes v. St. David's Support Corp.</i> , 944 S.W.2d 423 (Tex. App.—Austin 1997, writ denied)	459, 461
<i>Huie v. DeShazo</i> , 922 S.W.2d 920 (Texas 1996).....	413
<i>ICLUB Investment Partnership v. FedEx Corporation, et al.</i> , C.A. No. 7238-CS (June 25, 2013).....	398
<i>Icom Systems, Inc. v. Davies</i> , 990 S.W.2d 408 (Tex. App.—Texarkana 1999, no pet.)	9, 10, 11
<i>Imperial Group (Texas), Inc. v. Scholnick</i> , 709 S.W.2d 358 (Tex. App.—Tyler 1986, writ <i>ref'd n.r.e.</i>)	10
<i>Indiana Electrical Workers Pension Fund v. Millard</i> , No. 07 Civ. 172-JGK, 2007 U.S. Dist. LEXIS 54203 (S.D.N.Y. July 24, 2007)	173
<i>In re infoUSA, Inc. Shareholders Litigation</i> , 953 A.2d 963 (Del. Ch. 2007)	36, 114, 115, 217
<i>International Bankers Life Insurance Co. v. Holloway</i> , 368 S.W.2d 567 (Tex. 1963)	8, 10, 444
<i>International Telecharge, Inc. v. Bomarko, Inc.</i> , 766 A.2d 437 (Del. 2000)	210
<i>Invacare Corporation v. Healthdyne Technologies, Inc.</i> , 968 F. Supp. 1578 (N.D. Ga. 1997)	346
<i>In re IT Group Inc.</i> , C.A. No. 04-1268-KAJ, 2005 WL 3050611 (D. Del. 2005).....	142
<i>Italian Cowboy Partners, Ltd. v. Prudential Ins. Co.</i> , 341 S.W.3d 323 (Tex. 2011)	277
<i>Ivanhoe Partners v. Newmont Mining Corp.</i> , 535 A.2d 1334 (Del. 1987).....	270
<i>In re IXC Commc'ns, Inc. S'holders Litig.</i> , C.A. Nos. 17324 & 17334, 1999 Del. Ch. LEXIS 210 (Del. Ch. Oct. 27, 1999).....	204, 303, 319, 377
<i>Jackson v. Turnbull</i> , C.A. No. 13042, 1994 WL 174668 (Del. Ch. Feb. 8, 1994), <i>aff'd</i> , 653 A.2d 306 (Del. 1994).....	300, 434
<i>Jackson Nat'l Life Insur. v. Kennedy</i> , 741 A.2d 377 (Del. Ch. 1999)	64
<i>James River-Pennington, Inc. v. CRSS Capital, Inc.</i> , C.A. No. 13870, 1995 WL 106554 (Del. Ch. Mar. 6, 1995).....	472
<i>Jedwab v. MGM Grand Hotels, Inc.</i> , 509 A.2d 584 (Del. Ch. 1986)	63, 64, 207, 299, 300

<i>In re John Q. Hammons Hotels Inc. S'holder Litig.</i> , C.A. No. 758-CC, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009)	190, 191
<i>In re John Q. Hammons Hotels Inc. S'holder Litig.</i> , C.A. No. 758-CC, 2011 Del. Ch. LEXIS 1 (Del. Ch. Jan. 14, 2011)	191
<i>Johnson v. Brewer & Pritchard, P.C.</i> , 73 S.W.3d 193, 199–200 (Tex. 2002)	458
<i>Johnson v. J. Hiram Moore, Ltd.</i> , 763 S.W.2d 496 (Tex. App.—Austin 1988, writ denied)	462
<i>Johnson v. Jackson Walker, L.L.P.</i> , 247 S.W.3d 765 (Tex. App.—Dallas 2008, pet. denied)	8, 83, 112
<i>Johnson v. Peckham</i> , 120 S.W.2d 786 (Tex. 1938)	461
<i>Johnson & Johnson v. Guidant Corp.</i> , 525 F. Supp. 2d 336 (S.D.N.Y. 2007)	324
<i>Johnson Ranch Royalty Co. v. Hickey</i> , 31 S.W.2d 150, 153 (Tex. App.—Amarillo 1930, writ ref'd)	413
<i>Johnston v. Pedersen</i> , 28 A.3d 1079 (Del. Ch. 2011)	74
<i>Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co.</i> , 156 A. 350 (Del. Super. 1931)	62
<i>Julian v. Eastern States Construction Service, Inc.</i> , C.A. No. 1892-VCP, 2008 WL 2673300 (Del. Ch. July 8, 2008)	175
<i>Kahn v. Chell</i> , Transcript (Laster, V.C., June 7, 2011)	44
<i>Kahn v. Dairy Mart Convenience Stores, Inc.</i> , C.A. No. 12489, 1996 Del. Ch. LEXIS 38 (Del. Ch. Mar. 29, 1996)	206, 209, 211
<i>Kahn v. Kolberg Kravis Roberts & Co., L.P.</i> , 23 A.3d 831 (Del. 2011)	15, 412
<i>Kahn v. Lynch Communications Systems, Inc.</i> (“ <i>Lynch I</i> ”), 638 A.2d 1110 (Del. 1994)	141,
148, 190, 191, 197, 206, 210, 356, 357, 361, 362, 363	
<i>Kahn v. Lynch Communications Systems, Inc.</i> (“ <i>Lynch II</i> ”), 669 A.2d 79 (Del. 1995)	210
<i>Kahn v. M&F Worldwide Corp.</i> , 88 A.3d 635 (Del. 2014)	192
<i>Kahn v. MSB Bancorp, Inc.</i> , C.A. No. 14712-NC, 1998 WL 409355 (Del. Ch. 1998), <i>aff'd</i> 734 A.2d 158 (Del. 1999)	205, 266, 269
<i>Kahn v. Portnoy</i> , No. 3515-CC, 2008 WL 5197164 (Del. Ch. Dec 11, 2008)	479
<i>Kahn v. Roberts</i> , 679 A.2d 460 (Del. 1996)	206
<i>Kahn v. Sullivan</i> , 594 A.2d 48 (Del. 1991)	206, 210
<i>Kahn v. Tremont Corp.</i> , 694 A.2d 422 (Del. 1997)	70, 116, 206, 208, 209, 211, 242
<i>Kaiser Alum. Corp. v. Matheson</i> , 681 A.2d 392 (Del. 1996)	63
<i>Kallick v. SandRidge Energy, Inc.</i> , C.A. No. 8182-CS, 2013 WL 868942 (Del. Ch. Mar. 8, 2013)	351
<i>Kaplan v. Wyatt</i> , 484 A.2d 501, 506-507 (Del. Ch. 1984), <i>aff'd</i> , 499 A.2d 1184 (Del. 1985)	99
<i>Katell v. Morgan Stanley Group, Inc.</i> , C.A. No. 12343, 1995 Del. Ch. LEXIS 76, (Del. Ch. June 15, 1995)	208
<i>In re KDI Corp. Shareholders Litigation</i> , C.A. No. 10278, 1990 Del. Ch. LEXIS 201, Fed. Sec. L. Rep. (CCH) 95727 (Del. Ch. Dec. 13, 1990)	209
<i>KE Prop. Mgmt. Inc. v. 275 Madison Mgmt. Inc.</i> , C.A. No. 12683, 1993 WL 285900 (Del. Ch. July 27, 1993) (unpublished mem. op.)	463
<i>Kelly v. Blum</i> , No. 4516-VCP, 2010 WL 629850 (Del. Ch. Feb. 24, 2010)	482
<i>In re Kids Creek Partners, L.P.</i> , 212 B.R. 898 (Bankr. N.D. Ill. 1997)	463

