# 2019 BAIRD HOLM LLP
# IN-HOUSE COUNSEL CLE

## WEDNESDAY, DECEMBER 4, 2019

BH

BAIRD HOLM LLP
ATTORNEYS AT LAW

1700 FARNAM STREET, SUITE 1500 · OMAHA, NE 68102 · **WWW.BAIRDHOLM.COM**

BH | BAIRD HOLM LLP
ATTORNEYS AT LAW

***Pigs Get Fed (or Fat), Hogs Get Slaughtered:***
**Drafting Enforceable Employment Non-Compete Agreements in Nebraska**

**R.J. (Randy) Stevenson**

My apologies to PETA


BH | BAIRD HOLM LLP
ATTORNEYS AT LAW

Interesting title.
So what is the point?

BH | BAIRD HOLM LLP
ATTORNEYS AT LAW

## Here is the point:

- Don't believe others – properly drafted non-compete agreements are enforceable
- Follow the "magic language" found in over 30 years' of Nebraska Supreme Court case law
- Limit the non-compete to one year
- Have good consideration
- Avoid restrictions on former/future customers

Do the above and the courts will view you as a good little piggy who should be fed (*i.e.*, win)

BH | BAIRDHOLM LLP ATTORNEYS AT LAW

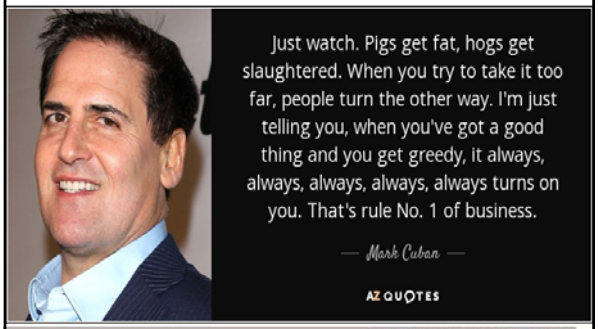
## Here is the point (cont.):

- If you ignore Nebraska Supreme Court case law, or
- Attempt to restrict competition for more than one year, or
- Don't have good consideration, or
- Try to restrict competition with *former* or *prospective* customers

Then you will have a big problem. The courts will view you as a hog who should be slaughtered (*i.e.*, you lose). Bacon anyone?

BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## The No. 1 Rule of Business: Don't Get Greedy




BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## So When Should an Employer Use a Non-Compete Agreement in Nebraska?

- First, when there is customer/client goodwill to protect (*i.e.*, a business relationship that the employer has paid the employee to maintain or develop on its behalf)
- Second, see above
- Third, see above

## What Consideration (Quid Pro Quo) Is Required to Support a Non-Compete?

- *Yes Mr. President, there must be "quid pro quo." It's not always a bad thing!*
- Adequate consideration in Nebraska:
  - Signing is a condition of initial employment – Yes
  - Signing is a condition of continued employment – Dangerous. Not clearly recognized by courts
  - Signing is a condition of initial employment – Yes
  - Continued access to employer's confidential information/customers/business plans – Yes
  - Promotion/bonus/pay increase – Yes

## Yes. Thank you, Mick.

## Test of Enforceability

The three-part test of enforceability for an employee non-compete agreement in Nebraska:

- Is it injurious to the public?
- Is it unduly harsh and oppressive on the employee?
- Is it greater than reasonably necessary to protect the employer in some legitimate interest?
  - ***This third factor is typically the litigation "battleground"***

## Test of Enforceability (cont.)

No greater than reasonably necessary to protect the employer in a legitimate interest:

– May not prohibit ordinary competition (*e.g.*, cannot compete within a 30 mile radius)

– May protect goodwill/current customer relationships, but –

- Former customer restrictions – very risky
- Prospective customers – risky

## Test of Enforceability (cont.)

Following is a simple version of the Nebraska Supreme Court's "magic language" for employee non-compete agreements:

"For a period of one year following the termination of employment, employee shall not work for or solicit customers with whom employee actually did business and had personal contact while employed by employer."


Yes, so long as you are a pig.
Not so if you are a hog.

## Judicial Reformation

Consequences of overly-broad/ agreement:

- No reformation or "blue-penciling." It's not going to happen. Period. The courts will not revise language to make it enforceable.
- One overly-broad provision will "infect" other, otherwise enforceable provisions
- The courts will not sever unreasonable language.
- It makes no difference even if the parties' agreement requests the court to reform the agreement – the courts do not believe they have the authority to draft the parties' contract.

## Other Considerations

- Choice of law
  - Courts may not apply another state's law just because the parties agreed to it
  - Typically, courts apply the law of the state with the "greatest interest" in the controversy (looking at factors such as where the employee performed services, where the business is located, etc.)
- Choice of forum
  - Typically observed by the courts. Therefore, within reason (there must be a credible nexus), force the lawsuit in the state with the law you want to apply. Even then, the court may apply foreign law.

So remember, be a pig . . .

. . . and not a hog. Life will be much better!


Questions?

Thank you!

**R.J. (Randy) Stevenson**
rstevenson@bairdholm.com
402.636.8226

BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# Evaluating Corporate Compliance Programs: How the DOJ Measures Compliance

Kimberly A. Lammers

December 4, 2019

## DOJ Press Release Accompanying Guidance

- Effective compliance programs play a **critical role** in preventing misconduct, facilitating investigations, and informing fair resolutions. Today's guidance document is part of our broader efforts in training, hiring, and enforcement **to help promote corporate behaviors that benefit the American public** and ensure that **prosecutors evaluate the effectiveness of compliance in a rigorous and transparent manner**.
  - Assistant Attorney General Brian A. Benczkowski

## DOJ Health Care Activity

November 25, 2019

- **Tennessee Emergency Medical Doctor Pleads Guilty to Unlawfully Distributing Controlled Substances**

November 22, 2019

- **New Jersey/Pennsylvania Doctor Pleads Guilty to Accepting Bribes and Kickbacks In Exchange for Prescribing Powerful Fentanyl Drug**

November 15, 2019

- **Head of New York Medical Clinics Found Guilty in Nearly $100 Million Money Laundering and Health Care Kickback Scheme**

## DOJ Health Care Activity

November 13, 2019
- **Owner of Detroit-Area Health Care Clinics Pleads Guilty to Drug Diversion Scheme**

November 8, 2019
- **Insurance Broker Found Guilty of 22 Counts in $2 Million Scheme to Defraud Carefirst Bluecross Blueshield**

November 6, 2019
- **Three Individuals, Including A Former Texas Mayor, CEO and Owner, Found Guilty in a $154 Million Money Laundering and Health Care Fraud Scheme**



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## DOJ Financial Fraud Activity

November 25, 2019
- **Iowa Man Pleads Guilty to Fraud Charge for Role in Crude Oil Futures Trading Scheme**
- **Former Executives and Employees of Health Technology Start-Up Charged in a $1 Billion Scheme to Defraud Clients, Lenders and Investors**

November 22, 2019
- **Samsung Heavy Industries Company Ltd Agrees to Pay $75 Million in Global Penalties to Resolve Foreign Bribery Case**
- **Former President of Transportation Company Found Guilty of Violating the Foreign Corrupt Practices Act and Other Crimes**



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## DOJ Intellectual Property Activity

September 16, 2019
- **Couple Who Worked at Local Research Institute for 10 Years Charged with Stealing Trade Secrets, Wire Fraud**

August 27, 2019
- **Eight Defendants Charged with Running Two of the Largest Illegal Television Show and Movie Streaming Services in the United States**

July 30, 2019
- **Chinese National Sentenced to Over Three Years in Prison for Trafficking Counterfeit Apple Goods into the United States**



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## When Does the DOJ Evaluate an Organization's Compliance Program?

- Charging Decision:
  - To help prosecutors in determining whether they should decline to bring a case, or if resolution is appropriate, what the resolution should be



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## When Does the DOJ Evaluate an Organization's Compliance Program?

- Sentencing Decision:
  - To determine the organization's culpability score under the Sentencing Guidelines, which determines the range of fines that could be applied to the organization



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## When Does the DOJ Evaluate an Organization's Compliance Program?

- Decision on Whether to Require Independent Compliance Monitor:
  - To determine whether an independent compliance monitor is necessary to prevent reoccurrence of misconduct, or whether the organization's compliance program is sufficiently effective to permit the company to self-monitor



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Evaluation of Corporate Compliance Programs

- Original guidance released in February 2017
- Heavily focused on compliance program design
  - Existence of compliance policies and procedures
  - Autonomy and resources available for compliance
  - Organization's conduct in analyzing and remediating misconduct
- Updated guidance released April 2019 with expanded focus



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## New Focus on Implementation and Effectiveness

- New guidance contains increased focus on implementation and effectiveness of an organization's compliance program



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Three Fundamental Questions Prosecutors Will Ask

- Is the organization's compliance program well designed?
- Is the compliance program being conducted earnestly and in good faith, and has it been implemented effectively?
- Does the organization's compliance program work in practice?



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Key Questions Regarding Design

- Is compliance program designed for maximum effectiveness in preventing and detecting wrongdoing by employees?
- Is management enforcing compliance program requirements or tacitly encouraging or pressuring employees to engage in misconduct?



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Topics Regarding Compliance Program Design

- Risk assessment process
- Policies and procedures
- Training and communications
- Confidential reporting structure and investigation process
- Management of third-party agreements and relationships
- Mergers and acquisitions



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Compliance Program Design

- Has the organization identified its risk profile and devoted appropriate scrutiny and resources to those risks?
  - Avoids policing of low-risk areas at expense of reviewing high-risk areas
- What if any guidance and training has been provided to key gatekeepers in the control process?
  - Do they know what misconduct to look for?
  - Do they know when and how to escalate concerns?



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Compliance Program Design

- Are the organization's employees adequately informed about the compliance program?
- Are they convinced of the organization's commitment to compliance?
- How is training conducted (on-line, in person or both)?
  - What is the organization's rationale for this?
  - Does training address lessons learned from prior compliance incidents?



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Compliance Program Design

- Is comprehensive due diligence conducted on potential acquisition or affiliation targets?
- How were risks identified during due diligence process addressed?
- How are compliance policies and procedures implemented at new entities?



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Topics Regarding Effectiveness of Implementation

- Commitment by senior and middle management
- Autonomy and resources
- Incentives and disciplinary measures



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Commitment by Senior and Middle Management

- Does management tolerate greater compliance risks in pursuit of new business or greater revenues?
- Has management encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties?
- Does management have a genuine commitment to compliance that remains strong even in face of competing interests or business objectives?



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Board Oversight

- What compliance expertise is available to the board of directors?
- Does the board and/or external auditors hold private sessions with compliance?



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Autonomy and Resources

- Sufficient seniority within organization
- Sufficient resources, including sufficient staff, to effectively undertake requisite auditing, documentation and analysis
- Sufficient autonomy from management, including direct access to the board of directors or board's audit committee



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Topics Regarding Whether Compliance Program Works in Practice

- Continuous improvement, periodic testing and review
- Investigation of misconduct
- Analysis and remediation of misconduct



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Investigation of Misconduct

- Failure to prevent or detect misconduct does not mean the program is not effective
- DOJ recognizes no compliance program can ever prevent all misconduct
- If compliance program did effectively identify misconduct, and misconduct was timely remediated and self-reported, this is "strong indicator" the compliance program was working effectively



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Internal Audit

- What is the process for determining where and how frequently internal audit will undertake an audit?
- How are audits carried out?
- How often does internal audit conduct assessments in high-risk areas?
- What types of audit findings and remediation procedures have been reported to management and the board?



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Handling of Misconduct

- When issues are identified, is there timely action and self-reporting?
- Does the organization conduct a root cause analysis and make changes to prevent similar misconduct from occurring in future?
  - Which controls failed?
  - How was misconduct funded and what processes could have detected improper access to or use of funds?
  - Were prior indications of misconduct missed?
  - Were changes to policies and procedures made to prevent similar issues of misconduct?
  - Were managers held accountable for misconduct that occurred under their supervision?



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Questions?



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Thank you!

Kimberly A. Lammers
klammers@bairdholm.com
402-636-8219



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

# 2019 Corporate Law Update

Stephanie A. Mattoon
J. Scott Searl

## Pre-Judgment Interest

**Neb. Rev. Stat. § 45-104**

"Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing . . . on money received to the use of another and retained without the owner's consent . . . and on money loaned or due and withheld by unreasonable delay of payment."

***Weyh v. Gottsch***

- "§§ 45-103.02 and 45-104 provide separate and independent means of recovering prejudgment interest"
- § 45-104 available without regard to whether the claim is liquidated
- Takeaway: pre-judgment interest of 12% will be available for many claims

## Shareholder Inspection

***KT4 Partners v. Palantir Technologies***

- Major shareholder requested inspection
  - Purpose: "to investigate fraud, mismanagement, abuse, and breach of fiduciary duty"
- General Rule: emails should not be ordered produced if more traditional records would achieve purpose
- Court held the general rule did not apply to these facts
  - KT4 put forward evidence that wrongdoing occurred over email
  - Palantir did not observe corporate formalities
- Takeaway: inspection requests can reach emails in rare circumstances; observe corporate formalities

## Stock Ledger Maintenance

**In re *Hawk Systems***

- Action seeking declaration of status as majority shareholder, sole director, and sole officer
  - Petitioner has burden of proof by a preponderance
  - Stock ledger was "a mess"
  - Petitioner could only prove he owned 1/3 of the shares
- Court denied petitioner's request because he couldn't prove his status due to the lack of corporate records
- Takeaway: maintain a clean and accurate stock ledger



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Caremark Claims

***Marchland v. Barnhill***

- DE Supreme Court reversed dismissal of *Caremark* claim
- Listeria outbreak in Blue Bell ice cream killed 3
  - No Food Safety Committee
  - No board discussion of food safety
- No oversight = bad faith
  - Cannot be exculpated
- Takeaway = increased scrutiny on "intrinsically critical" issues

**In re *Clovis Oncology***

- Caremark claim post-*Marchland* survived motion to dismiss
- Clovis' clinical trial
  - Reporting unconfirmed responses → "red flag"
  - Drug safety "mission critical"
- Takeaway = easier to plead *Caremark* claims post-*Marchland*
  - Counter-Example: In re *LendingClub Corp.*



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Executive Compensation

***Howland v. Kumar***

- Lowered strike price of stock options before public announcement of patent
  - 94.4% owned by directors
  - Post-annoucement, stock skyrocketed from $0.69 to peak of $4.99
- Breach of duty of loyalty
- Takeaway: exercise caution when using non-public information to compensate executives

***Tornetta v. Musk***

- Compensation package for Elon Musk
  - Valued at $55.8 billion
  - Approved by board *and* shareholders
- Court applied *MFW* framework to executive compensation review
- Takeaway: ratification usually, but not always, effective



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Shareholders v. Stakeholders

**Bus. Roundtable, Statement on the Purpose of a Corp.**

"While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:

- Delivering value to our customers. . . .
- Investing in our employees. . . .
- Dealing fairly and ethically with our suppliers. . . .
- Supporting the communities in which we work. . . .
- Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate."



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Controlling Shareholder Transactions

***Olenik v. Lodzinski***

- Controlling shareholder transactions are subject to "entire fairness" review unless *MFW* protections are in place
- *MFW* Protections:
  - Approval of independent Special Committee
  - Uncoerced, informed vote of minority shareholders
- Must be in place "up front"
  - AKA before "substantive economic negotiations" (*Flood v. Synutra*)
  - Valuation = "substantive economic negotiations" (*Olenik v. Lodzinski*)
- Takeaway: put *MFW* protections in place from the start, or at least before valuation



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## "Interested" Directors

**In re *Towers Watson***

- Test for conflicts of minority of directors:
  - Conflicted director controls
  - Information "material"
- Seller's CEO received compensation proposal from shareholder of Buyer
  - Court: not material because board knew CEO was going to be executive of merged co.
- Takeaway: this was a close call; when in doubt, disclose

***BGC Partners*; *JSS v. Steelpoint***

- Conflicts found when Seller's
  - Directors served on Buyer-affiliated boards + personal relationships (i.e., attending galas, arranging a private tour, shared service to Buyer's alma mater) (*BGC*)
  - Managers were appointed by senior unitholder of Buyer (*JSS*)
  - Manager received large severance package before vote (*JSS*)
- Takeaway: conflicts may not be apparent; use independent Special Committees
- Neb. Rev. Stat. § 21-2,122



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# #MeToo Reps & Warranties

**Thomson Reuters Practical Law**

1. [To the Company's Knowledge,] [except as set forth in the Company Disclosure Letter,] [[I/i]n the last [five/[NUMBER]] years]:

(a)no allegations of sexual harassment [or sexual misconduct] have been made involving any [current/current or former] director, officer, [or ]employee [at the level of [vice president/[OTHER SENIORITY CLASSIFICATION] or above] of the Company or any of its Subsidiaries], and

(b)neither the Company nor any of its Subsidiaries have entered into any settlement agreements related to allegations of sexual harassment [or sexual misconduct] by any [current/current or former] director, officer, [or ]employee [at the level of [vice president/[OTHER SENIORITY CLASSIFICATION] or above] of the Company or any of its Subsidiaries].



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# Material Adverse Effects

***Akorn v. Fresenius Kabi AG***

General MAE

- Under *IBP*, MAE =
  - (1) an unknown event
  - (2) that substantially threatens earnings capacity
  - (3) for a significant period of time

| | Q2 2017 | Q3 2017 | Q4 2017 | FY 2017 | Q1 2018 |
|---|---|---|---|---|---|
| Revenue | (29%) | (29%) | (34%) | (25%) | (27%) |
| Operating Income | (84%) | (89%) | (292%) | (105%) | (134%) |
| EPS | (96%) | (105%) | (300%) | (113%) | (170%) |

Regulatory MAE

- Qualitative Analysis
  - "[S]ome of Akorn's data integrity failures were so fundamental that he would not even expect to see them 'at a company that made Styrofoam cups,' let alone a pharmaceutical company manufacturing sterile injectable drugs."
- Quantitative Analysis
  - $900 million, or 21% of valuation
  - >20% decline "would reasonably be expected to result in an MAE"



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# Seller's Privilege Post-Closing

***Shareholder Representatives Services v. RSI Holdco***

- Absent some affirmative action by Seller, all assets of target—including privilege over attorney-client communications—transfers to survivor (*Great Hill Equity Partners IV*)
- "Any privilege attaching as a result of [Law Firm] representing [Target] . . . in connection with the transactions contemplated by this Agreement shall survive the Closing and shall remain in effect; *provided*, that such privilege from and after the Closing shall be assigned to and controlled by [Representative]."
  - Court enforced this provision, even though Seller did not segregate the privileged communications from its computers transferred to Buyer



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# M&A Brokers

**NE Bureau of Securities, Interpretive Opinion No. 19**

- Parallels SEC No-Action Letter, "M&A Brokers" (Jan. 31, 2014 (rev. Feb. 4, 2014))

Privately held company exception to "broker-dealer" requirements:

(1) the broker will not have the ability to bind a party to an M&A transaction;
(2) the broker will not provide financing for the transaction;
(3) the broker will not have custody or control of funds or securities issuance in relation to the transaction;
(4) the transaction does not involve a public offering;
(5) if the broker represents both parties, proper disclosure of that fact to both parties and the written consent of the parties to joint representation;
(6) if the transaction involves a group of buyers, the group was not formed with the assistance of the broker;
(7) after the transaction, the buyer has the power to control and actively operate the company;
(8) the transaction does not involve a passive buyer;
(9) any securities the buyer or the broker receives as a result of the transaction are restricted securities under Rule 144(a)(3) of the Securities Act of 1933; and
(10) the broker has not been barred or suspended from affiliation with a broker-deal by the SEC.



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# Anti-Reliance Clauses

***Heritage Handoff***

Ineffective:

Except for the representations and warranties contained in Section 2 of this Agreement . . . the Shareholder, the Company and/or any other Person has not made or does not make any other express or implied representation, either written or oral, on behalf of the Shareholder or the Company . . . as to the future revenue, profitability or success of the Company, or any representation arising from statute or otherwise in law.

***International Bus. Machines***

Effective:

In entering into this SOW, Lufkin Industries is not relying upon any representation made by or on behalf of IBM that is not specified in the Agreement or this SOW, including, without limitation, the actual or estimated completion date, amount of hours to provide any of the Services, charges to be paid, or the results of any of the Services to be provided under this SOW.



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# Earn Outs

***Himawan v. Cephalon***

"Commercially reasonable efforts" means "the exercise of such efforts and commitment of such resources by a company with substantially the same resources and expertise as [Buyer], with due regard to the nature of efforts and cost required for the undertaking at stake."

- Court: objective standard
  - Plaintiff identified similarly situated companies
  - Motion to Dismiss denied
- Takeaway: define and negotiate efforts clauses

***Collab9 v. En Pointe***

- Implied covenant of good faith and fair dealing
  - Buyer maintained poor records
  - Buyer moved revenue off target's book into sham entity
- Court dismissed
  - Buyer has total control
  - Seller could have negotiated for protections but failed to
- Takeaway: claims based on implied covenants rarely win in DE



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Questions?



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Thank you!

Stephanie A. Mattoon
smattoon@bairdholm.com
(402) 636-8238

J. Scott Searl
ssearl@bairdholm.com
(402) 636-8265



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# Opportunity Zone Update
# 2nd Set of Proposed Regulations

**Jesse D. Sitz**
**BAIRD HOLM LLP**

## Agenda

- Refresher overview of OZ rules
  - o Economics
  - o Typical 2-tier structure
- 2nd Set of Proposed Regulations
  - o Leased property
  - o "Freebie" rule for 90% test
  - o Disposition of assets within 10-year period
  - o "Trade or Business" safe harbors

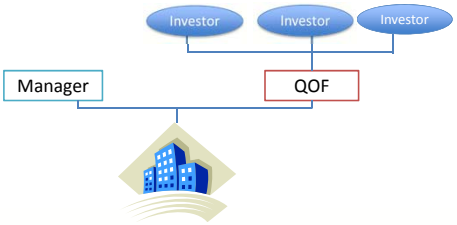
## Qualified Opportunity Zones

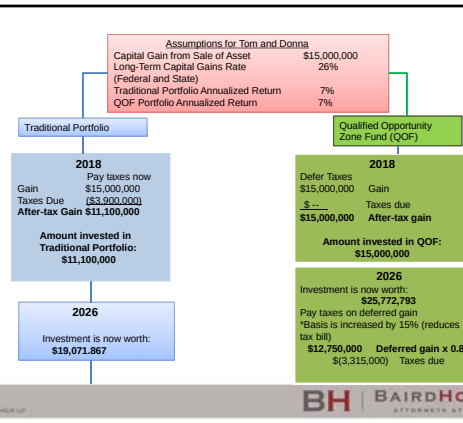
- New incentive focused on deferral of recognition of capital gains
  - Think: 1031 exchange, but different
- Not a lending program—rather, a source of equity for qualified projects
- Three benefits to project sponsors:
  - Benefit 1: Temporary Deferral of Gain
  - Benefit 2: Partial Exclusion of Deferred Gain
  - Benefit 3: Exclusion of Additional Gains

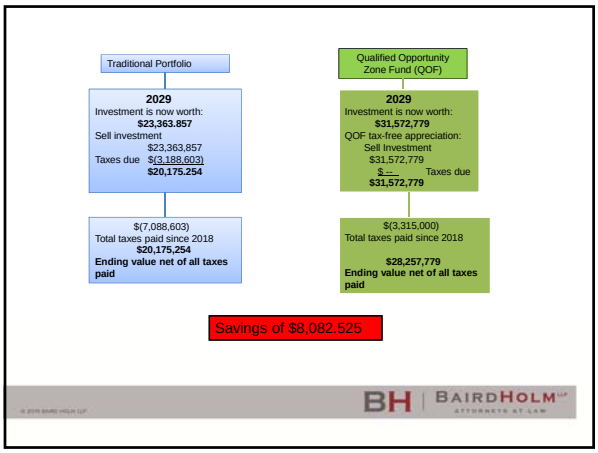
## Where are the "Designated Opportunity Zones"?

- Designated "OZs" were chosen by governor of each state
  - Must generally be a "low-income community" under same rules as NMTC
  - OZ designations remain in effect until 12/31/2028
  - No new designations
- 44 Designated OZs in Nebraska
  - 15 in Douglas County
  - https://opportunity.nebraska.gov/program/opportunity-zones/

## Typical OZ Structure





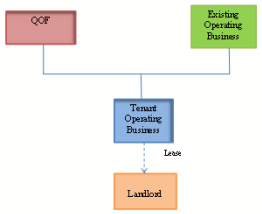

## Leased Property as QOZBP

- Leased property ***can*** be QOZBP
  - Must be acquired under a lease after 12/31/2017
  - Must be located in QOZ for substantially all of the period in question

## Leased Property (cont'd)

- Lessor and lessee must be unrelated unless:
  - "Market rate" lease under IRC section 482; and
  - Significant restrictions on prepayments of rent; and
  - Lessee must purchase TPP that is QOZBP and that has a value not less than the value of the leased personal property.
    - Related parties should be ***very*** cautious.

## Economics of Leased Property




## 90% Test "Freebie" and Disposition Rules

- 6 month grace period for a QOF to invest capital contributions it receives
  - E.g., QOF receives funds on December 30
  - Must be invested in only cash, cash equivalents, or debt instruments with a term of 18 months or less
- If QOZB disposes of asset, QOF is provided 12 months to reinvest

## "Trade or Business"

- A lessor can be carrying on a "trade or business"
  - But ***not*** a triple net lease
- Safe harbors for operating T&Bs
  - Hours Test - at least 50% of the services are performed in the QOZ within the QOZ to the total hours of work performed;
  - Pay Test - if at least 50% of the services are performed in the QOZ, determined by comparing the amounts paid; or
  - Qualitative Test - a qualitative determination that the tangible property of the business that is in a QOZ and the management or operational functions performed for the business in the QOZ are each necessary to generate at least 50% of the gross income of the trade or business.

## Questions?

## Thank You

**Baird Holm LLP**
www.bairdholm.com

**Jesse D. Sitz**
**402.636.8250**
**jsitz@bairdholm.com**

# Definitions, Threats, Costs and Breach Statistics

**Robert L. Kardell**
Ret. FBI, JD, MBA, CPA, CISSP, CFE, CFF, GSEC, A+, Net+,
BKardell@BairdHolm.com

## Part I – Definitions and Threats

## Definitions of "breach of security"

- **Iowa Code Chapter 715C**
  - The unauthorized acquisition of personal information maintained in computer form
- **Nebraska Revised Statute 87-802**
  - …unauthorized acquisition of unencrypted computerized data that compromises the security, confidentiality, or integrity of personal information

## Definitions of "records" under data breach statutes

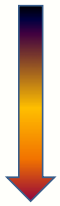
| PII Definitions | Nebraska Neb. Rev. Stat. § 87-301 | Iowa Chapter 715C | South Dakota Chapter 22-40 |
|---|---|---|---|
| Individual's first name or first initial and last name in combination with | | | |
| SSN | Yes | Yes | Yes |
| Drivers License | Yes | Yes | Yes |
| Electronic ID or routing code | Yes | | |
| Financial Account w/ password | Yes | Yes | Yes |
| Unique electronic ID w/ password | | Yes | |
| Biometric Data | Yes | Yes | |
| State ID | Yes | | |
| Account Number | Yes | | |
| Credit / Debit Card Number | Yes | | |
| Username or Email w/ password | Yes | | |
| Health Information | | | Yes |
| Employee ID with password/ code | | | Yes |



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Types of Cyber Threats

**Most Able to Prevent**



**Least Able to Prevent**

| | |
|---|---|
| Accidental | •Data Spills<br>•Lost Laptops<br>•Exceeding Authority |
| Malicious | •Hacking<br>•Phishing<br>•Why = Money or Information |
| Computer Flaws | •Software Holes<br>•Programing Issues |
| APT | •Country v. Country<br>•Country v. Corporation |
| Natural Disasters | •Fire<br>•Floods<br>•Hurricanes |



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Accidental Cyber Threats Outline

| | |
|---|---|
| Employees | • Downloading Data<br>• Lost Computers<br>• Not Following Policy |
| Data Spills | • Mis-directed Emails<br>• Downloading Sensitive Information<br>• Exceeding Authority |
| Personal Devices at Work | • Syncing<br>• Ownership |
| Social Networking | • Facebook / LinkedIn<br>• Dating Sites |



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Malicious Cyber Threats Outline

| | |
|---|---|
| Identity Theft | • Credit Cards<br>• ATMs |
| Tech Support Scams | • Remote computer access<br>• Study by Microsoft |
| Computer Takeover Schemes | • Ransomware<br>• Malware |
| Social Techniques | • Changing Trends<br>• Technology Centered |
| Business Email Compromises | • Type of Man-in-the-Middle<br>• CEO / Vendor / Customer / Attorney |



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Social Engineering Techniques

Changing Technique
- Con-men with personal interactions
  - Same Goals = Gain Trust & Get Money
- Technology Centered Schemes
  - Computers
  - Email
  - Texting
  - Social Media



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Infamous Hacker

"The lethal combination is when you exploit both people and technology… it's easier to manipulate people rather than technology.".



BH | BAIRD HOLM LLP ATTORNEYS AT LAW


## Business E-mail Compromise (BEC)

**Definition:**

Sophisticated scam targeting businesses working with foreign suppliers and/or businesses that regularly perform wire transfer payments.

**How:**

Carried out by compromising legitimate business e-mail accounts through social engineering, brute-force, computer intrusions, etc.

BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## BEC Methodology

- **Spoofed accounts**
  - Adding an additional letter to the user name (i.e. abcd@yahoo.com to abcdd@yahoo.com )
  - Need to be aware of free domains, i.e., Yahoo, G-Mail, AOL, Hotmail
- **Spoofed Domain**
  - Slight variations of the domain (i.e. abc@0123.com to abc@O123.com )


BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## BEC Methodology Non-Spoofed

- **"Phishing Perfected"**
- **Hacked accounts**
  - Spear phishing
  - E-mail account login spoof
  - **Things to look for:**
    - E-mails forwarded to trash folder or spam folder
    - E-mails forwarded to actor accounts
    - Edited "rules" for account



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## BEC - Hallmarks

- Targets
  - Open source e-mail accounts
  - Accountants, bookkeepers, controllers, etc.
  - CPA firms, law firms



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## BEC - Hallmarks

- Social engineering, research and information gathering to minimize suspicion
  - Specific to the business being targeted
  - Amount requested
  - Company logos, letterhead, signatures, etc.
  - Coding and phrases (i.e. "Code to admin expenses")



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Business Email Compromises

- Coincide with:
  - executive travel
  - close of business day or week
- IP addresses trace back to free domain registrars
- Phishing schemes
- Pressure to act quickly and secretly

## Business Impact


## BEC Prevention Techniques

- Multi-Factor Authentication
- Have Written Pre-approved Instructions
  - Back-up Approval Authority
  - No Wire Transfers Over Weekends / Holidays
  - No Wire Transfers Without Original Signature
- Communicate with Bank on Instructions
- Minimize Bank Information in E-mail

## Part II - Financial Risks
## The True Cost of Cyber Security



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Investigative Costs of Data Breach

- **Notification Expenses**
- **Crisis Management**
- **Regulatory Investigation Expense**
- **Data Breach Liability**
- **Content Liability**
- **Data Loss & System Damage (or Data Restoration Coverage)**
- **Business Interruption / Lost Revenue**



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Additional Costs of Cyber Breach

- **Direct Financial Costs**
  - Lost profits
  - Software
  - Hardware and systems
  - Information
- **Intangibles**
  - Reputation
  - Personnel
- **Indirect Third-party Liability**
  - Lawsuits, remediation, on-going monitoring
  - Fines and criminal liability



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Financial Risks of Cyber Security

- Prevention is always cheaper than remediation
  - Reaction is always more slower / more expensive
  - Investigations
  - Forensics
  - Rebuilding networks
  - Restoring drives
  - Fines and penalties
  - Intangibles
  - Always cheaper to protect what you already have built



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

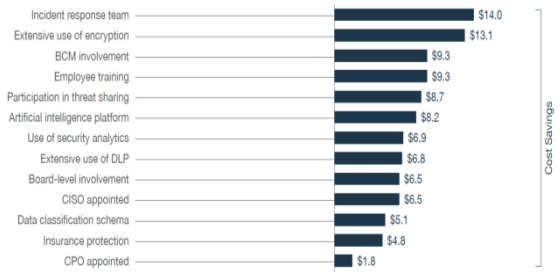
## Cyber Security Costs - Information


- Study by IBM and Ponemon Institute LLC



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Key Security Techniques




- Study by IBM and Ponemon Institute LLC



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Key Security Techniques


- Study by IBM and Ponemon Institute LLC



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Part III – Statistics
## Pulling It All Together