<i>In re KKR Financial Holdings LLC Shareholder Litigation</i> , 101 A.3d 980, (Del. Ch. Oct. 14, 2014).....	189
<i>Knapp v. North American Rockwell Corp.</i> , 506 F.2d 361 (3d Cir. 1974), <i>cert. den.</i> 421 U.S. 965 (1975).....	429
<i>Koehler v. NetSpend Holdings Inc.</i> , C.A. No. 8373-VCG, 2013 Del. Ch. LEXIS 131 (Del. Ch. May 21, 2013)	282
<i>Kohls v. Duthie</i> , 765 A.2d 1274 (Del. Ch. 2000).....	206, 207, 210
<i>Krieger v. Wesco Financial Corp.</i> , C.A. No. 6176-VCL (Del. Ch. October 13, 2011)	432
<i>Krim v. ProNet, Inc.</i> , 744 A.2d 523 (Del. 1999).....	271
<i>Kunz v. Huddleston</i> , 546 S.W.2d 685 (Tex. Civ. App.—El Paso 1977, writ ref’d n.r.e.)	461
<i>Kuroda v. SPJS Holdings, L.L.C.</i> , 971 A.2d 872 (Del. Ch. April 15, 2009)	488
<i>Kurz v. Holbrook</i> , 989 A.2d 140 (Del. Ch. Feb. 9, 2010) (<i>reversed in part on other grounds by Crown EMAK Partners, LLC v.</i> <i>Kurz</i> , 992 A.2d 377 (Del. 2010)	392, 405, 417
<i>Laird Hill Salt Water Disposal, Ltd. v. East Texas Salt Water Disposal, Inc.</i> , 351 S.W.3d 81 (Tex. App.—Tyler 2011, pet. denied).....	422
<i>Lambrecht v. O’Neal</i> , 3 A.3d 277 (Del. 2010)	88, 91, 92
<i>Landon v. S & H Marketing Group, Inc.</i> , 82 S.W.3d 666 (Tex. App.—Eastland 2002, no pet.)	7, 9, 10, 125
<i>Lank v. Steiner</i> , 224 A.2d 242 (Del. 1966)	51
<i>Latesco, L.P. v. Wayport, Inc.</i> , C.A. No. 4167-VCL, 2009 WL 2246793 (Del. Ch. July 24, 2009).....	51
<i>In re Lear Corporation Shareholder Litigation</i> , 926 A.2d 94 (Del. Ch. 2007) (“ <i>Lear I</i> ”)	232, 233, 234, 313
<i>In re Lear Corporation Shareholder Litigation</i> , 967 A.2d 640 (Del. Ch. 2008) (“ <i>Lear II</i> ”)	234, 237
<i>Lee v. Pincus</i> , C.A. No. 8458-CB (Del. Ch. Nov. 14, 2014)	58
<i>Leonard Loventhal Account v. Hilton Hotels Corp.</i> , C.A. No. 17803, 2000 WL 1528909 (Del. Ch. Oct. 10, 2000).....	338
<i>Leslie v. Telephonics Office Tech., Inc.</i> , C.A. No. 13045, 1993 WL 547188 (Del. Ch. Dec. 30, 1993).....	425
<i>Levco Alternative Fund Ltd. v. Reader's Digest Association, Inc.</i> , 803 A.2d 428 (Del. Aug. 13, 2002)	212
<i>Lewis v. Anderson</i> , 477 A.2d 1040, 1047–49 (Del. 1984).....	90, 91, 96
<i>Lewis v. Fuqua</i> , 502 A.2d 962 (Del. Ch. 1985)	116
<i>Lewis v. Ward</i> , 852 A.2d 896 (Del. 2004)	96, 185
<i>Lifshutz v. Lifshutz</i> , 199 S.W.3d 9 (Tex. App.—San Antonio 2006, pet. denied)	61, 423
<i>In re Linear Technology Corp. Derivative Litigation</i> , No. C-06-3290, 2006 WL 3533024 (N.D. Cal. Dec. 7, 2006)	173
<i>Litle v. Waters</i> , C.A. No. 12155, 1992 WL 25758 (Del. Ch. Feb. 11, 1992)	443, 454, 455
<i>In re LNR Property Corp. Shareholder Litigation</i> , 896 A.2d 169 (Del. Ch. 2005).....	212
<i>London v. Tyrrell</i> , C.A. No. 3321-CC, 2008 WL 2505435 (Del. Ch. June 24, 2008).....	87
<i>London v. Tyrrell</i> , C.A. No. 3321-CC, 2010 Del. Ch. LEXIS 54 (Del. Ch. Mar. 11, 2010).....	99
<i>In re Loral Space and Communications Inc. Consolidated Litigation</i> , C.A. No. 2808-VCS, 2008 WL 4293781 (Del. Ch. Sept. 19, 2008).....	237, 367

<i>Louisiana Municipal Employees' Retirement System v. Fertitta</i> , C.A. No. 4339-VCL, 2009 Del. Ch. LEXIS 144 (Del. Ch. July 28, 2009)	339, 349, 363
<i>Louisiana Municipal Police Employees' Retirement System v. Crawford</i> , 918 A.2d 1172 (Del. Ch. 2007)	87, 205, 432
<i>In re Lukens Inc. Shareholders Litig.</i> , 757 A.2d at 738.....	330
<i>Lyondell Chemical Company v. Ryan</i> , 970 A.2d 235 (Del. 2009).....	139, 198, 245, 251, 254, 255, 256, 257, 260, 364
<i>MAI Basic Four, Inc. v. Prime Computer, Inc.</i> , [1988-89 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 94,179 (Del. Ch. 1988)	340, 342
<i>Malone v. Brincat</i> , 722 A.2d 5 (Del 1998)	5, 50, 127
<i>Malpiede v. Townson</i> , 780 A. 2d 1075, 1096 (Del. 2001).....	57
<i>Maric Capital Master Fund, Ltd., v. Plato Learning, Inc.</i> , 11 A.3d 1175 (Del. Ch. 2010)	38
<i>Marron v. Ream</i> , Civil Action No. H-06-1394, 2006 U.S. Dist. LEXIS 72831 (S.D. Tex. May 8, 2006)	98
<i>Martin Marietta Materials, Inc. v. Vulcan Materials Co.</i> , 68 A.3d 1208 (Del. 2012), affirming <i>Martin Marietta Materials, Inc. v. Vulcan Materials Co.</i> , 56 A.3d 1072 (Del. Ch. 2012)	278, 279
<i>In re Massey Energy Derivative and Class Action Litigation</i> , C.A. No. 5430-VCS, 2011 Del. Ch. LEXIS 83 (Del. Ch. May 31, 2011)	97
<i>Massey v. Farnsworth</i> , 353 S.W.2d 262 (Tex. Civ. App.—Houston 1961), rev'd on other grounds, 365 S.W.2d 1 (Tex. 1963).....	437
<i>Matador Capital Management Corp. v. BRC Holdings, Inc.</i> , 729 A.2d 280 (Del. Ch. 1998)	201, 270, 303, 306, 309, 330
<i>Matter of Shell Oil Co.</i> , 607 A.2d 1213 (Del. 1992)	436
<i>Matulich v. Aegis Communications Group, Inc.</i> , 942 A.2d 596 (Del. 2008)	76
<i>In re MAXXAM, Inc./Federated Development Shareholders Litigation</i> , 659 A.2d 760 (Del. Ch. 1995).....	116, 208
<i>In re MAXXAM, Inc./Federated Development Shareholders Litigation</i> , C.A. No. 12111, 1997 Del. Ch. LEXIS 51 (Del. Ch. Apr. 4, 1997)	206, 208
<i>McBeth v. Carpenter</i> , 565 F.3d 171 (5th Cir. 2009).....	461, 463
<i>McCollum v. Dollar</i> , 213 S.W. 259 (Tex. Comm'n App. 1919), holding approved	7, 11, 12
<i>McDermott, Inc. v. Lewis</i> , 531 A.2d 206 (Del. 1987).....	5
<i>McLendon v. McLendon</i> , 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied)	461
<i>McMillan v. Intercargo Corp.</i> , 768 A.2d 492 (Del. Ch. 2000).....	237, 271, 312
<i>McMullin v. Beran</i> , 765 A.2d 910 (Del. 2000)	41, 43
<i>McPadden v. Sidhu</i> , 964 A.2d 1262 (Del. Ch. 2008)	54, 61, 240, 241
<i>Meinhard v. Salmon</i> , 249 N.Y. 458, 164 N.E. 545 (N.Y. 1928)	458
<i>Mendel v. Carroll</i> , 651 A.2d 297 (Del. Ch. 1994).....	305
<i>Mercier v. Inter-Tel (Delaware), Inc.</i> , 929 A.2d 786 (Del. Ch. 2007)	331
<i>In re Merrill Lynch & Co., Inc. Securities, Derivative and ERISA Litigation</i> , Master File No. 07 Civ. 9633 (JSR) (S.D.N.Y. Feb. 17, 2009)	96
<i>In re MFW S'holders Litig.</i> , 67 A.3d 496 (Del. Ch. 2013).....	192, 194, 195, 196
<i>M.G. Bancorporation Inc. v. LeBeau</i> , 737 A.2d 513, 526 (Del. 1999)	436
<i>Michelson v. Duncan</i> , 407 A.2d 211 (Del. 1979)	124, 423
<i>Milam v. Cooper Co.</i> , 258 S.W.2d 953 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.)	8