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

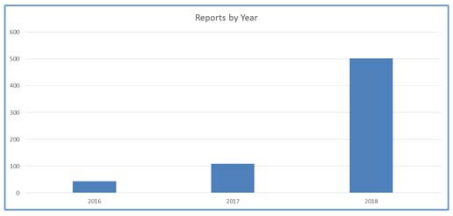
## Nebraska Breach Statistics

| | Total Records | Nebraska Records |
|---|---|---|
| Total Number of Breach Reports | 667 | |
| Total Number of Records | 5,612,198,979 | 2,049,316 |
| Average Records per Report | 8,555,181 | 3,124 |
| Global Average per record (IBM Report) | $148.00 | $148.00 |
| US Average per record (IBM Report) | $233.00 | $233.00 |
| Global average cost per incident | $1,266,166,842.82 | $462,345.68 |
| US average cost per incident | $1,993,357,259.31 | $727,882.05 |
| Total Estimated Cost | $830,605,448,892.00 | $303,298,768.00 |



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

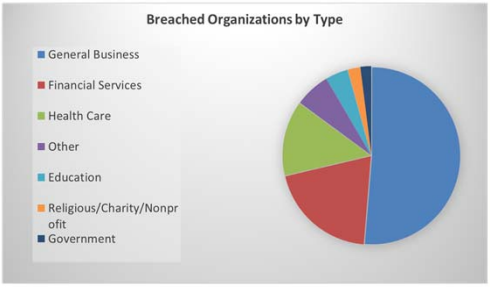
## Nebraska Breach Statistics






BH | BAIRD HOLM LLP ATTORNEYS AT LAW

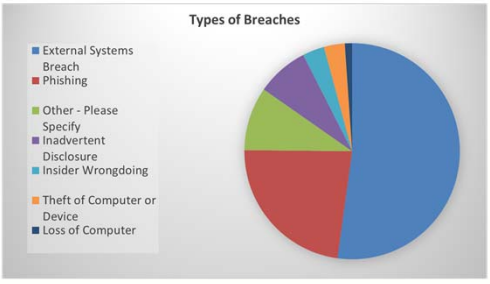
## Nebraska Breach Statistics






BH | BAIRD HOLM LLP ATTORNEYS AT LAW

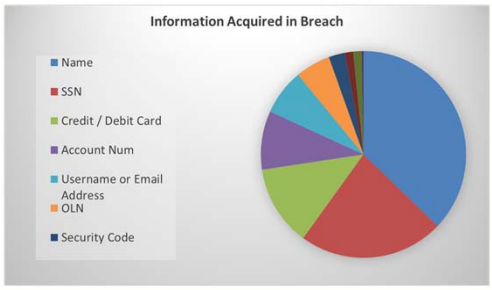
## Nebraska Breach Statistics






BH | BAIRD HOLM LLP ATTORNEYS AT LAW

## Nebraska Breach Statistics






BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# Questions?

Disclaimer: This presentation is provided as a public service for informational, educational, or reference purposes. It is not designed to give individual advice. It is not legal advice or a substitute for legal advice. It does not create a lawyer-client relationship. Do not attempt to solve individual problems based upon the information contained in this presentation. Please seek the advice of an attorney for advice on all legal matters. No endorsement, warranty, or claim is made with respect to this presentation.



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

# Thank You

**Robert L. Kardell**
Bkardell@BairdHolm.com
www.BairdHolm.com



BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## References:

- Cost of a Data Breach Study, IBM and Ponemon Institute
  - https://www.ibm.com/security/data-breach
- Global Tech Support Scam Research, Microsoft
  - https://news.microsoft.com/uploads/prod/sites/358/2018/10/Global-Results-Tech-Support-Scam-Research-2018.pdf



BH | BAIRD HOLM LLP ATTORNEYS AT LAW

# Corporate Strategy and Legal Ethics: Purdue Pharma Case Study

OxyContin's 12 Hour problem

**Joel D. Pedersen**

## Overview

- **Case Connections**
  - **Why Purdue Pharma**
  - **Puffery vs. Fraud (12hs)**
  - **Pain as a vital sign – FDA Approvals**
- **Ethics Focal points for lawyers**
- **Counsel as business advisor**
- **Whistleblowers and Qui Tam**

## Upjohn Warning

§3-501.13

- **Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.**
  - Must explain organization is "client" rather than the individual
    - and the organization takes precedence

https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-17

## Case Connections

- National Prescription Opiate Litigation
- Massachusetts (Targeted)
- Oklahoma (Public Nuisance)
- Earlier Cases – leading up to 2007
  - False Claims Act – Qui Tam. Most settled or dismissed – confidentiality connected to separations from employment

## Fraud - Misrepresentation

- 2007 case admitted misrepresentation – Branding
- When did you know and who knew
- Lawyers role
- Federal Government's role
  - Defense was FDA & DEA Approval

## 2007 Case

- Purdue's marketing of OxyContin as "less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."
- (Information ¶ 20, *United States v. Purdue Frederick Co.,* No. 1:07–CR–00029 (W.D.Va.))

**$276.1 million** forfeited to the United States

**$160 million** paid to federal and state government agencies to resolve liability for false claims made to Medicaid and other government healthcare programs

**$130 million** set aside to resolve private civil claims (monies remaining after 36 months will be paid to the United States)

**$5.3 million** paid to the Virginia Attorney General's Medicaid Fraud Control Unit to fund future health care fraud investigations

**$20 million** paid to fund the Virginia Prescription Monitoring Program for the foreseeable future

In addition, Purdue will pay the maximum statutory criminal fine of $500,000.

Purdue's top executives will pay the following amounts to the Virginia Attorney General's Medicaid Fraud Control Unit:

**$19 million** paid by Michael Friedman

**$8 million** paid by Howard R. Udell

**$7.5 million** paid by Dr. Paul D. Goldenheim

Each executive will also pay a $5,000 criminal fine.

BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## Pain Killer – Barry Meier

"There is no question that the marketing of OxyContin was the most aggressive marketing of a narcotic drug ever undertaken by a pharmaceutical producer."

BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## One pill can kill

**OxyContin 60 mg, 80 mg, and 160 mg Tablets, or a single dose greater than 40 mg, ARE FOR USE IN OPIOID-TOLERANT PATIENTS ONLY. A single dose greater than 40 mg, or total daily doses greater than 80 mg,** may cause fatal respiratory depression when administered to patients who are not tolerant to the respiratory depressant effects of opioids.

BH | BAIRDHOLM LLP ATTORNEYS AT LAW

## NOT PURDUE UNIVERSITY

1869
The Indiana General Assembly chooses the Lafayette area for the new institution and accepts a $150,000 gift from John Purdue, as well as $50,000 from Tippecanoe County and 100 acres from local residents. **The legislature names the new school Purdue University.**

## Focal Points

- **Company pays $600M+ fines & forfeiture for misbranding "less addictive" (2007)**
- **President, General Counsel, Medical Director plead guilty to "misbranding" & forfeit $37.5M (2007)**
- **Closely held family corporation**
- **12 hour dosing is salient advantage**
- **Efficacy falls short in practice**
- **Strategy in response = increase dose**
- **Higher dose = higher addiction risk**

## Why Purdue Pharma?

- Howard Udell
  - owned a United States patent for a "self-destructing document and e-mail messaging system." First filed in 1997
  - "We have in fact picked up references to abuse of our opioid products on the internet," Purdue Pharma's general counsel, Howard R. Udell, wrote in early 1999 to another company official.

## Why Purdue Pharma?

- Richard Sackler
  - Smoking gun Emails -
  - Aggressive Marketing
  - Blamed "untrustworthy" addicts
- Solutions all increased revenue –
  - Higher Doses
  - Longer periods
  - Narcan

## Richard Sackler Emails

"a blizzard of prescriptions that will bury the competition" -1996

"We have to hammer on the abusers in every way possible. They are the culprits and the problem. They are reckless criminals." - 2001

## Why Purdue Pharma?

- J. David Haddox
  - American Academy of Pain Medicine
    - Task force chair
    - "Consensus document to Ease opioid restrictions."
  - Coined the term Psuedo Addiction – telling physicians it was a result of under treatment of pain – Higher doses needed



Department of Veterans Affairs

**Pain as the 5th Vital Sign Toolkit**

TAKE 5
Pain: The 5th Vital Sign

October 2000

Revised Edition



| Vital Signs | |
|---|---|
| 1st | Body Temperature |
| 2nd | Pulse |
| 3rd | Respiratory Rate |
| 4th | Blood Pressure |
| 5th |  |

*Q. "What is an acceptable pain score?"*

A. Every person is an individual. It is best if people determine what pain rating is acceptable for them. Zero pain is not always possible. Acceptable pain relief is a pain level that is not distressing, and one that allows you to sleep, eat and perform your regular daily activities.

**Pain as the 5th Vital Sign Toolkit** Page 16

## § 3-501.1. Competence

- **A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation.**

## ABA Informal Op. 1470 (1981)

- **"[A] lawyer should not undertake representation in disregard of facts suggesting that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."**

## § 3-501.2. Scope of representation

- **(a) a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.**

## Comment 2 –

- "a lawyer and a client may disagree about the means to be used to accomplish the client's objectives."

## Comment 2 –

- Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.

## Comment 2

- **Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."**

## § 3-501.2. Scope of representation

- **(f) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.**

## Comment 9

- [9] **When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate**. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent

## After 2007
## Why Purdue Pharma?

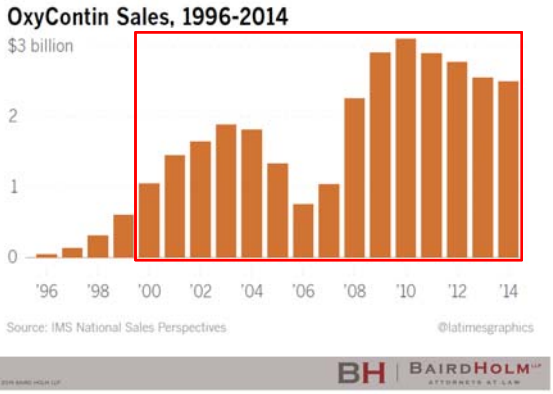
- Purdue Pharma – "the poster child for really bad corporate behavior"
- Since the 2007 Judgment, Purdue sales reps visited Massachusetts prescribers and pharmacists *more than 150,000 times*. - Mass AGO Complaint
- Kept track of over-prescribers and did not report

BH | BAIRDHOLM LLP ATTORNEYS AT LAW

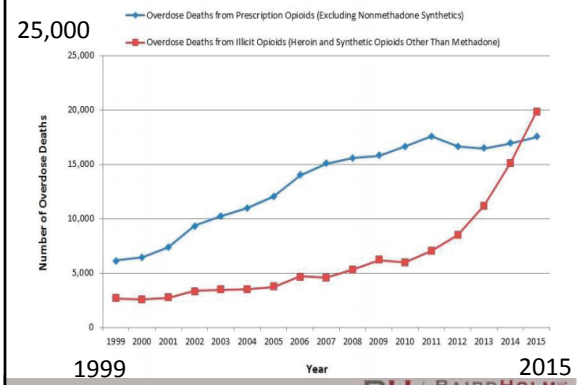
## Dopesick – Beth Macy

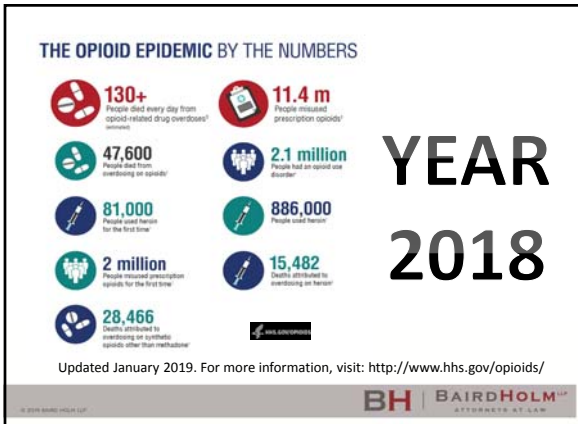
- "Dopesick begins in the coalfields . . . largely with the introduction of Oxycontin in 1996."
- "From there the scourge . . . shifted from Oxycontin . . . to heroin and synthetic analogs."
- Soldier's disease in the civil war

BH | BAIRDHOLM LLP ATTORNEYS AT LAW




BH | BAIRDHOLM LLP ATTORNEYS AT LAW




## Purdue Pharma's Response

- **As required by law, OxyContin promotional materials used during interactions with healthcare professionals were submitted to the FDA for review.**

## Purdue Pharma's Response

- **OxyContin has always had FDA-approved labeling disclosing that the medication has a risk of addiction and abuse and is a Schedule II product with an abuse liability similar to morphine.**

## Purdue Pharma's Response

- **In February 2018, Purdue ceased using a sales force to promote opioids to healthcare professionals.**

## Purpose Statement and Values

### Purpose Statement

Compassion for patients and excellence in science inspire our pursuit of new medicines.

### Integrity

We do what is right.

### Courage

We challenge convention and embrace change.

### Innovation

We apply creative and agile thinking to generate solutions.

### Collaboration

We work together to meet our commitments and goals.

## National Prescription Opiate Litigation

- Ohio
- DEA ARCOS/DADS Database released
- Repeated expressions of judge's desire to settle the litigation
- President declares national emergency

## West Virginia

## West Virginia

- Many people in the Panhandle have embraced the idea of addiction as a disease, but a vocal cohort dismisses this as a fantasy disseminated by urban liberals.
- West Virginia has an overdose death rate of 57.8 per 100,000 people.

## Oklahoma

- $85M case settlement Teva
- $200M From Purdue Pharma
- $75M Sackler Family pledge for addiction research and treatment

## Oklahoma

- **Aug 1, 2019 Johnson & Johnson trail concluded**
- **AG requested $17.2 Billion**
- **Judge considering motions and 700+ page brief**
- **Decision reached Aug 27, 2019**
  - **$512 Million**

## Nebraska

- The **overdose death rate** in **Nebraska** is 8.1 per 100,000 residents, the lowest in the nation.
- AG Peterson has not joined lawsuits despite strong pressure to do so
- South Sioux City and 5 Nebraska Counties have sued – Douglas County included

## Massachusetts Complaint

- January 2019
  - Access to formerly sealed information
  - 270+ pages with lots of facts charts and diagrams
  - Kentucky case on disclosing deposition

## Insys Therapeutics

- May 2, 2019 Boston Jury convi cts CEO and four former executives on racketeering charges
- Bribing doctors to prescribe opioids and deceiving insurance to pay

## United States Attorney Andrew E. Lelling:

- “Just as we would street-level drug dealers, we will hold pharmaceutical executives responsible for fueling the opioid epidemic by recklessly and illegally distributing these drugs, especially while conspiring to commit racketeering along the way.”

## § 3-501.6. Confidentiality of information.

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;
- A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. – Comment 13

## Nebraska Opinion #12—11

- "where a civil action has been filed by a federal agency against a lawyer and his current or former clients, alleging fraud and violation of federal regulations relating to the representation of the clients, **the lawyer could reasonably believe it was necessary to establish his/her own defense to the charges by releasing confidential documents**"

## § 3-503.3. Candor toward the tribunal.

- **(a) A lawyer shall not knowingly:**
- **(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;**

## Depositions included

- [1] This Rule also applies when the lawyer is representing a client in an ancillary proceeding . . .such as a deposition.

## § 3-503.3. Candor toward the tribunal.

- **(a) A lawyer shall not knowingly:**
- **(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or**

## § 3-503.3. Candor toward the tribunal.

- **(a) A lawyer shall not knowingly:**
- **(3) offer evidence that the lawyer knows to be false.**

## § 3-503.3. Candor toward the tribunal.

- **(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.**

## § 3-502.1. Advisor.

- **In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.**

## Comment 5

- **A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.**

## § 3-504.1. Truthfulness in statements to others.

- **In the course of representing a client a lawyer shall not knowingly:**

**(a) make a false statement of material fact or law to a third person; or**

**(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.**



## False Claims Act

The False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733 was enacted in 1863 by a Congress concerned that suppliers of goods to the Union Army during the Civil War were defrauding the Army. The FCA provided that any person who knowingly submitted false claims to the government was liable for double the government's damages plus a penalty.



## Upjohn Warning
§3-501.13

- **Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.**
  - Must explain organization is "client" rather than the individual
    - and the organization takes precedence

https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-17

## Balance of Interests

- **"a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."**

## Questions?

## Thank you!

**Joel D. Pedersen**
Baird Holm LLP
1700 Farnam Street Suite 1500
Omaha, NE 68102-2068
jpedersen@bairdholm.com
402.636.8343 Direct Dial Phone

BAIRD HOLM LLP

ATTORNEYS AT LAW

EST. 1873

# 2019 CORPORATE LAW UPDATE

# I. Corporate Governance

## Delaware Statutory Law

### Amendments to the Delaware General Corporation Law
2019 Delaware Laws Ch. 45 (S.B. 88) (effective Aug. 1, 2019)

Amendments to the Delaware General Corporate Law ("DGCL") changed how a corporation may give notice via e-mail to stockholders. Notably, the amendments flip the rule: from requiring stockholders to opt-in for e-mail notice to be effective to requiring stockholders to opt-out for e-mail notice to not be effective. Other amendments similarly update the DGCL for the digital age, such as easing requirements for delivery of stockholder consents and outlining a framework for use of electronic transmission and electronic signatures of entity documents.

### Amendments to the Delaware Revised Uniform Limited Partnership Act
2019 Delaware Laws Ch. 46 (S.B. 89) (effective Aug. 1, 2019)

The Delaware legislature amended the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), similar to the amendments to the 2018 amendments to the Delaware Limited Liability Company Act ("DLLCA"). A new section allows for division of limited partnerships ("LPs")—one LP can divide into multiple LPs and allocate its assets and liabilities among them. A new subchapter allows creation of statutory public benefit LPs. An entity organized under this subchapter must be managed in a way that balances partners' pecuniary interests with the public benefit specified in its organizational certificate. A new section allows the attorney general to petition the Court of Chancery to cancel and dissolve an LP for abuse of its LP powers. New provisions allow for the creation of "protected series," which are security interests that are shielded from claims of creditors of other series or of the LP as a whole. These 2019 amendments to DRULPA closely track the 2018 amendments to DLLCA, and both sets of amendment became effective on August 1, 2019.

## Forum Selection Clauses

### *Sciabacucchi v. Salzberg*
No. 2017-0931, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018)

Vice Chancellor Laster invalidated forum selection provisions Blue Apron, Roku, and Stitch Fix added to their charters before filing registration statements in connection with their initial public offerings. The forum selection provisions attempted to require any claim under the Securities Act of 1933 ("Securities Act") to be filed in federal court. (The U.S. Supreme

Court recently clarified that state and federal courts continue to have concurrent jurisdiction in Securities Act claims. *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018).) V.C. Laster heavily relied on *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (Strine, C.), which held corporations may adopt forum selection bylaws for internal-affairs claims but not for claims relating to external affairs. Section 115 of the Delaware General Corporation Law was added in 2015 to codify *Boilermakers*. Because Delaware law regulating the proper scope of charter provisions and bylaw provisions are so similar, V.C. Laster applied the reasoning of *Boilermakers* to the charter provisions at issue and ruled that Securities Act claims are external affairs, outside the scope of charter or bylaw provisions. Lastly, V.C. Laster emphasized the "first principles" of Delaware corporate law—that incorporation is, at its essence, a state-regulated contract between the corporate body and its shareholders—to draw a connection between the limitations on the state's territorial jurisdiction and the restrictions on the proper scope of charters and bylaws. An appeal of this case is currently pending before the Delaware Supreme Court.

### *Li v. loanDepot.com, LLC*
No. 2019-0026, 2019 WL 1792307 (Del. Ch. Apr. 24, 2019)

Vice Chancellor Laster dismissed a lawsuit by Timothy Li against his former employer, loanDepot.com, LLC ("loanDepot"), to enforce his indemnification advancement right because the lawsuit violated the operating agreement's forum selection clause. Under loanDepot's operating agreement, employee and agents were granted a right to mandatory indemnification, including the right of mandatory advancement. loanDepot sued Li in California state court and then commenced an arbitration action against him, which it ultimately dropped. These actions triggered Li's indemnification rights; however, loanDepot moved to dismiss, citing a forum selection clause in the operating agreement that requires any disputes relating to the agreement to be heard "in the state or federal courts located in Los Angeles, California." Li argued that because he was also a member, Section 18-109(d) of the Delaware Limited Liability Company Act acted to prevent any waiver of his rights to seek redress in Delaware courts. V.C. Laster disagreed, citing *Elf Atochem North America Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999), which held Section 18-109(d) is permissive and does not impose any restrictions on forum selection clauses in LLC operating agreements. Further, Section 18-109(d)'s waiver bar for members did not apply to Li's claim since the indemnification rights triggered related to Li's acts as an employee and not Li's acts as a non-managing member.

*Sun Life Assurance Company of Canada–U.S. Operations Holdings, Inc. v. Group One Thousand One, LLC*
206 A.3d 261 (Del. Super. Ct. 2019)

In this case, the Delaware Superior Court refused to transfer the breach-of-contract case to the Delaware Court of Chancery pursuant to a forum selection clause because the Chancery Court lacked subject-matter jurisdiction to hear the claim. Group One Thousand One, LLC ("G1001"), agreed to buy several subsidiaries of Sun Life Assurance Company of Canada ("Sun Life") under a stock purchase agreement. After closing a dispute arose as to who was entitled to a large tax refund issued to an acquired Sun Life subsidiary. The stock purchase agreement contained a forum selection clause that chose the Chancery Court as the preferred court. Because the Chancery Court is a court of limited jurisdiction, the case turned on whether it has statutory or equitable jurisdiction over the dispute. On the statutory jurisdiction issue, the parties offered differing interpretations of Section 18-111 of the Delaware Limited Liability Company Act ("LLC Act"). The court favored Sun Life's narrower interpretation that the Chancery Court only has jurisdiction over those documents or instruments "explicitly contemplated" by the LLC Act, reasoning that G1001's broad interpretation that the Chancery Court has jurisdiction over all agreements LLCs enter into would be overbroad and "absurd." Because stock purchase agreements were not "explicitly contemplated" by the LLC Act, no statutory jurisdiction existed. The court also held there was no equitable jurisdiction because Sun Life only pleaded one claim for money damages relating to breach of contract. G1001 argued that the money-damages claim was a veiled claim for specific performance, but the court found that argument unpersuasive.

In re *Facebook, Inc. Shareholder Derivative Privacy Litigation*
367 F. Supp. 3d 1108 (N.D. Cal. 2019)

This was one of many lawsuits brought against Facebook in the aftermath of the Cambridge Analytica scandal. The plaintiffs alleged a variety of claims, including violations of the Securities and Exchange Act, breaches of director fiduciary duties, and violations of California insider trading laws. Facebook moved to dismiss based on *forum non conveniens*, specifically seeking to enforce a forum selection clause in its charter that designates the Delaware Court of Chancery as the exclusive forum for various actions, including derivative suits. The plaintiffs argued the forum selection clause should not apply because the Chancery Court is not a suitable alternative forum, the plaintiffs are not signatories to the charter, and public policy favors local resolution of local issues. On the suitable-alternative-forum issue, the court held the Delaware Court of Chancery was a suitable alternative forum for all claims except the federal claims, as the Delaware Court of Chancery would not have jurisdiction over those claims. The court dismissed the non-

signatories argument as clearly out of line with *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), which held a board-adopted bylaw that acted as a forum selection clause was valid. Finally, although the court acknowledged California's interest in adjudicating the case, it stated California's interest did not make this case "exceptional" or "unusual" so as to justify invalidating a forum selection clause. Pursuant to this reasoning, the court severed the federal claims and dismissed the state claims to be brought to the Delaware Court of Chancery.

### *Applied Underwriters, Inc. v. O'Connell Landscape Maintenance, Inc.*
No. A-18-709, 2019 WL 5395203 (Neb. Ct. App. Oct. 22, 2019)

Applied Underwriters, Inc. ("Applied"), a Nebraska corporation, sued for non-payment on its promissory with O'Connell Landscape Maintenance, Inc. ("O'Connell"), a California corporation. O'Connell moved to dismiss based on lack of personal jurisdiction, since it did not have any contact with or transact business in Nebraska. However, the promissory note included a forum selection clause that purported to set the exclusive jurisdiction of any action in a court sitting in Douglas County, Nebraska and to require O'Connell to waive any objection based on forum non conveniens. The Nebraska Court of Appeals refused to enforce the forum selection clause, relying on its opinion in *Applied Underwriters Captive Risk Assurance Co. v. E.M. Pizza, Inc.*, 923 N.W.2d 789 (Neb. Ct. App. 2019). The court deemed the clause as contrary to Nebraska's Choice of Forum Act, which requires the state to be a reasonably convenient forum for the action in cases where the contract has a forum selection clause and provides the only basis for jurisdiction. Because Nebraska was not a convenient forum for O'Connell to defend the claim, the claim was dismissed.

### *Applied Underwriters Captive Risk Assurance Company v. Sky Materials Corp.*
No. A-19-308, 2019 WL 5884210 (Neb. Ct. App. Nov. 12, 2019)

Applied Underwriters Captive Risk Assurance Company, Inc. ("AUCRA"), an Iowa corporation, sued Sky Materials Corp. ("Sky Materials"), a New York corporation who operated exclusively in New York, for nonpayment under a Reinsurance Participation Agreement. Sky Material moved to dismiss for lack of personal jurisdiction and forum non conveniens. Sky Material presented evidence that it had no connection to Nebraska, it performed construction services exclusively in New York, and that it never entered Nebraska to execute the Agreement. The district court granted the motion to dismiss on three grounds: (1) the forum selection clause in the Agreement was unenforceable under Nebraska's Choice of Forum Act; (2) personal jurisdiction over Sky Materials did not exist; and (3) dismissal was appropriate under Nebraska judges' statutory power to stay or dismiss a case when "in the interest of substantial justice" the case "should be heard in

another forum." The Court of Appeals affirmed, again citing *Applied Underwriters Captive Risk Assurance Co. v. E.M. Pizza, Inc.*, 923 N.W.2d 789 (Neb. Ct. App. 2019) and relying mainly on the statutory grounds as an independent justification for dismissal.

## Choice of Law Provisions

### *Nuvasive, Inc. v. Miles*
C.A. No. 2017-0720-SG, 2019 WL 4010814 (Del. Ch. Aug. 26, 2019)

A Delaware corporation with its principal place of business in California included a choice of law provision in its contracts with California employees stating that (more employer-friendly) Delaware law applied to the contract. The employment contract also included one-year non-compete and non-solicitation provisions. The court applied Delaware's choice of law framework, which follows the Restatement (Second) of Conflict of Laws. Under this framework, the court initially enforced the non-compete under Delaware law because the clause did not violate California's public policy, as California law allows choice of law provisions in employment contracts if the employee is independently represented by counsel. The employee briefed the court on his lack of counsel during contract negotiation and renewed his motion for summary judgment. The court granted the renewed motion and refused to enforce the non-compete and non-solicitation clauses, this time holding that they are contrary to the "fundamental policy" of California. Therefore, although Delaware court in this case ultimately refused to enforce the non-compete and non-solicitation clauses on choice-of-law principles, the question remains whether the outcome would be different if the employee were represented by counsel.

### *Lyon v. Neustar, Inc.*
No. 2:19-cv-00371-KJM-KJN, 2019 WL 1978802 (E.D. Cal. May 3, 2019)

This case concerns the California exception to the state's general prohibition on choice of law provisions in employment agreements for employees represented by counsel that was referenced in *Nuvasive, Inc. v. Miles*. In this case, an employer attempted to enforce a Virginia choice of law provision against a California employee. The employer argued the independent counsel exception applied because the employee referenced "my lawyers" during negotiation. The court held, however, that the exception did not apply, based on credible testimony of the employee that the reference to his lawyers was just posturing. The application of California's prohibition on choice of law provisions in employment agreements is further complicated by another exception for contracts not "entered into, modified, or extended on or after January 1, 2017." Although the employment agreement was entered

into before 2017, the court held the separation agreement, which was executed in 2018, counted as a modification. Thus, the exception did not apply, and the court refused to apply Virginia law.

## Executive Compensation Issues

### *Stein v. Blankfein*
No. 2017-0354, 2019 WL 2323790 (Del. Ch. May 31, 2019)

A shareholder of The Goldman Sachs Group, Inc. ("Goldman") sued Goldman's directors, alleging excessive director compensation that amounted to a breach of fiduciary duty. The complaint alleged the Goldman directors were eligible to receive $605,000 in compensation annually, substantially more than the directors of Goldman's peer companies. The defendants moved to dismiss, arguing (1) the terms of Goldman's stock incentive plan require a business judgment standard unless the plaintiff prove bad faith; or (2) in the alternative, if the entire fairness standard applies, the directors' compensation was entirely fair to the corporation. Shareholder approval of a director compensation plan that removes discretion from directors to adjust compensation warrants a business judgment standard under In re *Investors Bancorp, Inc. Stockholder Litigation*, 177 A.3d 1208 (Del. 2017). The court was not persuaded by the defendants' argument that shareholder approval of the stock incentive plan with a provision exculpating directors absent bad faith was analogous to direct shareholder ratification under *Investors Bancorp*. The court analyzed the exculpatory provision as a waiver and concluded that the waiver was invalid because it was not made knowingly. If such a waiver were possible at all, the court reasoned, it would—at minimum—have to warn shareholders that to vote in favor the plan would be to waive the right to entire fairness review of self-interested transactions. On whether the compensation was fair, the court found the plaintiff's argument to be weak, but specific and sufficient to survive a motion to dismiss in light of the Goldman directors making substantially more than directors do at peer companies.

### *Howland v. Kumar*
No. 2018-0804, 2019 WL 2479738 (Del. Ch. June 13, 2019)

This derivative suit alleged breach of the fiduciary duty of loyalty and unjust enrichment resulting from repricing of stock options granted to directors, officers, and employees. On August 22, 2017, Anixa Biosciences, Inc. ("Anixa") was issued a key patent. The board was informed of this fact (or at least its likelihood), but the issuance was not yet public. On September 6, the Compensation Committee of the board approved lowering the strike price of previously underwater stock options held by directors, officers, and

employees. About 94.4% of the stock options were held by directors. On September 18, Anixa issued a press release announcing the issuance of the patent; its stock price surged from $0.69 before the announcement to a peak of $4.99 on September 26. Based on the timing of the stock option repricing, the plaintiff alleged that the board misused corporate information to benefit themselves. The Court of Chancery largely agreed, denying almost all of the defendant's motion to dismiss. The court held that the entire fairness standard applied because members of the Compensation Committee were self-interested and, further, that it was reasonable to infer that the repricing was unfair due to its timing—just before the public announcement, which the directors knew was likely to increase Anixa's share price. The court also refused to dismiss the unjust enrichment claim and excused the demand requirement for similar reasons.

### *Tornetta v. Musk*
C.A. No. 2018-0408-JRS, 2019 WL 4566943 (Del. Ch. Sept. 20, 2019)

A shareholder of Tesla, Inc. ("Tesla") challenged the decision of the corporation's board to approve a compensation package for its CEO, Elon Musk, valued at $55.8 billion. After the board approved the compensation package, it submitted the decision to Tesla's shareholders for approval. The shareholders overwhelmingly approved the compensation package. Although ordinarily board decisions are entitled to deference under the business judgment rule, especially where there is shareholder ratification, the court nonetheless held the entire fairness standard applied. The court emphasized the importance of Musk's status as controlling shareholder of Tesla and Delaware law's disdain of controlling shareholder transactions. *See Kahn v. M & F. Worldwide Corp.*, 88 A.3d 635 (Del. 2014). The court expanded application of *MFW*, which originated in the merger context, to this executive compensation case. The risk of coercion from the controlling shareholder, the court argued, outweighed any remedial effects of shareholder ratification. Because the board did not follow the *MFW* framework for obtaining deference under the business judgment rule, the entire fairness standard applied and the motion to dismiss was denied.

## Caremark Claims

### *Marchland v. Barnhill*
212 A.3d 805 (Del. 2019)

The Delaware Supreme Court reversed the dismissal of a *Caremark* claim in this case, signaling a different approach to notoriously difficult-to-win *Caremark* claims at the pleading stage. The case arises from a listeria outbreak attributed to Blue Bell Creameries USA, Inc. ("Blue Bell") ice cream

that killed three people. Under *Caremark*, a board's "utter failure" to exercise oversight over corporate activities is a duty of loyalty violation. In re *Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). The Court of Chancery dismissed the claim, interpreting the plaintiff's claim as challenging the effectiveness of board oversight rather than the existence of it. The Delaware Supreme Court reversed, finding that the Blue Bell board did not have a food safety committee, did not dedicate time regularly to the discussion of food safety (as evidenced by the board's minutes), and did not establish a protocol that required management to keep the board apprised of food safety risks. On these facts, the court held there was a reasonably inference that the lack of oversight was so egregious as to constitute bad faith. The court did not find as persuasive defendant's counterargument that board-level oversight was not necessary because the company was subject to extensive government regulation. This decision underlines the importance of board-level oversight, especially on "a compliance issue intrinsically critical to the company's business operation," as food safety was to Blue Bell.