<i>Miller v. American Real Estate Partners, L.P.</i> , C.A. No. 16788, 2001 WL 1045643 (Del. Ch. Sept. 6, 2001) (unpublished mem. op.)	466, 472
<i>Miller v. McCown De Leeuw & Co. (In re Brown Schools)</i> , 386 B.R. 37 (Bankr. D. Del. Apr. 24, 2008)	147
<i>Mills Acquisition Co. v. Macmillan, Inc.</i> , 559 A.2d 1261 (Del. 1988)	189, 198, 203, 204, 208, 209, 211, 212, 268, 306, 307, 314, 327
<i>Mills Acquisition Co. v. Macmillan, Inc.</i> , C.A. No. 10168, 1988 WL 108332 [1988-89 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 94,071 (Del. Ch. 1988), rev'd on other grounds, 559 A.2d 1261 (Del. 1989)	340, 342
<i>Missouri Pacific Railway v. Shuford</i> , 72 Tex. 165, 10 S.W. 408 (1888)	12
<i>Mizel v. Connelly</i> , C.A. No. 16638, 1999 Del. Ch. LEXIS 157 (Del. Ch. July 22, 1999)	116
<i>In re MONY Group Inc. Shareholder Litigation</i> , 852 A.2d 9 (Del. Ch. 2004)	5, 273, 276, 312
<i>In re MONY Group Inc. Shareholders Litigation</i> , 853 A.2d 661 (Del. Ch. 2004)	276
<i>Moore Business Forms, Inc. v. Cordant Holdings Corp.</i> , C.A. Nos. 13911, 14595, 1996 Del. Ch. LEXIS 56 (Del. Ch. June 4, 1996)	207
<i>Moore Corp. Ltd. v. Wallace Computer Services, Inc.</i> , 907 F. Supp. 1545 (D. Del. 1995)	266, 267, 270, 340, 342
<i>Moran v. Household International, Inc.</i> , 490 A.2d 1059 (Del. Ch.), aff'd, 500 A.2d 1346 (Del. 1985)	54
<i>Moran v. Household International, Inc.</i> , 500 A.2d 1346 (Del. 1985)	54, 266, 270, 336, 337, 338, 344, 347, 400
<i>Morgan v. Box</i> , 449 S.W.2d 499 (Tex. App.—Dallas 1969, no writ)	451
<i>Morgan v. Cash</i> , C.A. No. 5053-VCS, 2010 WL 2803746 (Del. Ch. July 16, 2010)	72, 186
<i>Moroney v. Moroney</i> , 286 S.W. 167, 170 (Tex. Com. App. 1926)	79
<i>In re Morrison</i> , 555 F.3d 473 (5th Cir. 2009)	63
<i>In re Morton's Rest. Grp., Inc. S'holders Litig.</i> , 74 A.3d 656 (Del. Ch. 2013)	189, 196
<i>NACCO Industries, Inc. v. Applicia Incorporated</i> , 997 A.2d 1 (Del. Ch. 2009)	48, 325, 326
<i>In re National City Corp. S'holders Litig.</i> , C.A. No. 4123-CC, 2009 Del. Ch. LEXIS 138 (Del. Ch. July 31, 2009)	366, 379
<i>In re Netsmart Technologies, Inc. Shareholders Litigation</i> , 924 A.2d 171 (Del. Ch. 2007)	44, 218, 221, 222, 226, 233, 313
<i>New Jersey Carpenters Pension Fund v. infoGROUP, Inc.</i> , C.A. No. 5334-VCN 2011 Del. Ch. LEXIS 147 (Del. Ch. Sept. 30, 2011, revised Oct. 6, 2011)	15, 115
<i>Newcastle Partners, L.P. v. Vesta Insurance Group, Inc.</i> , 887 A.2d 975 (Del. Ch. 2005), aff'd 906 A.2d 807 (Del. 2005)	426
<i>In re Nine Systems Corp. Shareholders Litigation</i> , Consol. C.A. No. 3940-VCN (Del. Ch. Sept. 4, 2014)	70
<i>North American Catholic Educational Programming Foundation Inc. v. Gheewalla</i> , 930 A.2d 92 (Del. 2007)	127, 129, 131, 133, 134, 135, 137, 140, 141
<i>Norton v. K-Sea Transportation Partners L.P.</i> , 67 A.3d 354 (Del. May 28, 2013)	468, 470, 472, 490
<i>In re Novell, Inc. Shareholder Litigation</i> , C.A. No. 6032-VCN, 2013 Del. Ch. LEXIS 1 (Del. Ch. Jan. 3, 2013) ("Novell I")	262, 263, 328
<i>In re Novell, Inc. Shareholder Litigation</i> , C.A. No. 6032-VCN, 2014 Del. Ch. LEXIS 249 (Del. Ch. Nov. 25, 2014) ("Novell II")	262, 263, 264, 265

<i>NRC, INC. d/b/a National Realty v. Richard Huddleston</i> , 886 S.W.2d 526, (Tex. App.—Austin 1994, no writ).....	9
<i>In re NYMEX Shareholder Litigation</i> , C.A. No. 3621-VCN, 2009 Del. Ch. LEXIS 176 (Del. Ch. Sept. 30, 2009).....	96, 206
<i>In re NYSE Euronext Shareholders Litigation</i> , C.A. No. 8136-CS (Del. Ch. May 10, 2013) (TRANSCRIPT)	302
<i>Odyssey Partners v. Fleming Companies</i> , 735 A.2d 386 (Del. Ch. 1999)	113, 130
<i>Official Committee of Bond Holders of Metricom, Inc. v. Derrickson</i> , 2004 WL 2151336 (N.D. Cal. 2004).....	141
<i>Official Committee of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins</i> , C.A. No. 20228-NC, 2004 WL 1949290 (Del. Ch. Aug. 24, 2004)	54, 157, 158, 159
<i>Official Committee of Unsecured Creditors v. R.F. Lafferty Co., Inc.</i> , 267 F.3d 340 (3d Cir. 2001).....	144
<i>Official Committee of Unsecured Creditors of Radnor Holdings Corp. v. Tennenbaum Capital Partners LLC (In re Radnor Holdings Corp.)</i> , 353 B.R. 820 (Bankr. D. Del. 2006)	147
<i>Oliver v. Boston University</i> , C.A. No. 16570, 2006 WL 1064169 (Del. Ch. Apr. 14, 2006)	71, 216
<i>Omnicare, Inc. v. NCS Healthcare, Inc.</i> , 818 A.2d 914 (Del. 2003).....	315, 316, 317, 318, 319, 321, 322, 367, 383
<i>Onti, Inc. v. Integra Bank</i> , 751 A.2d 904 (Del. Ch. 1999).....	436
<i>In re OPENLANE, Inc. S'holders Litig.</i> , C.A. No. 6849-VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011)	321, 322
<i>Openwave Sys. v. Harbinger Capital Partners Master Fund I, Ltd.</i> , 924 A. 2d 228, (Del. Ch. 2007)	403
<i>Optima International of Miami, Inc. v. WCI Steel, Inc.</i> , C.A. No. 3833-VCL (Del. Ch. June 27, 2008)	320, 321, 367
<i>In re Oracle Corp. Derivative Litigation</i> , 824 A.2d 917 (Del. Ch. 2003).....	114, 116
<i>In re Oracle Corp. Derivative Litig.</i> , 867 A.2d 904 (Del. Ch. 2004), <i>aff'd</i> , 872 A.2d 960 (Del. 2005).....	15
<i>In re Orchid Cellmark Inc. Shareholder Litigation</i> , C.A. No. 6373-VCN, 2011 Del. Ch. LEXIS 75 (Del. Ch. May 12, 2011)	306
<i>Orloff v. Shulman</i> , No. 852-N, 2005 WL 3272355 (Del. Ch. Nov. 23, 2005).....	458
<i>Orman v. Cullman</i> , 794 A.2d 5 (Del. Ch. 2002).....	115
<i>Orman v. Cullman (General Cigar)</i> , C.A. No. 18039, 2004 Del. Ch. LEXIS 150 (Del. Ch. Oct. 20, 2004).....	318, 319
<i>Pace v. Jordan</i> , 999 S.W.2d 615 (Tex. App. – Houston [1st Dist.] 1999, pet. denied).....	79
<i>Palmer v. Fuqua</i> , 641 F.2d 1146 (5th Cir. 1981)	461
<i>Paramount Communications Inc. v. QVC Network Inc.</i> , 637 A.2d 34 (Del. 1994).....	184, 185, 186, 187, 203, 205, 261, 267, 270, 271, 274, 285, 286, 303, 304, 307, 308, 314, 316, 327, 409
<i>Paramount Communications, Inc. v. Time, Inc.</i> , 571 A.2d 1140 (Del. 1989)	187, 205, 266, 267, 268, 270, 271
<i>Paramount Communications Inc. v. Time Inc.</i> , C.A. Nos. 10866, 10670, and 10935, 1989 WL 79880 (Del. Ch. July 14, 1989) [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514 (Del. Ch. 1988), <i>aff'd</i> , 571 A.2d 1140 (Del. 1989).....	340