### *Rojas v. Ellison*
No. 2018-0755, 2019 WL 3408812 (Del. Ch. July 29, 2019)

After the Los Angeles City Attorney sued J.C. Penney Company, Inc. ("J.C. Penney") for violation of California's consumer protection laws, a J.C. Penney shareholder file this suit, which includes a *Caremark* claim. To survive dismissal under *Caremark*, the plaintiff must allege facts that either (1) the board "utterly failed" to implement an oversight program; or (2) having instituted an oversight problem, the board "consciously failed to monitor" the company's operations. The second prong is typically met by showing the board ignored a "red flag." Because the J.C. Penney board has established a reporting and compliance system, the first prong did not apply. The plaintiffs argued that the settlement of the consumer protection suit was a "red flag" that put the board on notice of a violation of law. However, the court did not agree, reasoning that the settlement of a regulatory lawsuit does not always constitute a "red flag." Because this settlement did not include any admission of liability and acknowledgement that J.C. Penney was in violation of any laws, the court held that this regulatory settlement did not constitute a "red flag." Therefore, the plaintiff failed to plead sufficient facts to maintain a *Caremark* claim, meaning that the plaintiff's argument a demand would have been futile due to directors' personal liability causing them to be interested also failed.

### In re *Clovis Oncology, Inc. Derivative Litigation*
C.A. No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019)

Following in the footsteps of *Marchland*, the plaintiffs in this case pleaded a *Caremark* claim that survived a motion to dismiss. Clovis Oncology ("Clovis")

was in the business of developing cancer treatments. In developing a drug to treat lung cancer, Clovis adopted a well-respected clinic trial protocol that requires reporting only confirmed responses. Clovis actually reported both confirmed and unconfirmed responses, which the plaintiffs argued was a "red flag" that the board ignored, violating their oversight duties. The court agreed, likening drug safety for Clovis to food safety in *Marchland*. Because drug safety was "mission critical" and because the plaintiff pled facts that the board knew management was not reporting responses according to protocol, this *Caremark* claim was allowed to continue past the pleadings stage. Although the defendants countered that the reporting of unconfirmed responses was part of a plan approved by the FDA, the court drew inferences in favor of the plaintiffs at this stage and noted that plaintiffs' claims may not stand up after discovery.

### In re *LendingClub Corp. Derivative Litigation*
C.A. No. 12984-VCM, 2019 WL 5678578 (Del. Ch. Oct. 31, 2019)

This case is evidence that *Caremark* claims are still difficult to plead post-*Marchland*. LendingClub Corporation ("LendingClub") self-reported alleged misconduct by its CEO and others to the SEC. After disclosing this and the company's remedial efforts to shareholders, certain shareholders initiated this action, which included a *Caremark* claim. The plaintiffs argued that the board failed to adequately monitor company affairs. The court dismissed the case for failure to plead demand futility, which requires pleading a majority of directors face a substantial risk of liability. On *Caremark*'s first prong, the court found that the board did not "utterly fail to implement" internal controls because the complaint admitted that an Audit Committee existed and met monthly. On the second prong, the court was not persuaded that LendingClub's board ignored any "red flags." Because the LendingClub directors did not face a substantial risk of liability from the *Caremark* claim, the court refused to excuse the demand requirement, and the claim was dismissed.

## Advance Notice Bylaws

### *Saba Capital Master Fund, Ltd. v. Blackrock Credit Allocation Income Trust*
C.A. No. 2019-0416-MTZ, 2019 WL 2711281 (Del. Ch. June 27, 2019)

A shareholder of two investment funds attempted to challenge the re-election of incumbent board members at upcoming at meetings. The funds had advance notice bylaws, which require shareholders to give timely notice to the company of nominations. The activist shareholder provided timely notice of its nominations. In response, the funds requested supplemental information on the nominees, in the form of a forty-seven page questionnaire

that was due in five days. When the activist shareholder failed to meet that deadline, the funds refused to honor the nominations. The shareholder sued to challenge the invalidation of the nominations. The court sided with the activist shareholder, interpreting the advance notice bylaws' ambiguity in favor of the shareholder. The bylaws at issue only allowed supplemental requests for information "if necessary" and then only for the purposes of determining whether the nominees meet the director qualifications. Because the request for supplemental information exceeded the scope of director qualifications, the court excused strict compliance with the five-day deadline. The funds were ordered to count votes for the activist shareholder's nominees at the upcoming annual meeting.

*Bay Capital Finance, LLC v. Barnes & Noble Education, Inc.*
C.A. No. 2019-0539-KSJM (Del. Ch. Aug. 14, 2019) (transcript ruling)

In this case, the court enforced the company's advance notice bylaw to prevent an activist shareholder's board nominations from taking effect. The company's advance notice bylaw included a provision that only record holders of stock could submit notices of nomination. The activist shareholder, Bay Capital Finance, LLC ("Bay Capital"), submitted its nomination when it held stock only in "street name" (i.e., still in the name of a broker-deal or bank intermediary). Bay Capital did not become an official record holder of stock until one day after submitting the nomination, which was then after the deadline established in the advance notice bylaw. The court refused to fault the company for Bay Capital's mistake and held the nomination as invalid because it Bay Capital was not a record holder at the time of nomination. Bay Capital alternatively argued that it had relied on the deadline stated in the proxy statement for the meeting, which mistakenly did not match the advance notice bylaw. The court dismissed this argument because the facts were clear that Bay Capital did not actually rely on the proxy statement and simply made a mistake in obtaining record holder status too late.

## Shareholder Inspection of Books and Records

*Tiger v. Boast Apparel, Inc.*
214 A.3d 933 (Del. 2019)

This case reversed a recent trend in the Court of Chancery and held that there is no presumption of confidentiality to corporate records produced pursuant to shareholder inspection rights. A shareholder sued under Section 220 of the Delaware General Corporation Law to inspect records of Boast Apparel, Inc. ("BAI"). The Court of Chancery ordered BAI to produce the records, but also ordered the produced records were confidential for an

indefinite period of time based on a presumption of confidentiality. Although the Delaware Supreme Court ultimately upheld the confidentiality order, it made clear that there is no presumption of confidentiality of corporate records ordered produced. The court was particularly skeptical of confidentiality orders for indefinite periods of time; however, it noted that the Court of Chancery has the discretion to determine confidentiality of records ordered produced on a case-by-case basis.

### *KT4 Partners LLC v. Palantir Technologies Inc.*
203 A.3d 738 (Del. 2019)

KT4 Partners LLC ("KT4") was a major investor in Palantir Technologies Inc. ("Palantir"). The relationship between the entities soured when Palantir's CEO accused KT4's principal of stealing trade secrets. KT4 subsequently attempted to sell its interest in Palantir, but the sale did not go through, allegedly due to Palantir's wrongdoing. KT4 sued under Section 220 for inspection of all books and records (including electronic documents) relating to an amendment to an Investors' Rights Agreement for the stated purpose of investigating potential fraud, mismanagement, or abuse. The Court of Chancery ordered the requested records be produced, but specifically excluded production of emails. On appeal, the Delaware Supreme Court reversed and ordered emails to be produced as well. Delaware case law states that email should not be ordered produced if other, more traditional, records will achieve the petitioner's purpose. The court held that the general rule on non-production of emails did not apply in this case because Palantir did not have a history of observing corporate formalities in regards to recordkeeping. Therefore, informal emails could contain the evidence of fraud or abuse that KT4 was requesting. This decision emphasizes the importance of keeping traditional, non-electronic corporate records.

## Entity & Contract Formation Issues

### *Kotler v. Shipman Associates, LLC*
C.A. No. 2017-0457-JRS, 2019 WL 4025634 (Del. Ch. Aug. 21, 2019)

In this unusual case, the court invalidated a contract that was executed in counterparts because there was not a meeting of the minds as to what version of the contract the parties agreed to. The contract at issue was a warrant agreement between a cosmetics company and an independent contractor. Very little evidence surrounding negotiation of the contract existed, but it was established that the company sent a contract containing a post-separation non-compete to the independent contractor. The contractor then significantly edited the contract (including the non-compete) and sent back either a clean version or a counterpart signature page. The court held

the warrant agreement to be unenforceable because the parties did not have the requisite meeting of the minds to form a contract. Although this case should not be taken to mean that execution in counterparts jeopardizes the validity of the contract, it is a reminder of the importance of keeping thorough records of not just the contract, but also correspondence around its execution.

### *Eagle Force Holdings, LLC v. Campbell*
C.A. No. 10803-VCMR, 2019 WL 4072124 (Del. Ch. Aug. 29, 2019)

In another unusual contract-execution case, the court held the parties did not have the requisite intent to form a binding contract, despite the fact that both parties signed the agreements. The agreements at issue were transaction documents to form an LLC, which would market medical technology. One party contributed intellectual property he had developed, and the other contributed capital. The parties negotiated and exchanged drafts, and both parties signed the agreements at a two-to-five minute meeting. One party argued the signatures were only signifying receipt of the latest drafts, while the other argued that the signatures were meant to be binding on final agreements. The court held that evidence of signatures does not mean that the agreements are per se enforceable. A variety of facts led the court to hold that the signatures only signified receipt of the documents, including a previous practice of signing to signify receipt, the parties' attorneys not believing that the agreements were final, and the agreements appearing to still be in draft form (e.g., designated as such on the first page, blank terms). Under these unique facts, the court held the asserting that a binding contract existed did not establish by a preponderance of the evidence that parties' intended to be bound, despite the presence of signatures.

### *Weyh v. Gottsch*
929 N.W.2d 40 (Neb. 2019)

David Weyh and Barry Gottsch entered into an oral agreement, whereby Weyh would farm Gottsch's land, Gottsch would supply equipment and do the books, and they would split the profits 50-50. The business venture lasted a decade, at which time Weyh requested an accounting and the parties disagreed as to the original agreement. The district court determined that Gottsch owed Weyh profits of nearly $1.2 million and pre-judgment interest of about $1 million. On appeal, the Nebraska Supreme Court zeroed in on the pre-judgment issue, clarifying for the first time that Nebraska's two pre-judgment interest statutes provide independent means of recovery. Now, under Section 45-104, pre-judgment interest of 12% per annum is available on a variety of enumerated claims. The recovery of pre-judgment interest is even if the claim is unliquidated (i.e., liability or the amount of damages is

reasonably disputed). Depending on the accrual of the action, this clarified means of obtaining pre-judgment interest could mean a significant increase in damages recovered in breach of contract actions in Nebraska.

### *Ralston Investment Group, Inc. v. Wenck*
933 N.W.2d 903 (Neb. 2019)

This case highlights the dangers of going into business with little formal documentation. Five investors formed a corporation, RIG, to own and operate a gas station. The investors each contributed capital to RIG, but they did not execute bylaws or a shareholder agreement. The venture did not turn out to be profitable, and RIG periodically required cash injections to keep operating. Four investors stated that they formed an oral agreement during this period that they would all contribute capital in proportion to their initial contributions when RIG needed money. Wenck, the fifth investor, stated that no such agreement existed and that he only agreed to attempt to make additional capital contributions when he could. Wenck ended up behind on capital contributions in comparison to those of the other investors. The court held that there was insufficient evidence to prove the existence of a contract, deferring to the trial court's findings of fact on that issue. The four investors also sued Wenck for contribution for overpaying their fair share of personal guarantees on a RIG loan. Wenck had settled his guarantee claim and was still making monthly payments to the bank at the time of suit. The court held for Wenck on this issue as well, because Wenck's guarantee obligation was not discharged until he completed his payment plan. Because the four investors did not discharge any obligation of Wenck's, they could not sue him for contribution.

## Judicial Dissolution of LLCs

### *Acela Investments LLC v. DiFalco*
C.A. No. 2018-0558-AGB, 2019 WL 2158063 (Del. Ch. May 17, 2019)

Three investors—DiFalco, Shah, and Aigner—formed an LLC as part of a business venture in the pharmaceutical industry. The LLC had a "bespoke governance structure," which led to a deadlock. Aigner was named CEO, and DiFalco was named President. They were required to make decisions with the "advice and consent" of each other. Additionally, either (1) Aiger or (2) DiFalco and Shah together could veto any action of the board of managers. The agreement also contained a provision that allowed an "Independent Representative" to vote in the place of an interested director in case a conflict of interest arose. Eventually, two camps formed—Aiger on one end, DiFalco and Shah on the other—and deadlocked on fundamental decisions. Under Delaware law, if a deadlock forms between two directors and it cannot

be resolved by some mechanism within the LLC agreement, then dissolution becomes the only remedy available. Because Aiger and DiFalco disagreed on most issues, had to agree on decisions as CEO and President, and each had a veto power, a deadlock formed. The court considered whether the conflicts of interest clause could be used to break the deadlock, but ultimately decided that it could not. The court identified two flaws with the clause: it did not specific who decides when the Independent Representative steps in, and the scope of the provision was ambiguous. Because the agreement did not provide a mechanism to break the deadlock, the court ordered the LLC to be dissolved and liquidated.

## Stock Ledger Maintenance

### In re *Hawk Systems, Inc.*
C.A. No. 2018-0288-JRS, 2019 WL 4187452 (Del. Ch. Sept. 4, 2019)

This case underscores the importance of stock ledger maintenance. Mark Spanakos petitioned the court for a declaration that he was majority stockholder, sole director, and sole officer of Hawk Systems, Inc. ("Hawk"). To obtain this declaration, Spanakos had to prove his case by a preponderance of the evidence. The problem was that Hawk was severely mismanaged, and its stock ledger was "a mess." Spanakos only had evidence that he controlled about one-third of the shares, but he couldn't prove any more than that, although he claimed he owned about 90% of the shares. Spanakos got to this high ownership stake by arguing that a judgment he obtained from a Florida court against bad actors in the company granted him millions of voting shares and voided millions of other Hawk shares. The Delaware court disagreed on the interpretation of the order. Because Spanakos could not provide evidence that he was the majority stockholder, sole director, and sole officer of Hawk, the court refused to make the declarations. This decision left Spanakos unable to control the corporation he had investment millions into, largely due to the lack of a proper stock ledger.

## Obligations to Stakeholders

### *Statement on the Purpose of a Corporation*
Business Roundtable (Aug. 19, 2019)

For decades, the widely accepted purpose of corporations was to maximize long-term value for its shareholders. On August 19, 2019, the Business Roundtable—an association of CEOs of the nation's corporations—made headlines by issuing a statement that appeared to flip that paradigm. The statement emphasized serving all of a corporation's *stake*holders. The

statement, which was signed by 181 CEOs, included commitments to pay workers fairly, train and educate workers for a changing world, create fair and ethical supply chains, protect the environment, and embrace sustainable practices. The statement does little on its own, and it remains to be seen what action major corporations will take to implement these commitments. However, the statement signals the beginnings of a potential sea change regarding how we think about the purpose of corporations. As public attitude changes, we can corporate law to change as well.

## Director Review Standards

### *Olenik v. Lodzinski*
208 A.3d 704 (Del. 2019)

The main issue in this case was the timing requirement of so-called *MFW* protections. In *Kahn v. M & F. Worldwide Corp.*, 88 A.3d 635 (Del. 2014), the court held that mergers proposed by a controlling shareholder and its subsidiary are entitled to the business judgment standard of review (instead of the more rigorous entire fairness standard) (1) if the deal is conditioned up front "upon the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care" and (2) upon "the uncoerced, informed vote of a majority-of-the-minority of stockholders." The court later clarified the definition of "up front" in *Flood v. Synutra International, Inc.*, 195 A.3d 754 (Del. 2018), holding that *MFW* protections must be in place before "substantive economic negotiations" take place. In this case, two companies with the same controlling shareholder entered into merger negotiations. The companies did not condition the deal on *MFW* protections until ten months into negotiations. The court noted that some of these negotiations could be characterized as "preliminary discussions" that fall outside of the "up front" requirement, but held that "substantive economic negotiations" had taken place for nearly eight months before *MFW* protections were in place. Most importantly, the parties underwent a valuation process, which the court identified as a turning point to "substantive economic negotiations." Because MFW protections were not in place "up front," the court refused to apply the business judgment standard and dismiss the minority shareholders' claims.

### *Reith v. Lichtenstein*
No. 2018-0277, 2019 WL 2714065 (Del. Ch. June 28, 2019)

Steel Connect, Inc. ("Steel Connect") acquired another company and sold preferred stock to Steel Partners Holdings, L.P. ("Steel Holdings") to finance part of the deal. Before the deal, Steel Holdings owned about 36% of Steel Connect's shares. After the stock purchase and through equity grants to

Steel Holding-affiliated directors on Steel Connect's board, Steel Holdings achieved majority control. A stockholder of Steel Connect alleged that Steel Holdings was a controlling stockholder and, therefore, owed and breached fiduciary duties by causing the stock issuance. If there is a controlling stockholder on both sides of a transaction, the deal is stripped of protection under the business judgment rule and is instead scrutinized under the entire fairness test. Although Steel Holdings only held a minority stake in Steel Connect, the court nevertheless held that it exerted "actual control" over Steel Connect. This "actual control" ruling was due to Steel Holdings' substantial stake in Steel Connect, its ability to elect directors, and its substantial influence over management (e.g., Steel Connect paid a Steel Holdings affiliate to provide managerial services and many top executives were Steel Holdings affiliates). Steel Holdings' control over Steel Connect's board also had the effect of excusing the demand requirement for derivative suits because the demand would have been futile considering the interested board. The court allowed the preferred stock and equity-grants claims to continue under the entire fairness standard, but dismissed the preferred-stock claim as to the independent directors that comprised the special committee because the plaintiff failed to plead a non-exculpated breach of fiduciary duty.

### In re *Towers Watson & Co. Stockholders Litigation*
No. 2018-0132, 2019 WL 3334521 (Del. Ch. July 25, 2019)

Towers Watson & Co. ("Towers Watson") shareholders challenged the merger between Towers Watson and Willis Group Holdings plc ("Willis") on the basis that Towers Watson's CEO (and lead negotiator of the deal) did not disclose to the board a compensation proposal he received from a large Willis shareholder before the merger was consummated. The court dismissed the suit because it held the plaintiffs failed to rebut the presumptive validity of the transaction under the business judgment rule. Under Delaware law, an allegation of material conflicts of a minority of directors can only rebut the business judgment rule if (1) the conflicted director controls or dominates the rest of the board; or (2) a reasonable board member would find the undisclosed information material to his or her evaluation of the transaction. The plaintiffs argued the second prong applied, that the non-disclosure of the compensation proposal was material. The court disagreed, citing the board's knowledge that the CEO was going to be the CEO of the larger, combined entity, which would likely mean an increase in compensation. Additionally, the board kept involved in merger negotiations and pre-merger compensation negotiations stopped at the proposal. Because undisclosed information was not material, the business judgment rule still applied. (Note that, on identical facts in parallel securities litigation, the Fourth Circuit found that a reasonable jury could find the undisclosed compensation

proposal was material. In re *Willis Towers Watson plc Proxy Litigation*, 937 F.3d 297 (4th Cir. 2019).)

### In re *BGC Partners, Inc. Derivative Litigation*
C.A. No. 2018-0722-AGB, 2019 WL 4745121 (Del. Ch. Sept. 30, 2019)

Shareholders of BGC Partners, Inc. ("BGC") sued in relation to BGC's purchase of Berkeley Point Financial LLC ("Berkeley") from an affiliate of Cantor Fitzgerald L.P. ("Cantor"). BGC and Cantor were controlled, directly or indirectly, by the same shareholder. BGC shareholders argued that since the controlling shareholder's stake in Cantor was much larger than his stake in BGC, he caused BGC to overpay for Berkeley. The Court of Chancery excused the demand requirement based on futility and denied the defendants' motion to dismiss for failure to state a claim. For the demand question, the court applied the *Aronson* test, which states that a demand is futile if there is reasonable doubt that (1) the directors are disinterested and independent; or (2) the challenged transaction was otherwise a product of valid business judgment. *Aronson v. Lewis*, 466 A.2d 375 (Del. Ch. 1983). The court rejected the plaintiff's argument as to the second prong, holding that although the transaction may be subject to the entire fairness standard due to the controlling shareholder problem, that fact is more properly analyzed under the first prong. The court scrutinized the relationships between the controlling shareholder and the "independent" directors that made up the special committee. Due to relationships stemming from spouses and family members, charity work, and support of the controlling shareholder's alma mater, in addition to board compensation being a substantial portion of their incomes, the court held that a majority of the "independent" directors were interested. This ruling had the effect of excusing the demand as futile under the *Aronson* test, as well as defeating the motion to dismiss for failure to state a claim. (Note that Nebraska's analogue statute for determining whether a director is "interested" is NEB. REV. STAT. § 21-2,122.)

### *JJS, Ltd. v. Steelpoint CP Holdings, LLC*
C.A. No. 2019-0072-KSJM, 2019 WL 5092896 (Del. Ch. Oct. 11, 2019)

The Court of Chancery allowed a breach of fiduciary duty claim to survive a motion to dismiss in this case involving a challenge to the asset sale of an LLC. Common unitholders of Pro Performance Sports, LLC ("Pro Performance") alleged that the sale violated Pro Performance's Operating Agreement because the common unitholders were not permitted to have a separate class vote on the asset sale. Using canons of interpretation, the Vice Chancellor held the Operating Agreement conveyed a right to vote to common unitholders, but not a right to a separate vote as a class. The plaintiffs also alleged the Pro Performance board breached its fiduciary duty of loyalty. The court denied the motion to dismiss as to this claim, holding

that a majority of the managers were conflicted. Three of the managers who approved the transaction were appointed by the senior unitholder of the buyer, and a fourth manager was conflicted due to receiving a large severance package just before the vote. The plaintiff's pleadings were sufficient to strip the board's decision of business judgment rule protection, apply the entire fairness rule, and deny the motion to dismiss.

# II. Mergers & Acquisitions

## #MeToo Representations and Warranties

*#MeToo Provision Becoming Standard Safeguard in M&A Deals*
Andrea Vittorio, BLOOMBERG LAW (June 27, 2019 5:53 AM)

Representations in transaction documents stating that the company's leadership has not been accused of sexual harassment or misconduct are increasingly popular. A study of public merger agreements filed between May 2018 and June 2019 revealed that forty-five agreements included representations on sexual harassment, dubbed "Weinstein clauses." These clauses have appeared in deals of all sizes and can cover both buyer and seller's leadership.

*#MeToo Representations and Warranties*
Thomson Reuters Practical Law (last visited Nov. 16, 2019)

The Practical Law databased by Thomson Reuters recommends the following language in its #MeToo Representations and Warranties template:

1. [To the Company's Knowledge,] [except as set forth in the Company Disclosure Letter,] [[I/i]n the last [five/[NUMBER]] years]:

(a) no allegations of sexual harassment [or sexual misconduct] have been made involving any [current/current or former] director, officer, [or] employee [at the level of [vice president / [OTHER SENIORITY CLASSIFICATION] or above] [, or independent contractor] of the Company or any of its Subsidiaries], and

(b) neither the Company nor any of its Subsidiaries have entered into any settlement agreements related to allegations of sexual harassment [or sexual misconduct] by any [current/current or former] director, officer, [or] employee [at the level of [vice president / [OTHER SENIORITY CLASSIFICATION] or above] [, or independent contractor] of the Company or any of its Subsidiaries].

## Indemnification Clauses

*Hill v. LW Buyer, LLC*
C.A. No. 2017-0591-MTZ, 2019 WL 3492165 (Del. Ch. July 31, 2019)

This case concerns a tax indemnity clause in a stock purchase agreement. The clause stated that the sellers would indemnify the buyer for any unpaid

taxes, provided that the buyer gives the sellers a detailed notice of the claim within one year of closing and obtains the sellers' consent before settling the claim. After closing, the buyer discovered unpaid taxes, paid the claim, and then gave the sellers notice one day before the deadline. The court did not permit the buyer recover a payment under the tax indemnity clause because it unilaterally settled the claim without notification to the sellers. As the buyer did not follow the procedure laid out in the tax indemnify clause, the court reasoned, it could not recover under it. This case is reminder that special care should be put into not only the language of the agreement, but also post-closing behavior and attempts to enforce the agreement. Further, indemnification clauses that require a seller's consent before settlement can be a powerful enforcement mechanism to effect notice from buyer of any claim.

## Attorney-Client Privilege

### *Shareholder Representative Services LLC v. RSI Holdco, LLC*
C.A. No. 2018-0517-KSJM, 2019 WL 2290916 (Del. Ch. May 29, 2019)

This case addressed the question when a buyer may use an acquired company's privileged pre-merger attorney-client communications in post-closing litigation against the sellers, where the transfer between buyer and seller involved the transfer of computer systems and email servers, giving the buyer possession of the target's privileged pre-merger attorney-client communications. The Court of Chancery of Delaware referenced a previous decision, *Great Hill Equity Partners IV, LP v. SIGN Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013), for the proposition that, absent some affirmative action taken by the sellers, all assets of a target company—including privilege over attorney-client communications—transfers to the surviving company. In this case, the sellers secured a provision in the merger agreement preserving their ability to assert privilege post-merger over pre-merger communications. The buyer was also prevented by that provision from relying on those privileged communications in post-closing litigation against the sellers. The buyer argued that those contractual provisions were insufficient because the sellers did not excise or segregate the privileged communications from the computers and servers transferred to the buyer. The court disagreed, concluding that the merger agreement operated to preserve the privilege. Therefore, RSI Holdco, LLC's motion for disposition of privilege dispute was denied, and Shareholder Representative Services LLC's cross-motion for entry of a protective order was granted.

## Board Observers

### *Obasi Investment LTD v. Tibet Pharmaceuticals, Inc.*
931 F.3d 179 (3d Cir. 2019)

As a matter of apparent first impression on certified interlocutory appeal, the U.S. Court of Appeals for the Third Circuit held that nonvoting board observers were not proper defendants in stock purchasers' action because they were not persons named in a corporation's IPO registration statement as performing "similar" functions as directors. In this case, stock purchasers brought a putative class action against the corporation, nonvoting board observers affiliated with the corporation's placement agent, and the placement agent, alleging that the corporation's IPO registration statement omitted material negative information in violation of the Securities Act. The court held as a matter of law that, based on the registration's statements description, the observers did not perform functions "similar" to directors. In support of its decision, the court determined that a board member within the meaning of the Securities Act is one who is "appointed to direct or manage the affairs" of a company. The observers were found to lack the ability to manage the company's affairs, due in part to their inability to vote; their alignment with the placement agent; and the fact that their tenures were to end automatically. As a result of the foregoing, the order of the district court was reversed and summary judgment was entered for the defendants.

## Regulatory Matters

### *Merger & Acquisition Brokers*
Nebraska Dept. of Banking and Finance, Bureau of Securities,
Interpretive Opinion No. 19 (Aug. 9, 2019)

This opinion from the Nebraska Bureau of Securities clarifies the definition of "broker-dealer" under Section 8-1101(2) of the Securities Act of Nebraska (the "Act"). The opinion parallels an SEC no-action letter regarding "M&A Brokers," dated January 31, 2014 (revised February 4, 2014). The opinion clarifies that M&A brokers that facilitate transactions between privately held companies are not "broker-dealers" under the Act, as long as they also meet the following conditions: (1) the broker will not have the ability to bind a party to an M&A transaction; (2) the broker will not provide financing for the transaction; (3) the broker will not have custody or control of funds or securities issuance in relation to the transaction; (4) the transaction does not involve a public offering; (5) if the broker represents both the buyer and the seller, proper disclosure of that fact to both parties and the written consent of the parties to joint representation; (6) if the transaction involves a group of buyers, the group was not formed with the assistance of the

broker; (7) after the transaction, the buyer has the power to control and actively operate the company; (8) the transaction does not involve a passive buyer; (9) any securities the buyer or the broker receives as a result of the transaction are restricted securities under Rule 144(a)(3) of the Securities Act of 1933; and (10) the broker has not been barred or suspended from affiliation with a broker-deal by the SEC. If brokers of private-company deals are able to meet these conditions, they will be subject to less regulation under the Act. However, the general anti-fraud provisions of Section 8-1102 of the Act would still apply.

### *Antitrust Compliance Credit*

Department of Justice, Office of Public Affairs,
"Antitrust Division Announces New Policy to Incentivize Corporate Compliance" (July 11, 2019)

The Antitrust Division of the U.S. Department of Justice ("DOJ") announced a new policy that would reward strong corporate compliance programs when the DOJ makes charging decisions. As part of the change, the DOJ updated its Justice Manual, which provides guidance to federal prosecutors, removing previous guidance that credit should not be given for compliance programs at the charging stage. The DOJ also published, for the first time, guidance for federal prosecutors on evaluating corporate compliance programs in criminal antitrust cases. The DOJ hopes that this policy change will incentivize the development of corporate compliance programs. Previously, only the first to report criminal conduct would receive immunity from prosecution.

## Boilerplate Issues

### *Dolan v. Altice USA, Inc.*

C.A. No. 2018-0651-JRS, 2019 WL 2711280 (Del. Ch. July 3, 2019)

This case is an example of the interaction between boilerplate and bespoke provisions in an agreement creating ambiguity. The Dolan family founded and controlled Cablevision Systems Corp. ("Cablevision"). The Dolan family sold Cablevision to Altice Europe N.V. and Altice USA Inc. (collectively, "Altice") through a merger agreement. The agreement contained a representation that Altice would operate Cablevision substantially the same as before the deal until 2020, which was negotiated out of the Dolan family's concern to maintain Cablevision's current employees and quality of reporting. Altice terminated Cablevision employees after the merger, and the Dolan family sued to enforce the representation. Altice moved to dismiss, arguing that the Dolan family did not have standing to sue since they were not parties to the agreement under a no-third-party-beneficiary clause. The court denied the motion, holding that the bespoke representation and the

"bespoke boilerplate" no-third-party-beneficiary clause (i.e., it carved out exceptions for certain provisions of the agreement, but it did not carve out the Dolan family so it could enforce the representation) created an ambiguity that required parol evidence to resolve. Altice argued in the alternative that the representation terminated at closing because it was not designated as a surviving covenant in the agreement's boilerplate survival clause. Similar to its ruling on the third-party-beneficiary issue, the court held the interaction between the bespoke representation and the boilerplate survival clause created an ambiguity that required parol evidence to resolve.

### *Brown Robin Capital, LLC v. The Anschutz Corp.*
C.A. No. 2019-0456-JRS (Del. Ch. Aug. 14, 2019) (transcript ruling)

The substance, and even existence, of forum selection clauses are often dictated by the boilerplate language included in the first draft of the agreement. *Special Order Your Forum Selection Clause*, Glenn D. West of Weil Gotshal & Manges LLP, LEXOLOGY (Oct. 28, 2019). This case demonstrates the importance of the specific wording of these often under-negotiated terms. In this case, the buyers asked the Chancery to issue a preliminary injunction halting a lawsuit initiated by the sellers in Texas, which alleged that the buyers engaged in fraud in relation to the parties' transaction. The agreement's forum selection / choice of law paragraph stated that the agreement shall be exclusively interpreted under Delaware law and that the parties consent to the exclusive personal jurisdiction and venue of the Delaware Court of Chancery. The court questioned the paragraph's application to this fraud action and held that the paragraph only operated as a forum selection clause for actions related to contractual interpretation. However, the court further held that the fraud action at hand would necessarily require contractual interpretation and granted the preliminary injunction.