<i>Parfi Holding AB v. Mirror Image Internet, Inc.</i> , 794 A.2d 1211 (Del. Ch. 2001), rev'd in part on other grounds, 817 A.2d 149 (Del. 2002), cert. denied, 123 S. Ct. 2076 (2003).....	113
<i>Parkview Gen. Hosp. v. Waco Constr., Inc.</i> , 531 S.W.2d 224 (Civ. App.—Corpus Christi 1975, no writ)	439
<i>Parnes v. Bally Entm't Corp.</i> , 722 A.2d 1243 (Del. 1999).....	96
<i>Pate v. Elloway</i> , No. 01-03-00187-CV, 2003 WL 22682422 (Tex. App.—Houston [1st Dist.] Nov. 13, 2003, pet. denied).....	96
<i>Patton v. Nicholas</i> , 279 S.W.2d 848 (Tex. 1955).....	442, 449, 450
<i>In re Pennaco Energy, Inc. Shareholders Litigation</i> , 787 A.2d 691 (Del. Ch. 2001)	307
<i>People ex rel Spitzer v. Grasso</i> , No. 401620/04, 2006 WL 3016952 (N.Y. Sup. Ct. Oct. 18, 2006)	180
<i>People ex rel Spitzer v. Grasso</i> , 836 N.Y.S.2d 40 (App. Div. 2007)	181
<i>Pepper v. Litton</i> , 308 U.S. 295 (1939).....	181, 182
<i>Pereira v. Cogan</i> , 294 B.R. 449 (S.D.N.Y. 2003), reversed on other grounds, <i>Pereira v. Farace</i> , 413 F.3d 330 (2d Cir. 2005)	61, 142
<i>Pereira v. Farace</i> , 413 F.3d 330 (2d Cir. 2005)	61, 143
<i>In re Performance Nutrition, Inc.</i> , 239 B.R. 93 (Bankr. N.D. Tex. 1999)	128
<i>Pershing Square, L.P. v. Ceridian Corp.</i> , 923 A.2d 810 (Del. Ch. 2007).....	414, 415
<i>Pfeffer v. Redstone</i> , 965 A.2d 676 (Del. 2009).....	37, 38, 49
<i>Phelps Dodge Corp. v. Cyprus Amax Minerals Co.</i> , C.A. Nos. 17398, 17383, 17427, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999).....	281, 288, 303, 304, 314
<i>Philadelphia Electric Co. v. Hercules, Inc.</i> , 762 F.2d 303 (3d Cir. 1985)	429
<i>Plas-Tex v. Jones</i> , No. 03-99-00286-CV, 2000 WL 632677 (Tex. App.—Austin 2002, no pet.)	128
<i>In re Ply Gem Industrial, Inc. S'holders Litigation</i> , C.A. No. 15779-NC, 2001 Del. Ch. LEXIS 84 (Del. Ch. 2001).....	115
<i>In re PNB Holding Co. Shareholders Litigation</i> , C.A. No. 28-N, 2006 WL 2403999 (Del. Ch. Aug. 18, 2006)	47, 361, 362
<i>Pogostin v. Rice</i> , 480 A.2d 619 (Del. 1984)	208, 268
<i>Police & Fire Retirement System of the City of Detroit v. Bernal</i> , C.A. No. 4663-CC, 2009 WL 1873144 (Del. Ch. June 26, 2009).....	255, 256, 257
<i>Pontiac Gen. Employees Ret. Sys. v. Ballantine</i> , C.A. No. 9789-VCL, 2014 WL 6388645 (Del. Ch. Oct. 14, 2014) (TRANSCRIPT))	58, 351
<i>Potter v. Hughes</i> , 546 F.3d 1051 (9th Cir. 2008)	96
<i>In re Primedia, Inc. Shareholders Litigation (Primedia II)</i> , 67 A.3d 455 (Del. Ch. May 10, 2013)	15, 80
<i>In re Primedia, Inc. S'holders Litig. (Primedia III)</i> , Consolidated C.A. No. 6511-VCL, 2013 Del. Ch. LEXIS 306 (Del. Ch. Dec. 20, 2013)	15, 97
<i>Production Resources Group, L.L.C. v. NCT Group, Inc.</i> , 863 A.2d 772 (Del. Ch. 2004).....	131, 141, 144
<i>In re Puda Coal Stockholders' Litigation</i> , C.A. No. 6476-CS (Del. Ch. Feb. 6, 2013) (bench ruling).....	24, 419, 420
<i>Pueblo Bancorporation v. Lindoe, Inc.</i> , 63 P. 3d 353,362 (Colo. 2003)	450
<i>In re Pure Resources, Incorporated Shareholders Litigation</i> , 808 A.2d 421 (Del. Ch. 2002)	42, 44, 190, 221, 355, 356, 357