## Termination

### *Akorn, Inc. v. Fresenius Kabi AG*
No. 535, 2018, 2018 WL 6427137 (Del. Dec. 7, 2018)

In this case, the Supreme Court of Delaware held for the first time at a buyer could properly terminate a merger based on the occurrence of a material adverse effect ("MAE"). The court affirmed the Court of Chancery in its dismissal of Akorn, Inc.'s ("Akorn") claims, based on its holding that Fresenius Kabi AG ("Fresenius") had no obligation to close its proposed merger with Akorn and that Fresenius properly terminated the merger agreement. The Court of Chancery properly relied on *In re IBP Inc. Shareholders Litigation*, 789 A.2d 14 (Del. Ch. 2001) and *Hexion Specialty*

*Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008) to find that Akron had suffered an MAE under the merger agreement ("general MAE"), excusing Fresenius' obligation to close. Additionally, Fresenius properly terminated the agreement because Akorn's breach of its regulatory representations and warranties gave rise to an MAE ("regulatory MAE") and Fresenius had not itself engaged in a prior, material breach of covenant that would prevent it from exercising its immediate termination right under the agreement. In finding that a general MAE occurred, the Court of Chancery relied on "durationally significant" decline in Akorn's revenue—Akorn's revenue had declined by at least 25% for a full year. The court focused on the unexpected nature of this decline, but it noted that termination would be permissible even if the decline were foreseeable because MAE, as defined by the merger agreement, was not limited to "unforeseeable" events. In finding that a regulatory MAE occurred, the Court of Chancery found Akorn's regulatory compliance issues—stemming from "data integrity" issues and reporting of false data to the FDA—were so pervasive as to be an MAE. The court analyzed the issue both qualitatively and quantitatively. On the qualitative analysis, the court focused on Akorn's extraordinarily terrible data integrity problem, which ran afoul of its FDA compliance as a pharmaceutical company. Compliance with FDA requirements was "essential" to Akorn's business. On the quantitative analysis, the court estimated that the regulatory problem would cost $900 million, or approximately 21% of the value of Akorn as contemplated by the merger agreement. The court found that a 20% decline "would reasonably be expected to result in an MAE." Significantly, the court did not find as persuasive Akorn's argument that MAE provisions are only for "unforeseen" events and carry an implied carve-out for risks that buyer could have found with proper due diligence. Therefore, the court held Fresenius could have properly terminated the merger under either a general MAE or a regulatory MAE theory.

### *Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc.*
C.A. No. 2018-0927-SG, 2019 WL 1223026 (Del. Ch. Mar. 14, 2019)

The Court of Chancery held that a "commercially reasonable efforts" provision did not impose a "duty to warn" the other party that the terminating party decided it would terminate the merger agreement if given the opportunity. Vintage Rodeo Parent, LLC ("Vintage") agreed to purchase Rent-a-Center, Inc. ("RAC"), effectuated though a merger. The merger agreement set an "End Date," and if regulatory approvals had not been received by that date, the agreement terminated, although either party had an option to extend the End Date by six months by delivering written notice to the other party. Prior to the End Date, RAC's board decided that, since the company was doing better, it would terminate the merger with Vintage if the opportunity arose. RAC proceeded "business as usual" until the End Date. On

the End Date, the parties had not yet received regulatory approval. When Vintage did not send RAC notice of its right to extend the End Date, RAC sent Vintage a notice of termination and immediately issued a press release stating the merger was terminated. Vintage sued, alleging that by not warning Vintage of its intention to terminate, RAC did not use "commercially reasonable efforts" to consummate the transaction, as it was obligated under the agreement. The court rejected Vintage's argument and held that the efforts clause did not also include a "duty to warn." As the court saw it, RAC did nothing untoward, and RAC did not have an obligation to inform Vintage of its contractual rights, especially since the facts were absent of any evidence of Vintage's misunderstanding or mistaken belief regarding its contractual rights.

*Genuine Parts Co. v. Essendant Inc.*
C.A. No. 2018-0730-JRS, 2019 WL 4257160 (Del. Ch. Sept. 9, 2019)

Shortly before Genuine Parts Co. ("GPC") and Essendant Inc. ("Essendant") signed a merger agreement, Sycamore expressed an interest in acquiring Essendant. After GPC and Essendant had signed the agreement, Sycamore made a formal offer, which the Essendant board of directors rejected. Sycamore then gave assurances that the offer would increase after it completed its due diligence. The Essendant board determined that this would lead to a better deal than GPC; therefore, it terminated its agreement with GPC and paid the termination fee required by the agreement. GPC maintained in this action that the termination fee was not an exclusive remedy and that Essendant was in breach of several other provisions of the merger agreement, including a non-solicitation provision. Essendant filed a motion to dismiss, which was denied. In support of its holding, the court noted that Essendant violated the non-solicitation provision when it indicated to Sycamore that it would be open to receiving a revised offer, after signing with GPC; the court observed that Sycamore was in the picture prior to signing, as opposed to a "pop-up bidder." Additionally, Essendant rejected Sycamore's first proposal, but accepted a substantially similar second proposal when Sycamore suggested the offer would be increased after it reviewed Essendant's non-public information; from this fact, the court found a reasonable inference that Essendant's board shared its "inclinations" with Sycamore, to encourage it to submit the substantially similar follow-up bid that would allow Essendant to "properly" begin competing negotiations.

## Appraisal Rights

*Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*
210 A.3d 128 (Del. 2019)

The Delaware Supreme Court held that the Court of Chancery abused its discretion by relying on an average of pre-merger thirty-day stock price of the seller in its appraisal determination. The case concerns the merger between Hewlett Packard Company ("HP") and Aruba Networks, Inc. ("Aruba"). After news of the merger became public, Aruba's share price jumped. Aruba's share price rose again shortly after that, when Aruba released its higher-than-expected quarterly earnings numbers. After the merger closed, some Aruba shareholders asked the court to appraise the "fair value" of their shares. The Court of Chancery used an average of Aruba's share price before the merger became public as the metric to appraise the shares. The Delaware Supreme Court reversed, instead using the deal price minus synergies to calculate fair value of the shares. Important to the court's reversal is Delaware law's requirement that the appraisal value be as of the "effective date of the merger," which in this case would include the bump from Aruba's good earnings report. The Delaware Supreme Court also placed heavy weight on HP's valuation of Aruba, especially considering it had access to non-public information on Aruba's operations under a confidentiality agreement. This case emphasizes the importance and primacy of using market-tested deal prices in appraisal actions.

### In re *Appraisal of Jarden Corporation*
C.A. No. 12456-VCS, 2019 WL 3244085 (Del. Ch. July 19, 2019)

This case demonstrates how a flawed sales process can impact the determination of the fair value of the seller's share in an appraisal proceeding. At issue was the fair value of the shares of Jarden Corporation ("Jarden") after it was acquired by Newell Rubbermaid, Inc. ("Newell"). Usually, Delaware courts view the deal price as the most reliable evidence of fair value. However, that general rule did not apply in this case, the court held, because the sales process was flawed. Jarden's CEO met with Newell's CEO without telling his board and negotiated the sales price without authorization from the Jarden board. This sales process cast the validity of the deal price into doubt, so the court instead relied on unaffected market price as the metric to value the shares. The court also engaged in discounted cash flow analysis, and found it consistent with the unaffected market price metric.

### In re *Appraisal of Columbia Pipeline Group, Inc.*
C.A. No. 12736-VCL, 2019 WL 3778370 (Del. Ch. Aug. 12, 2019)

In this case, the court relied on the deal price to determine fair value of the seller's shares, despite an imperfect sales process. TransCanada Corporation ("TransCanada") acquired Columbia Pipeline Group, Inc. ("Columbia"), and Columbia shareholders initiated this action for appraisal. The sales process

was far from perfect—management's conflicting interest in retiring was not disclosed to shareholders, and Columbia did not disclose that TransCanada breached a standstill agreement that prohibited it from engaging with Columbia without written consent from its board (Columbia's board did eventually waive the breaches and consent to negotiations). Despite these flaws, the court still relied on the deal price as the appraisal metric, because the transaction was generally negotiated at arm's length and Columbia's board did extract several price increased throughout negotiations. The court refused to deduct synergies from the sales price. Such a downward adjustment may have been warranted, but the court held TransCanada did not put forward sufficient evidence to quantify a synergies deduction.

### *In re Appraisal of Stillwater Mining Company*
C.A. No. 2017-0385-JTL, 2019 WL 3943851 (Del. Ch. Aug. 21, 2019)

The court in this case also used the deal price to measure the fair value of the seller's shares. Sibanye Gold Limited ("Sibanye") acquired Stillwater Mining Company ("Stillwater") through a reverse triangular merger. The court found the sales process bore "objective indicia of fairness," and therefore used the deal price as the appraisal metric. This was despite the finding that Stillwater's CEO engaged in unauthorized sales negotiations while also negotiating an employment agreement for himself. This conflict may have derailed the validity of use of the deal price for appraisal, but the court found that subsequent measures remedied the sales process—including retaining an investment banker to canvas for additional bidders pre-signing and conducting a post-signing market check. The court also emphasized the value of Sibanye's due diligence of Stillwater's non-public information, especially considering the SEC more tightly restricts what mining companies can disclose. The court did not deduct for synergies because Sibanye's own valuation expert testified that synergies were not part of the deal price and Sibanye told stockholders the same.

### *Manti Holdings, LLC v. Authentix Acquisition Company, Inc.*
C.A. No. 2017-0877-SG, 2019 WL 3814453 (Del. Ch. Aug. 14, 2019)

Contractual waivers of appraisal rights are valid under Delaware law, at least when the contractual provision is clear and unambiguous, and when the contract was entered into between sophisticated parties. The shareholders of Authentix Acquisitions Company, Inc. ("Authentix") entered into a shareholders' agreement that required their consent to a future merger and required them to not exercise their statutory appraisal rights. The court upheld this waiver of statutory appraisal rights, noting that the existing of the right is mandatory, but the exercise of it is not. Therefore, the waiver was not held to be contrary to Delaware law and actually supplements Delaware law. The court cautioned that this holding is narrow, however.

Waivers that are not made between sophisticated parties, waiver provisions that are not clear and unambiguous, and waivers made in agreements without substantial give-and-take may be invalid.

## Anti-Reliance Clauses

*Heritage Handoff Holdings, LLC v. Fontanella*
No. 1:16-cv-00691-RGA, 2019 WL 1056270 (D. Del. Mar. 6, 2019)

The court distinguished between an anti-reliance clause, which would effectively defeat a claim based on extra-contractual fraud, and a clause that states that the parties have not made any extra-contractual representations, which would not defeat an extra-contractual fraud claim. The clause at issue stated that each party to the agreement "has not made or does not make any other express or implied representation," except as provided in the agreements representations and warranties section. The federal court applying Delaware law held that this provision was not an anti-reliance clause and that the plaintiff's fraud claim could not be dismissed under the provision. The court noted that for a clause to operate as an anti-reliance clause, it must be clear in its language that the plaintiff has affirmatively agreed not to rely on extra-contractual statements. This case has important implications for the drafting of valid anti-reliance clauses, which are tremendously important in decreasing a seller's post-closing risk.

*International Business Machines Corporation v. Lufkin Industries, LLC*
573 S.W.3d 244 (Tex. 2019)

A much-debated opinion of the Texas Supreme Court held that for a purported anti-reliance to be effective in defeating a claim based on extra-contractual fraud, it must use a form or tense of the word "rely." *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323 (Tex. 2011). In this case, the Texas Supreme Court applied this precedent to hold that a purported anti-reliance was effective in defeating a claim based on extra-contractual fraud. The clause at issue stated that the plaintiff "is not relying upon any representations made by or on behalf of" the defendant. The court held that this language created a valid anti-reliance clause. Consistent with the federal Delaware court's holding in Heritage Handoff, the Texas court held that a provision that recites the parties have not made extra-contractual representations is not clear enough to defeat a fraud claim.

## Earn-Out Provisions

### *Himawan v. Cephalon, Inc.*
C.A. No. 2018-0075-SG, 2018 WL 6822708 (Del. Dec. 28, 2018)

The outcome of this case turned upon the meaning of the term "commercially reasonable efforts" in regards to the buyer's effort to meet certain milestones for earn-out payments to the sellers. Cephalon, Inc. ("Cephalon") purchased Ception Therapeutics, Inc. ("Ception") to gain access to a license for the rights to an antibody, which the parties hoped could be developed to treat asthma and esophagitis. The merger agreement stated the Cephalon must use "commercially reasonable efforts" to develop and commercialize the antibody. When Cephalon stopped developing the antibody, shareholders of Ception sued. The court first determined that "commercially reasonable efforts," as defined by the merger agreement, set an objective standard. Because the plaintiff's complaint pointed to similarly situated companies that were still pursuing a treatment based on the antibody, the court denied the defendant's motion to dismiss. Although the defendant countered that the companies that the plaintiffs pointed to were dissimilar from Cephalon in key respects, the court employed plaintiff-friendly inferences at the pleading stage. This litigation is still ongoing; the parties are currently in discovery.

### *Collab9, LLC v. En Pointe Technologies Sales, LLC*
C.A. No. N16C-12-032 MMJJ CCLD, C.A. No. N19C-02-141 MMJ CCLD,
2019 WL 4454412 (Del. Super. Ct. Sept. 17, 2019)

In this case, the court dismissed a claim alleging breach of the implied covenant of good faith and fair dealing for the purchaser's failure to maximize earn-out payments. PCM, Inc. ("PCM") purchased En Pointe Technologies Sales, LLC ("En Pointe") from Collab9, LLC ("Collab9"). As part of the consideration for the asset purchase agreement, PCM agreed to pay Collab9 earn-out payments based on a percentage of En Pointe's adjusted gross profit. After closing, Collab9 sued, claiming that PCM and En Pointe took actions to reduce the earn-out payments, including maintaining poor financial records and moving revenue off En Pointe's book and into a sham entity's books. The court granted the defendants' motion to dismiss. The court reasoned that PCM retained sole discretion over operation of En Pointe post-closing under the agreement. Collab9 cannot recover for protections it failed to negotiate into the contract.

BAIRD HOLM LLP

ATTORNEYS AT LAW

# Robert L. Kardell | Attorney

**Tel: 402.636.8313**
Fax: 402.344.0588
*bkardell@bairdholm.com*

## Areas of Practice

Privacy & Data Protection

Technology & E-Commerce

Business & Corporate Transactions

Intellectual Property, Copyright & Trademark

## Education

University of Nebraska College of Law, Juris Doctor, 1991

University of Nebraska College of Business, Masters in Business Administration, 1991

Benedictine College, Bachelor of Arts in Accounting, Distinction, 1987

## Bar & Court Admissions

Nebraska, 1992

Robert L. Kardell (Bob) is an attorney whose practice focuses on technology-based risk management solutions, technology and cyber threat prevention, remediation and response, and fraud prevention and investigation. Bob has more than 22 years of experience working for the Federal Bureau of Investigation as a Special Agent, Supervisory Special Agent, Supervisory Senior Resident Agent, Special Agent, Program Coordinator for Public Corruption, Complex Financial Crime, Healthcare Fraud, and Domestic Terrorism.

In his career, Bob has also worked as a computer forensics examiner and accounting forensics investigator. He has testified numerous times as a fact witness, was designated as an computer expert witness in a $300,000,000 civil case, and drafted expert reports for both accounting and computer-related investigations.

Bob has been a member of the Association of Certified Fraud Examiners and the Heartland ACFE for 12 years. During that time, he has served as a director and a member of the editorial advisory committee for the ACFE's Fraud Magazine. He is also a Certified Public Accountant (CPA); Certified Information Systems Security Professional (CISSP); Certified in Financial Forensics (CFF); Certified Fraud Examiner (CFE); and AccessData Certified Examiner (ACE).

## Selected Practice Highlights

- United States v. US Congressman Mel Reynolds
  - Indictment of a US Congressman. Investigation resulted in the trial of Reynolds and ultimately a guilty verdict on 15 of 16 counts, his wife also pleaded guilty.
- United States v. Village of Niles Mayor Nicholas Blase
  - Indictment of the Mayor for the Village of Niles. Investigation resulted in a guilty plea of Blase.
- United States v. Nicholas Boscarino
  - Investigated the extortion of money from the Village of Rosemont, Illinois. Four-week trial and a guilty verdict of all counts; investigation and indictment resulted in guilty pleas from two other defendants for fraud and perjury.
- United States v. Cook County Judge George J.W. Smith
  - Indictment of a sitting Cook County Judge. Investigation resulted in the guilty plea of Judge Smith to charges of mail fraud and tax fraud.