<i>Quadrangle Offshore (Cayman) LLC v. Kenetech Corporation</i> , No. 16362-NC, 1999 WL 893575 (Del. Ch. Oct. 13, 1999), <i>aff'd</i> , 751 A. 2d 878 (Del. Supr. 2000).....	64, 65
<i>Quadrant Structured Products Co. Ltd. v. Vertin</i> , C.A. No. 6990-VCL (Del. Ch. Oct. 1, 2014).....	140, 141
<i>Quark Inc. v. Harley</i> , Civ. A. Nos. 96-1046, 96-1048, 96-1061, 1998 U.S. App. LEXIS 3864 (10th Cir. March 4, 1998).....	421
<i>Quickturn Design System, Inc. v. Shapiro</i> , 721 A.2d 1281 (Del. 1998).....	184, 269, 321, 345, 346
<i>Quinn v. Anvil Corporation</i> , 620 F.3d 1005 (9th Cir. 2010)	97
<i>RAA Management, LLC v. Savage Sports Holdings, Inc.</i> , 45 A.3d 107 (Del. 2012).....	277
<i>Raab v. Villager Indus., Inc.</i> , 355 A.2d 888 (Del. 1976), <i>cert. denied sub nom.</i> <i>Mitchell v. Villager Indus., Inc.</i> , 429 U.S. 853 (1976).....	434
<i>Rabkin v. Olin Corp.</i> , C.A. No. 7547, 1990 Del. Ch. LEXIS 50, Fed. Sec. L. Rep. (CCH) 95255 (Del. Ch. Apr. 17, 1990), <i>reprinted in</i> 16 Del. J. Corp. L. 851 (1991), <i>aff'd</i> , 586 A.2d 1202 (Del. 1990).....	210
<i>Rales v. Blasband</i> , 634 A.2d 927 (Del. 1993)	25, 87, 91, 208
<i>Rand v. Western Air Lines, Inc.</i> , C.A. No. 8632, 1994 WL 89006 (Del. Ch. Feb. 25, 1994)	306, 309
<i>Raynor v. LTV Aerospace Corp.</i> , 317 A.2d 43 (Del. Ch. 1974).....	435
<i>In re Reading Co.</i> , 711 F.2d 509 (3d Cir. 1983).....	300
<i>Redmon v. Griffith</i> , 202 S.W.3d 225 (Tex. App.—Tyler 2006, pet denied).....	61, 63, 79, 442, 449, 451, 453
<i>Reis v. Hazelett Strip-Casting Corporation</i> , 28 A.3d 442 (Del. Ch. 2011).....	389
<i>Related Westpac LLC v. JER Snowmass LLC</i> , No. 5001-VCS, 2010 WL 2929708 (Del. Ch. July 23, 2010).....	485
<i>In re Resorts International Shareholders Litigation</i> , 570 A.2d 259 (Del. 1990)	206, 211
<i>Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.</i> , 506 A.2d 173 (Del. 1986).....	139, 185, 187, 188, 197, 198, 222, 227, 228, 231, 232, 233, 236, 237, 238, 241, 247, 248, 249, 251, 252, 253, 254, 255, 256, 259, 260, 261, 262, 267, 269, 270, 271, 273, 274, 276, 282, 284, 285, 287, 288, 290, 294, 304, 305, 307, 308, 310, 313, 318, 322, 327, 344, 371, 372, 396
<i>In re Revlon, Inc. Shareholders Litigation</i> , 990 A.2d 940 (Del. Ch. 2010).....	396
<i>Riblet Products Corp. v. Nagy</i> , 683 A.2d 37, 38 (Del. 1996).....	442, 454
<i>Rich v. Chong</i> , 66 A.3d 963 (Del. Ch. 2013).....	419
<i>Ritchie v. Rupe</i> , 339 S.W.3d 275 (Tex. App.—Dallas 2011, pet. granted)	443, 448
<i>Ritchie v. Rupe</i> , 443 S.W.3d 856 (Tex. 2014)	3, 7, 8, 9, 84, 442, 443, 444, 445, 446, 447, 448, 450, 453
<i>RJ Assocs., Inc. v. Health Payors' Org. Ltd. P'ship, HPA, Inc.</i> , No. 16873, 1999 WL 550350 (Del. Ch. July 16, 1999) (mem. op.).....	463
<i>Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings Inc.</i> , No. 5745-VCS, 2010 WL 5276991 (Del. Ch. Dec. 17, 2010).....	435
<i>Roberts v. General Instrument Corp.</i> , C.A. No. 11639, 1990 WL 118356 (Del. Ch. Aug. 13, 1990).....	302, 306, 310
<i>Robinson v. T.I.M.E.-DC, Inc.</i> , 566 F. Supp. 1077 (N.D. Tex. 1983)	64
<i>Romero v. US Unwired, Inc.</i> , No. 04-2312, 2006 WL 2366342 (E.D. La. Aug. 11, 2006)	97
<i>Roselink Investors, L.L.C. v. Shenkman</i> , 386 F.Supp.2d 209 (S.D.N.Y. 2004).....	141

<i>Roth v. Mims</i> , 298 B.R. 272 (N.D. Texas 2003)	141
<i>RSL Communications PLC ex rel. Jervis v. Bildirici</i> , 2006 WL 2689869 (S.D.N.Y. 2006)	141
<i>RTC v. Acton</i> , 844 F. Supp. 307 (N.D. Tex. 1994)	12
<i>RTC v. Miramon</i> , 22 F.3d 1357 (5th Cir. 1994)	12
<i>RTC v. Norris</i> , 830 F. Supp. 351 (S.D. Tex. 1993)	12, 13
<i>Rudisill v. Arnold White & Durkee, P.C.</i> , 148 S.W.3d 556 (Tex. App.—Houston [14th Dist] 2004, no pet.)	427
<i>In re Rural/Metro Corp. S’holders Litig.</i> , 88 A.3d 54 (Del. Ch. 2014)	58
<i>In re Rural/Metro Corp. S’holders Litig.</i> , Consol. C.A. No. 6350-VCL (Del. Ch. Oct. 10, 2014)	58
<i>Ryan v. Gifford</i> , 918 A.2d 341 (Del. Ch. 2007)	86, 87, 164, 167, 171, 172, 173
<i>Ryan v. Gifford</i> , C.A. No. 2213-CC, 2007 WL 4259557 (Del. Ch. Dec. 3, 2007)	165
<i>Ryan v. Gifford</i> , C.A. No. 2213-CC, 2009 WL 18143 (Del. Ch. Jan. 2, 2009)	167
<i>Ryan v. Lyondell Chemical Company</i> , C.A. No. 3176-VCN, 2008 WL 2923427 (Del. Ch. July 29, 2008) (“ <i>Lyondell I</i> ”) and on denial of certification of interlocutory appeal 2008 WL 4174038 (Del. Ch. August 29, 2008) (“ <i>Lyondell II</i> ”)	236, 237, 245, 246, 247, 248, 249, 251, 382
<i>Saito v. McCall</i> , No. 17132-NC, 2004 WL 3029876 (Del. Ch. Dec. 20, 2004)	92
<i>Sample v. Morgan</i> , 914 A.2d 647 (Del. Ch. 2007)	18, 160
<i>Sample v. Morgan</i> , 935 A.2d 1046 (Del. Ch. 2007)	162
<i>San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.</i> , 938 A.2d 304 (Del. Ch. 2009)	349, 351
<i>San Antonio Fire & Police Pension Fund v. Bradbury</i> , C.A. No. 4446-VCN, 2010 Del. Ch. LEXIS 218 (Del. Ch. Oct. 28, 2010)	351
<i>San Antonio Models, Inc. v. Peeples</i> , 686 S.W.2d 666 (Tex. App.—San Antonio 1985, no writ)	413
<i>In re Sanchez Energy Derivative Litigation</i> , Consol. C.A. No. 9132-VCG, 2014 WL 6673895 (Del. Ch. Nov. 25, 2014)	189
<i>In re Santa Fe Pacific Corp. Shareholder Litigation</i> , 669 A.2d 59 (Del. 1995)	187
<i>Schacht v. Brown</i> , 711 F.2d 1343 (7th Cir 1983)	144
<i>Schilling v. Belcher</i> , 582 F.2d 995 (5th Cir. 1978)	97
<i>In re Schmitz</i> , 285 S.W.3d 451 (Tex. 2009)	94
<i>Schnell v. Chris-Craft Industries</i> , 285 A.2d 437 (Del. 1971)	407, 408
<i>Schrage v. Bridgeport Oil Co., Inc.</i> , 71 A.2d 882 (Del. Ch. 1950)	300
<i>Schreiber v. Carney</i> , 447 A.2d 17, 21 (Del. Ch. 1982)	96
<i>Schwinger v. United States</i> , 652 F. Supp. 464 (E.D.N.Y. 1987)	140
<i>Scion Breckenridge Managing Member LLC v. ASB Allegiance Real Estate</i> , 68 A.3d 665 (Del. May 9, 2013)	471
<i>In re Scott Acquisition Corp.</i> , 344 B.R. 283 (Bankr. D. Del.)	144
<i>Scruggs Management Appellant Services, Inc. v. Hanson</i> , 2006 WL 3438243 (Tex. App.—Fort Worth, Nov. 30, 2006, pet. denied)	10
<i>Sea-Land Corp. S’holders Litig.</i> , 1987 WL 11283 (Del. Ch. May 22, 1987)	297
<i>Seagraves v. Urstady Property Co.</i> , C.A. No. 10307, 1996 Del. Ch. LEXIS 36 (Del. Ch. Apr. 1, 1996)	207

<i>Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.</i> , No. 8853, 1987 WL 12500 (Del. Ch. June 19, 1987)	166
<i>Security National Bank v. Peters, Writer & Christenson, Inc.</i> , 569 P.2d 875 (Colo. Ct. App. 1977)	64
<i>Selectica, Inc. v. Versata, Inc.</i> , 5 A.3d 586 (Del. Oct. 4, 2010), affirming C.A. No. 4241-VCN, 2010 WL 703062 (Feb. 26, 2010)	346, 347
<i>Selfe v. Joseph</i> , 501 A.2d 409 (Del. 1985).....	437
<i>Sheppard v. A.C.&S Co., Inc.</i> , 484 A.2d 521 (Del. Super. Ct. 1984).....	429
<i>Sherwood v. Chan Tze Ngon</i> , C.A. No. 7106-VCP, 2011 Del. Ch. LEXIS 202 (Del. Ch. Dec. 20, 2011)	35, 48
<i>Shocking Technologies, Inc. v. Michael</i> , C.A. No. 7164-VCN, 2012 Del. Ch. LEXIS 224 (Del. Ch. Oct. 1, 2012).....	32, 33, 35, 412
<i>In re Siliconix Inc. S'holders Litig.</i> , C.A. No. 18700, 2001 WL 716787 (Del. Ch. June 19, 2001)	190, 357, 457, 458
<i>Sinclair Oil Corp. v. Levien</i> , 280 A.2d 717 (Del. 1971).....	53, 64, 183
<i>Skeen v. Jo-Ann Stores, Inc.</i> , 750 A.2d 1170 (Del. 2000)	39, 31, 42, 43
<i>Smith v. Bolin</i> , 271 S.W.2d 93 (Tex. 1954)	462
<i>Smith v. Van Gorkom</i> , 488 A.2d 858 (Del. 1985).....	54, 184, 202, 203, 206, 235, 247, 266, 268, 273, 314
<i>SmithKline Beecham Corp. v. Rohm and Haas Corp.</i> , 89 F.3d 154 (3d Cir. 1996)	429
<i>In re Smurfit-Stone Container Corp. S'holder Litig.</i> , C.A. No. 6164-VCP, 2011 Del. Ch. LEXIS 79 (Del. Ch. May 20, 2011)	188
<i>Solar Cells, Inc. v. True N. Partners, LLC</i> , C.A. No. 19477, 2002 WL 749163 (Del. Ch. Apr. 25, 2002)	488
<i>Solash v. Telex Corp.</i> , No. 9518, 9528, 9525, 1988 WL 3587 (Del. Ch. 1988).....	14
<i>Solomon v. Pathe Communications Corp.</i> , 672 A.2d 35 (Del. 1996).....	356, 357
<i>Somers v. Crane</i> , 295 S.W.3d 5 (Tex. App.—Houston [1st Dist.] 2009), pet denied).....	79, 93, 98
<i>Sonitrol Holding Co. V. Marceau Investissements</i> , 607 A.2d 1177 (Del. 1992).....	64
<i>In re Southern Peru Copper Corporation Shareholder Derivative Litigation</i> , 52 A.3d 761 (Del. Ch. 2011), <i>aff'd</i> <i>Americas Mining Corp. v. Theriault</i> , 51 A.3d 1213 (Del 2012)	241, 244
<i>Spangler v. Jones</i> , 861 S.W.2d 392, 394-96 (Tex. App.—Dallas 1993).....	423
<i>Spiegel v. Buntrock</i> , 571 A.2d 767 (Del. 1990).....	207
<i>In re SS&C Technologies, Inc. Shareholders Litigation</i> , 911 A.2d 816 (Del. Ch. 2006)....	207, 217
<i>Stahl v. Apple Bancorp Inc.</i> , 1990 WL 114222 (Del. Ch. Aug. 9, 1990)	337
<i>Stanziale v. Pepper Hamilton, LLP, (In re Student Finance Corp.)</i> , 335 B.R. 539 (D. Del. 2005)	144
<i>Starr Surgical Co. v. Waggoner</i> , 588 A.2d 1130 (Del. 1991)	424
<i>State v. Nevitt</i> , 595 S.W.2d 140 (Tex.App.—Dallas 1980, writ ref'd n.r.e.).....	128
<i>Staton Holdings, Inc. v. Tatum, L.L.C.</i> , 345 S.W.3d 729 (Tex. App.—Dallas 2011, pet. denied)	277
<i>Steel Partners II, L.P. v. Point Blank Solutions, Inc.</i> , C.A. No. 3695-CC, 2008 WL 3522431 (Del. Ch. Aug. 12, 2008)	426
<i>Steinhardt v. Howard-Anderson</i> , C.A. No. 5878-VCL, 2011 Del. Ch. LEXIS 1 (Del. Ch. Jan. 29, 2011)	187

<i>Stephenson v. Commonwealth & S. Corp.</i> , 156 A. 215 (Del. Ch. 1931), <i>aff'd on other grounds</i> , 168 A. 211 (Del. 1933)	434
<i>Stone v. Ritter</i> , 911 A.2d 362 (Del. 2006)	5, 17, 18, 16, 20, 22, 26, 49, 56, 139, 235, 466, 488
<i>Stonecipher v. Butts</i> , 591 S.W.2d 806, 809 (Tex. 1979)	452
<i>Story v. Kennecott Copper Corporation</i> , 394 N.Y.S.2d 353, Sup. Ct. (1977)	424
<i>Stourbridge Investments LLC v. Bersoff</i> , Transcript (Laster, V.C., March 13, 2012)	44
<i>Strassburger v. Earley</i> , 752 A.2d 557 (Del. Ch. 2000)	15, 209, 210, 211
<i>Strebel v. Wimberly II</i> , 371 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2012, <i>pet. denied</i>)	463
<i>Stroud v. Grace</i> , 606 A.2d 75, 95 (Del. 1992)	403, 405
<i>Subaru of Am. v. David McDavid Nissan</i> , 84 S.W.3d 212 (Tex. 2002)	475, 477
<i>Sullivan Money Management, Inc. v. FLS Holdings, Inc.</i> , C.A. No. 12731, 1992 WL 345453 (Del. Ch. Nov. 20, 1992), <i>aff'd</i> 628 A.2d 84 (Del. 1993)	71, 76
<i>Suntech Processing Sys., L.L.C. v. Sun Communications, Inc.</i> , No. 05-99-00213-CV, 2000 WL 1780236 (Tex. App.—Dallas Dec. 5, 2000, <i>pet. denied</i>) (not designated for publication)	474
<i>Superior Vision Services v. Reliastar Life Ins. Co.</i> , C.A. No. 1668-N, 2006 WL 2521426 (Del. Ch. Aug. 25, 2006)	458
<i>Sutherland v. Sutherland</i> , C.A. No. 2399-VCL, 2009 Del. Ch. LEXIS 46 (Del. Ch. March 23, 2009), <i>clarified by</i> No. 2399-VCL, 2009 Del. Ch. LEXIS 52 (Del. Ch. Apr. 22, 2009)	123
<i>In re Synthes, Inc. S'holder Litig.</i> , 50 A.3d 1022 (Del. Ch. 2012)	15, 187, 197
<i>Swain v. Wiley College</i> , 74 S.W.3d 143, 150 (Tex. App.—Texarkana 2002, <i>no. pet.</i>)	422
<i>Swomley v. Schlecht</i> , C.A. No. 9355-VCL (Del Ch. Aug. 27, 2014)	195
<i>T. Rowe Price Recovery Fund, L.P. v. Rubin</i> , 770 A.2d 536 (Del. Ch. 2000)	206
<i>T.A. Pelsue Co. v. Grand Enterprises Inc.</i> , 782 F. Supp. 1476 (D. Colo. 1991)	421
<i>In re Talley Indus., Inc. Shareholders Litigation</i> , C.A. No. 15961, 1998 WL 191939 (Del. Ch. 1998)	203
<i>Taylor v. First Community Credit Union</i> , 316 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2010, <i>no. pet.</i>)	417
<i>Teachers' Retirement System of Louisiana v. Aidinoff</i> , 900 A.2d 654 (Del. Ch. 2006)	173
<i>In re Tele-Communications, Inc. Shareholders Litig.</i> , C.A. No. 16470-CC, 2005 WL 3642727 (Del. Ch. Dec. 21, 2005, revised Jan. 10, 2006)	212, 213
<i>In re Telesport Inc.</i> , 22 B.R. 527 (Bankr. E.D. Ark. 1982)	419
<i>The Bremen v. Zapata Off-Shore Co.</i> , 407 U.S. 1 (1972)	400
<i>In re The Limited, Inc. S'holders Litigation</i> , C.A. No. 17148-NC, 2002 Del. Ch. LEXIS 28, (Del. Ch. Mar. 27, 2002)	116
<i>Thornton v. Bernard Technologies, Inc.</i> , C.A. No. 962-VCN, 2009 WL 426179 (Del. Ch. Feb. 20, 2009)	18, 127
<i>Thorpe v. CERBCO, Inc.</i> , 676 A.2d 436 (Del. 1996)	10, 424
<i>ThoughtWorks, Inc. v. SV Investment Partners, LLC</i> , 902 A.2d 745 (Del. Ch. 2006)	63
<i>In re Times Mirror Co. Shareholders Litigation</i> , C.A. No. 13550, 1994 WL 1753203 (Del. Ch. Nov. 30, 1994) (Bench Ruling)	300, 301
<i>Tooley v. Donaldson, Lufkin & Jenrette, Inc.</i> , 845 A.2d 1031 (Del. 2004)	79, 80, 96, 135, 482

<i>In re Topps Company Shareholders Litigation</i> , 926 A.2d 58 (Del. Ch. 2007).....	226, 228, 279, 280, 312, 313, 328
<i>Torch Liquidating Trust v. Stockstill</i> , 561 F.3d 377 (5th Cir. 2009)	127, 133, 134, 137
<i>In re Toys “R” Us, Inc. Shareholder Litigation</i> , 877 A.2d 975 (Del. Ch. 2005)	283, 291, 312
<i>In re Trados Incorporated Shareholder Litigation</i> , No. 1512-VCL, 2009 WL 2225958 (Del. Ch. July 24, 2009) (<i>Trados I</i>)	65
<i>In re Trados Inc. Shareholder Litig.</i> , C.A. No. 1512-VCL, 2013 WL 4511262 (Del. Ch. Aug. 16, 2013) (<i>Trados II</i>).....	69, 70, 71
<i>In re Trans World Airlines, Inc. Shareholders Litig.</i> , C.A. No. 9844, 1988 Del. Ch. LEXIS 139 (Del. Ch. Oct. 21, 1988), <i>reprinted in</i> 14 Del. J. Corp. L. 870 (1989)	212
<i>Trenwick America Litig. Trust v. Billett</i> , 931 A.2d 438 (Del. 2007)	145
<i>Trenwick America Litigation Trust v. Ernst & Young LLP, et al.</i> , 906 A.2d 168 (Del. Ch. 2006)	144, 146, 147, 148
<i>Triplex Shoe Co. v. Rice</i> , 152 A. 342 (Del. 1930)	424
<i>TW Services v. SWT Acquisition Corp.</i> , C.A. No. 10427, 1989 Del. Ch. LEXIS 19 (Mar. 2, 1989)	340, 342
<i>In re Tyson Foods, Inc. Consolidated Shareholder Litigation</i> , 919 A.2d 563 (Del. Ch. 2007)	85, 167, 168, 171, 172, 173
<i>In re Tyson Foods, Inc. Consolidated Shareholder Litigation</i> , C.A. No. 1106-CC, 2007 WL 2351071 (Del. Ch. Aug. 15, 2007)	171
<i>In re United Finance Corporation</i> , 104 F.2d 593 (7th Cir. 1939).....	131
<i>United Technologies v. Treppel</i> , 2014 Del. LEXIS 608 (Del. Dec. 23, 2014)	415
<i>Unitrin, Inc. v. America General Corp.</i> , 651 A.2d 1361 (Del. 1995).....	185, 197, 202, 205, 268, 269, 270, 403
<i>Unocal Corp. v. Mesa Petroleum Co.</i> , 493 A.2d 946 (Del. 1985)	53, 183, 184, 185, 202, 205, 236, 267, 268, 269, 285, 301, 307, 316, 317, 318, 327, 331, 339, 342, 344, 346, 370
<i>U.S. Bank v. Stanley</i> , 297 S.W.3d 815 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ..	129, 137
<i>In re USACafes, L.P. Litig.</i> , 600 A.2d 43 (Del. Ch. 1991)	472, 489
<i>Valeant Pharmaceuticals International v. Jerney</i> , 921 A.2d 732 (Del. Ch. 2007)	174, 175, 176
<i>VantagePoint Venture Partners 1996 v. Examen, Inc.</i> , 871 A.2d 1108 (Del. 2005).....	5, 75
<i>In Re: Vartec Telecom, Inc.</i> , Case No. 04-81694-HDH-7 2007 WL 2872283 (U.S. Bkr. Ct. N.D. Tex. September 24, 2007).....	128
<i>In re Verestar, Inc.</i> , 343 B.R. 444 (Bankr. S.D.N.Y. 2006)	141, 144
<i>In re Villa West Assocs.</i> , 146 F.3d 798 (10th Cir. 1998)	463
<i>In re Vitalink Communications Corp. Shareholders Litigation</i> , C.A. No. 12085, 1991 WL 238816 (Del. Ch. 1991)	204, 272, 310
<i>Wal-Mart Stores, Inc. v. Coughlin</i> , 255 S.W.3d 424 (Ark. 2007)	149
<i>Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW</i> , No. 614, 2013 (Del. July 23, 2014)	166, 416
<i>In re Walt Disney Co. Derivative Litigation</i> , 731 A.2d 342 (Del. Ch. 1998), <i>aff’d in part, rev’d in part sub nom. Brehm v. Eisner</i> , 746 A.2d 244 (Del. 2000)	116
<i>In re The Walt Disney Co. Derivative Litigation</i> , 825 A.2d 275 (Del. Ch. 2003).....	150, 157, 158, 159
<i>In re The Walt Disney Co. Derivative Litigation</i> , 907 A.2d 693 (Del. Ch. 2005).....	3, 150, 153

<i>In re The Walt Disney Co. Derivative Litigation</i> , 906 A.2d 27 (Del. 2006).....	3, 17, 21, 61, 62, 149, 150, 153, 154, 249
<i>Warner Communications Inc. v. Chris-Craft Indus., Inc.</i> , 583 A.2d 962 (Del. Ch. 1989), <i>aff'd</i> , 567 A.2d 419 (Del. 1989).....	64, 76
<i>Warren v. Warren Equip. Co.</i> , 189 S.W.3d 324, 329 (Tex. App.— Eastland 2006, no pet.)	442
<i>Watchmark Corp. v. ARGO Global Capital, LLC, et al</i> , C.A. 711-N, 2004 WL 2694894 (Del. Ch. Nov. 4, 2004).....	77
<i>Watson v. Limited Partners of WCKT, Ltd.</i> , 570 S.W.2d 179 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.)	461
<i>Wayne County Employees' Retirement System v. Corti</i> , 954 A.2d 319 (Del. Ch. 2008).....	367
<i>Wayne County Employees' Ret. Sys. v. Corti</i> , C.A. No. 3534-CC, 2009 Del. Ch. LEXIS 126 (Del. Ch. July 24, 2009)	257
<i>In re Wayport, Inc. Litigation</i> , 76 A.3d 296 (Del. Ch. 2013)	49
<i>Weaver v. Kellog</i> , 216 B.R. 563 (S.D. Tex. 1997).....	141
<i>Webre v. Sneed</i> , 358 S.W.3d 322 (Tex. App.—Houston [1st Dist.] 2011, pet. granted), later proceeding at 2014 Tex. LEXIS 779 (Aug. 29, 2014).....	61, 63, 83, 93
<i>Weinberger v. UOP, Inc.</i> , 457 A.2d 701 (Del. 1983)	70, 147, 175, 189, 191, 203, 204, 211, 212
<i>Weinstein Enterprises, Inc. v. Orloff</i> , 870 A.2d 499 (Del. 2005)	425
<i>In re Western National Corp. Shareholders Litigation</i> , No. 15927, 2000 WL 710192 (Del. Ch. May 22, 2000).....	206
<i>Williams v. Geier</i> , 671 A.2d 1368 (Del. 1996)	183
<i>Willis v. Bydalek</i> , 997 S.W.2d 798 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).....	442, 449, 450
<i>Wingate v. Hajdik</i> , 795 S.W.2d 717 (Tex. 1990).....	79
<i>Wood v. Coastal States Gas Corp.</i> , 401 A.2d 932 (Del. 1979)	63
<i>Xerox Corp. v. Genmoora Corp.</i> , 888 F.2d 345 (5th Cir.1989).....	420
<i>Yucaipa American Alliance Fund II, L.P. v. Riggio et al.</i> , 1 A.3d 310 (Del. Ch. 2010).....	335, 339, 342
<i>Zapata Corp. v. Maldonado</i> , 430 A.2d 779 (Del. 1981)	61, 99
<i>Zauber v. Murray Sav. Ass'n</i> , 591 S.W.2d 932, 935 (Tex. Civ. App. – Dallas 1979), writ ref'd per curiam, 601 S.W.2d 940 (Tex. 1980)	93, 97
<i>In Re Zhongpin Inc. Consolidated Stockholders Litigation</i> , No. 7393-VCN (Del. Ch. Nov. 26, 2014).....	189
<i>Zimmerman v. Adhezion Biomedical LLC</i> , 62 A.3d 676 (Del. Ch. 2013)	482
<i>Zirn v. VLI Corp.</i> , 621 A.2d 773 (Del. 1993)	57, 122
<i>Zirn v. VLI Corp.</i> , 1989 WL 79963 (Del. Ch. July 17, 1989).....	73, 74
<i>In re Zoran Corporation Derivative Litigation</i> , 511 F. Supp. 2d 986 (N.D. Cal. 2007)	173

HOW RECENT FIDUCIARY DUTY CASES AFFECT ADVICE TO DIRECTORS AND OFFICERS OF DELAWARE AND TEXAS CORPORATIONS

By

Byron F. Egan, Dallas, TX*

I. Introduction.

The conduct of corporate directors and officers is subject to particular scrutiny in the context of business combinations (whether friendly or hostile), executive compensation and other affiliated party transactions, allegations of illegal or improper corporate conduct, and corporate insolvency. The individuals who serve in leadership roles for corporations are fiduciaries in relation to the corporation and its owners.

Increasingly the courts are applying principles articulated in cases involving mergers and acquisitions (“M&A”) to cases involving executive compensation, perhaps because both areas often involve conflicts of interest and self-dealing or because in Delaware, where many of the cases are tried, the same judges are writing significant opinions in both areas. Director and officer fiduciary duties are generally owed to the corporation and its shareholders, but when the corporation is insolvent, the constituencies claiming to be beneficiaries of those duties expand to include the entity’s creditors.

Similar fiduciary principles are applicable to governing persons of a general or limited partnership and a limited liability company (“LLC”). These entities are often referred to as “alternative entities” in recognition that the rights and duties of their owners and governing persons can be modified by contract to greater extent than is permitted in the case of corporations.

The focus of the Congress of the United States (“U.S.”) on how corporations should be governed following corporate debacles early in the last decade led to the Sarbanes-Oxley Act of

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Byron F. Egan is a partner of Jackson Walker L.L.P. in Dallas, Texas. Mr. Egan is Senior Vice-Chair and Chair of the Executive Council of the ABA Business Law Section’s Mergers and Acquisitions Committee and former Co-Chair of its Asset Acquisition Agreement Task Force, which published the *ABA Model Asset Purchase Agreement with Commentary* (2001). He is also a member of the American Law Institute. Mr. Egan is also Chair of the Texas Business Law Foundation and is former Chairman of the Business Law Section of the State Bar of Texas and of that Section’s Corporation Law Committee. See *Egan on Entities* attached as **Appendix F**.

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2002 (“SOX”).¹ SOX was intended to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.²

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)³ into law. This sweeping legislation governs not only the financial services industry, but also public companies generally.

On April 5, 2012, President Obama signed the Jumpstart Our Business Startups Act (the “JOBS Act”)⁴ into law. This legislation was enacted to bolster economic growth by providing certain private companies with greater access to early funding opportunities and exemptions from SOX.

While SOX, Dodd-Frank, the JOBS Act, and related changes to SEC rules and stock exchange listing requirements have mandated changes in corporate governance practices, our emphasis will be on state corporate statutes and common law.⁵ Our focus will be in the context of companies organized under the applicable Delaware and Texas statutes.

Prior to January 1, 2006, Texas business corporations were organized under, and many are still governed by, the Texas Business Corporation Act, as amended (the “TBCA”),⁶ which was supplemented by the Texas Miscellaneous Corporation Laws Act (the “TMCLA”).⁷ However, corporations formed after January 1, 2006 are organized under and governed by the Texas Business Organization Code (“TBOC”),⁸ which was extensively amended in the 82nd Texas Legislature, 2011 Regular Session (the “2011 Texas Legislature Session”),⁹ and the 83rd

¹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in several sections of 15 U.S.C.A.) (“SOX”); see *infra* **Appendix A**; Byron F. Egan, *Major Themes of the Sarbanes-Oxley Act*, 42 TEX. J. BUS. L. 339 (Winter 2008), available at <http://www.jw.com/site/jsp/publicationinfo.jsp?id=1186>; and Byron F. Egan, *Perils of In-House Counsel* (July 22, 2010), <http://www.jw.com/site/jsp/publicationinfo.jsp?id=1430>.

² SOX is generally applicable to all companies required to file reports, or that have a registration statement on file, with the Securities and Exchange Commission (“SEC”) regardless of size (“public companies”). Although SOX does have some specific provisions, and generally establishes some important public policy changes, it is implemented in large part through rules adopted by the SEC. See Summary of the Sarbanes-Oxley Act of 2002 attached as **Appendix A**. Among other things, SOX amends the Securities Exchange Act of 1934 (the “1934 Act”) and the Securities Act of 1933 (the “1933 Act”).

³ H.R. 4173, 111th Cong. (2nd Sess. 2010). See **Appendix B**. See also J.W. Verret, *Defending Against Shareholder Proxy Access: Delaware’s Future Reviewing Company Defenses in the Era of Dodd-Frank* (2010), George Mason University Law and Economics Research Paper No. 10-37, available at http://ssrn.com/abstract_id=1655482.

⁴ H.R. 3606, 112th Cong. (2012). See **Appendix A**.

⁵ See William B. Chandler III & Leo E. Strine Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State* (February 26, 2002), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=367720; cf. Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1 (2007); Leo E. Strine, Jr., *Toward A True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 HARV. L. REV. 1759 (2006).

⁶ TEX. BUS. CORP. ACT ANN. arts. 1.01 *et. seq.* (Vernon Supp. 2007) [hereinafter “TBCA”].

⁷ TEX. REV. CIV. STAT. ANN. art. 1302 (Vernon Supp. 2007).

⁸ The TEX. BUS. ORGS. CODE ANN. [hereinafter “TBOC”] provides that provisions applicable to corporations (TEX. BUS. ORGS. CODE ANN. Titles 1 and 2) may be officially and collectively known as “Texas Corporation Law” (TEX. BUS. ORGS. CODE ANN. § 1.008(b)). A detailed Table of Contents for the TBOC as of September 1, 2013 appears as **Appendix C**.

⁹ Byron F. Egan, *Business Entities in Texas after 2011 Texas Legislature* (July 13, 2011), <http://www.jw.com/publications/article/1629>.

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