## Professional & Civic Affiliations

- Nebraska State Bar Association
- Nebraska State Board of Public Accountancy
- Nebraska Society of Certified Public Accountants
- American Institute of Certified Public Accountants (AICPA)
- Association of Certified Fraud Examiners (ACFE), Fraud- Editorial Advisory Committee (2007-Present)
- Association of Certified Fraud Examiners (ACFE), Heartland Chapter- Board Member (2007-2010)
- High Tech Crime Investigators Association, Nebraska Chapter President (2009-2010)
- Nebraska Infragard (an association of businesses, academic institutions, state and local law enforcement agencies, and the FBI created to help protect the critical national infrastructure)

Robert L. Kardell
**Tel: 402.636.8313**
Fax: 402.344.0588
*bkardell@bairdholm.com*

BAIRD HOLM LLP

ATTORNEYS AT LAW

# Kimberly A. Lammers | Partner

**Tel: 402.636.8219**
Fax: 402.344.0588
*klammers@bairdholm.com*

## Areas of Practice

Health Care

## Education

Creighton University School of Law, J.D., *summa cum laude*, 1997

University of South Dakota, B.A., Political Science and Classics, *magna cum laude with University honors,* 1994

## Bar & Court Admissions

Nebraska, 1997

Iowa, 2005

Wisconsin, 2019

Kimberly A. Lammers assists clients with advice and representation for issues relating to Federal health care program fraud and abuse laws, regulatory compliance, Medicare and Medicaid reimbursement, clinical denials and appeals including RAC audits, contracting, medical staff, licensure, credentialing, conflict of interest, and human subject research and IRB issues. Prior to joining the firm, she spent 13 years working for a large health system in the areas of compliance and revenue cycle, and most recently served as that health system's Vice President of Compliance.

Kim is also a Certified Professional Coder through the American Academy of Professional Coders, and has completed ICD-10 proficiency testing through the AAPC.

Kim is licensed in both Iowa and Nebraska, and is active as a member of various legal associations, including the American Health Lawyers Association and the Health Care Compliance Association.

Kim received her law degree from Creighton University School of Law, *summa cum laude*, and received her undergraduate degree from the University of South Dakota, *magna cum laude, with University honors*.

## Professional & Civic Affiliations

- American Health Lawyers Association, Member
- Health Care Compliance Association, Member
- American Academy of Professional Coders, Certified Professional Coder

BAIRD HOLM LLP

ATTORNEYS AT LAW

# Stephanie A. Mattoon | Partner

**Tel: 402.636.8238**
Fax: 402.344.0588
*smattoon@bairdholm.com*

## Areas of Practice

Business & Corporate Transations

Energy & Renewable Energy

Nonprofit & Tax-Exempt Organizations

Securities

## Education

University of Nebraska College of Law, J.D., *with high distinction,* 2005

Texas Christian University, BBA in Marketing, *magna cum laude*, 2002

## Bar & Court Admissions

Iowa, 2005

Nebraska, 2006

Stephanie A. Mattoon represents entrepreneurs at all stages of their business life cycle with respect to entity formation, shareholder agreements, securities law compliance, and mergers and acquisitions. She regularly advises companies and boards of directors on corporate governance matters, including fiduciary duties and conflict of interest issues. From time to time she represents minority shareholders involved in oppression disputes and negotiated buy-out transactions. She has experience in counseling both franchisors and franchisees on state and federal franchise issues, including drafting franchise disclosure documents and negotiating the acquisition and resale of franchisee rights. She enjoys representing clients in a variety of industries, including technology, restaurant/bar, retail, nonprofit, renewable energy, and telecommunications.

Stephanie received her Juris Doctor, *with high distinction*, from the University of Nebraska College of Law in 2005, where she was inducted into the Order of the Coif and the Order of the Barristers. While in law school, she was a member of the *Nebraska Law Review* and the National Moot Court Team, and was awarded the CALI Excellence For the Future Awards in Corporations, Employee Benefits Laws, Pretrial Litigation, Torts and Trial Advocacy. Stephanie received a BBA in Marketing, *magna cum laude*, from Texas Christian University in 2002.

Stephanie is a 2013 TOYO Award recipient (Ten Outstanding Young Omahans), an award honoring 10 Omahans between the ages of 21 and 40 who demonstrate a commitment to community service and personal and professional development.

## Selected Practice Highlights

- Advising new business owners on entity formation, preparation of buy-sell agreements, and strategic planning
- Representing companies in structuring private offerings to raise capital in compliance with federal and state securities law exemptions
- Counseling boards of directors on a variety of corporate governance matters, including fiduciary duties, conflicted director transactions, and shareholder disputes
- Representing acquiring and acquired entities in all stages of mergers and acquisition transactions, including preparing letter of intent, negotiating term sheet, drafting the agreement, and closing the deal
- Assisting both franchisors and franchisees in compliance with federal and state franchise laws
- Advising 501(c)(3) non-profit organizations, including public charities and private foundations, on corporate governance and regulatory compliance

## Professional & Civic Affiliations

- Nebraska Sports Council, Board of Directors
- UNL College of Law Entrepreneurship Clinic, Advisory Board
- Lane Thomas Foundation, Board of Directors
- Joslyn Castle Trust, Board of Directors (Past President)
- Kids Can Community Center, Board of Directors
- Leadership Omaha Class 35
- Nebraska State Bar Association, Leadership Academy (2010-2011)
- Nebraska State Bar Association, Securities Section (Past Chair)
- American Bar Association, Business Law Section
- Omaha Bar Association

Stephanie A. Mattoon
**Tel: 402.636.8238**
Fax: 402.344.0588
*smattoon@bairdholm.com*

BAIRD HOLM LLP

ATTORNEYS AT LAW

# Joel D. Pedersen | Attorney

**Tel: 402.636.8343**
Fax: 402.344.0588
*jpedersen@bairdholm.com*

## Areas of Practice

Real Estate

Business & Corporate Transactions

Education

Construction

Public Finance

## Education

University of Nebraska College of Law, J.D., 1988

South Dakota State University, B.A., English, 1984

## Bar & Court Admissions

Nebraska, 1988

Joel D. Pedersen represents clients pursuing public-private partnerships as well as construction and development projects. He brings a wealth of experience that spans multiple practice areas including higher education, academic medical centers, non-profit governance and complex problem-solving. Before joining the Firm, Joel served as Vice President and General Counsel for the University of Nebraska since 2008.

Joel helped to establish and has provided legal support for the University of Nebraska's affiliated development corporations for the Cancer Center, Med Center, Nebraska Innovation Campus, Kearney University Village, and Baxter Arena. He also served as legal counsel for the University Technology Development Corporation and both the Nebraska Applied Research Institute and the National Strategic Research Institute, the University's main research development corporations. Joel also helped the University develop the organizational structure and governance in the recently concluded integration of Nebraska Medicine.

## Selected Practice Highlights

**Joel's experience includes:**

- Acting as chief legal officer and member of the senior leadership team for the four-campus University system
- Advising in multiple strategic projects, including: the Fred & Pamela Buffett Cancer Center at UNMC, Nebraska Innovation Campus in Lincoln, Baxter Arena in Omaha, Pinnacle Bank Arena in Lincoln, and iExcel at UNMC
- Leading the team that created NSRI, one of only 13 University Affiliated Research Centers in the United States
- Representing UNL in moving to the Big Ten Conference and exit from the Big XII
- Representing UNO in the move to Division I Athletics, the formation of the National Collegiate Hockey Conference and related conference re-alignments
- Serving as legal counsel to the Joint Antelope Valley Authority (JAVA), the entity created by the city, University and Lower Platte South Natural Resources District to oversee the Antelope Valley Project
- Representing the City of Lincoln in the public/private partnership that resulted in Haymarket Park
- Serving as lead counsel for multiple litigation matters, including appellate practice before the Court of Appeals and Supreme Court of Nebraska

## Professional & Civic Affiliations

- Nebraska State and Federal Bar
- Bar Foundation Fellow
- Master of the Bar, Robert Van Pelt American Inn of Court

BAIRD HOLM LLP

ATTORNEYS AT LAW

# J. Scott Searl | Attorney

**Tel: 402.636.8265**
Fax: 402.344.0588
*ssearl@bairdholm.com*

## Areas of Practice

Banking

Business & Corporate Transactions

Securities

## Education

Creighton University Law School, J.D., *Summa Cum Laude,* 1989

College of the Holy Cross, BA, History, *Magna Cum Laude,* 1985

## Bar & Court Admissions

Nebraska, 1989

J. Scott Searl draws from his broad general counsel experience to advise business owners and managers on a wide variety of corporate legal matters, including acquisitions, divestitures, commercial contracts, corporate governance, media law, ethics and compliance, and dispute resolution. He also provides outside general counsel services to businesses which have legal needs but do not have in-house counsel.

Scott previously served as general counsel for two companies, most recently as Senior Vice President, General Counsel and Chief Administrative Officer of a large media company with responsibility for all legal matters, human resources and other administrative functions. He also served as general counsel for a technology data center and systems integration firm. Scott works collaboratively with business owners and managers to help them effectively and efficiently achieve their goals.

Since 1998, Scott has been "AV" rated (highest legal and ethical rating) by *Martindale-Hubbell.*

## Selected Practice Highlights

**Scott's experience includes:**

- Serving as chief legal officer for print, digital and TV media company with over 230 print and digital publications and operations in 11 states
- Representing client in 13 acquisitions and two divestitures closed in a three-year period
- Acting as ethics and compliance officer for business with 4,500 employees
- Representing client in sales and leasing activity for business with 119 locations
- Serving as corporate secretary responsible for corporate governance, minutes and record-keeping for client with over 40 subsidiaries
- Serving as member of retirement plan committee for pension plan with $2.9 billion in assets
- Serving as chief legal officer for technology services firm with operations in four states, Brazil, India, Ireland and Mexico, with responsibility for all contract negotiations and intellectual property work

## Professional & Civic Affiliations

- Boys Town Fundraising Board of Directors (2014 – Present)
- Ronald McDonald House Charities – Omaha Board of Directors (2015 – Present); President (2017 – 2018)

- Durham Museum, Board of Directors (2014 – 2018)
- Omaha World-Herald Company, Board of Directors (2009 – 2011)
- Opera Omaha, Board of Directors (2004 – 2010); Treasurer & Chair of Finance Committee, and Member of Executive Committee (2008 – 2010)
- United Way of the Midlands, Board of Directors (2007 – 2009)
- Creighton University School of Law Alumni Advisory Board; Member of Academic and Curriculum Committees (2004 – 2009)
- Creighton Prep High School, Parent Advisory Board (2004 – 2011)
- St. Wenceslaus Parish, Finance Committee (2001 – 2004); Chair (2003 – 2004)
- PKS Information Services, Inc., Board of Directors (1996 – 1999)
- Greater Omaha Chamber of Commerce, Leadership Omaha (1994 – 1995)
- Association of Corporate Counsel; Member (1997 – 2018)
- News Media Alliance, Legal Affairs Committee (2012 – 2018)
- Nebraska State Bar Association (1989 – Present); Member of Executive Committee of the Corporate Counsel Section (2008 – Present)
- Omaha Bar Association; Member (1989 – Present)
- American Bar Association; Member (1989 – Present)
- USLaw Commercial Practice Group (2019 – Present)

## Recent Speaking Engagements

- "That's Not Fair: Unfair Business Practices and Wat You Can Do About Them," USLAW Fall Conference, Washington D.C., September 2019
- "How to Prevent and Respond to Unauthorized Use of Your Company's IP," Association of Corporate Counsel Mid-America Chapter, July 2019
- "Antitrust Risks and Compliance," various local sales management teams, 2019

J. Scott Searl
**Tel: 402.636.8265**
Fax: 402.344.0588
*ssearl@bairdholm.com*

BAIRD HOLM LLP

ATTORNEYS AT LAW

# Jesse D. Sitz | Partner

**Tel: 402.636.8250**
Fax: 402.344.0588
*jsitz@bairdholm.com*

## Areas of Practice

Agriculture & Agribusiness Finance

Business & Corporate Transactions

Estate Planning, Trusts & Estates

Nonprofit & Tax-Exempt Organizations

Taxation

## Education

University of Minnesota Law School, J.D., *cum laude*, 2005

University of Nebraska-Lincoln, B.S. in Animal Science, 1999

## Bar & Court Admissions

Iowa, 2005

Nebraska, 2006

U.S. Tax Court, 2011

Jesse D. Sitz represents clients with respect to general corporate matters, estate planning and probate matters, federal and state tax planning issues, and tax exempt matters.

Jesse received his Juris Doctor, *cum laude*, from the University of Minnesota Law School in 2005. While in law school, he was a member of the Wagner Moot Court Competition Team and the Minnesota Justice Foundation. He received a Bachelor of Science from the University of Nebraska-Lincoln in 1999. Jesse has earned the designation of Chartered Advisor in Philanthropy (CAP®) through the American College, and was named to Super Lawyers 2016 Great Plains Rising Stars list. He was also recognized as a leading attorney in Private Wealth Law by the 2017 Chambers High Net Worth Guide.

## Selected Practice Highlights

- Representing parties involved in mergers, acquisitions, and reorganizations
- Representing fiduciaries in probate and trust administration
- Assisting clients in appealing federal and state tax assessments and penalties
- Representing business owners, farmers, and ranchers to develop and implement tax efficient business succession and multi-generational transition plans
- Representing developers and investors in transactions involving historic tax credits, low income housing tax credits, and new market tax credits

## Professional & Civic Affiliations

- Nebraska Bar Association
- Iowa Bar Association
- Alzheimer's Association of the Midlands, Board of Directors
- American Bar Association and its Section on Taxation and Real Property, Probate, and Trusts
- Omaha Bar Association
- Downtown Omaha Inc., Board of Directors
- Omaha Venture Group
- ICAN Defining Leadership for Men 2009
- Nebraska State Bar Association 2013 Leadership Academy

## Selected Recent Publications

- "Forming and Converting to LLCs," *National Business Institute*, May 7, 2012

- "Business Law Boot Camp, Understanding Sales and Use Tax," *National Business Institute,* May 21, 2013
- "Limited Liability Companies-Fully Using Tax Advantages," *National Business Institute,* September 24, 2013
- "Trust and Estates 101-How Do I Incorporate a Limited Liability Company, Corporation, or Partnership into an Estate Plan?" Nebraska State Bar Association, March 14, 2014
- "Probate Boot Camp-Spouse's Elective Share vs. Second Probate" and "Probating Estates that Include a Business," *National Business Institute*, December 2014
- "Nebraska Farm Business Contracts, Tax Strategies, Regulatory Changes and More-Handling the Sale of an Agricultural Business" and "Business Succession Planning for Family Farms," *National Business Institute*, October 2016

Jesse D. Sitz
**Tel: 402.636.8250**
Fax: 402.344.0588
*jsitz@bairdholm.com*

BAIRD HOLM LLP

ATTORNEYS AT LAW

# R.J. (Randy) Stevenson | Partner

**Tel: 402.636.8226**
Fax: 402.344.0588
*rstevenson@bairdholm.com*

## Areas of Practice

Labor & Employment Law

## Education

University of Nebraska College of Law, J.D., 1985

University of Nebraska at Omaha, B.S., Business Administration, 1982

## Bar & Court Admissions

Iowa, 1996

Nebraska, 1985

R.J. (Randy) Stevenson is Chair of the firm's Labor, Employment and Employee Benefits Law Group. He represents private and public employers in all aspects of labor relations and employment law, including matters involving workplace safety and health across the United States.

He is one of a very few employment lawyers in the region who has been elected as a Fellow of The College of Labor and Employment Lawyers, the premier peer-selected organization of labor and employment lawyers in North America. Admission is by invitation only, after a rigorous screening process.

The College of Labor and Employment Lawyers
LEADERSHIP FOR GREATER PURPOSE

Since 2003, Randy has been selected by his peers for inclusion in *The Best Lawyers in America*® in the fields of Employment Law and Labor Law and was named the *Best Lawyers'* 2016 and 2020 Labor Law – Management "Lawyer of the Year" for Omaha, and 2017 Employment Law - Management "Lawyer of the Year" for Omaha. He is included in *Great Plains Super Lawyers* (© 2018), "Band A" in *Chambers USA*(© 2018), "Midwest Star" in *Benchmark,* America's Leading Litigation Firms and Attorneys (© 2018), and is "AV" rated by *Martindale-Hubbell.*

Randy is a past Chair of the Nebraska State Bar Association's Labor Relations and Employment Law Section. Additionally, he has served on the boards of numerous community, professional, civic and church groups and has been an Adjunct Faculty member at Creighton University's School of Law.

## Selected Practice Highlights

**Randy's experience includes:**

- Successfully representing hundreds of employers in construction, general industry, and agriculture on a national basis regarding OSHA matters, including more than 30 workplace fatality cases. Obtained the complete withdrawal of numerous citations and penalties at both the informal conference stage and in litigation
- Effectively represented employers in the labor relations area from union organizing to the successful negotiation of operationally-sound collective bargaining agreements
- Routinely working with employers to avoid litigation by training many supervisors and managers regarding legal compliance and best practices
- Advising and representing numerous employers on EEO matters against numerous state and federal equal employment agencies
- Successfully defending against numerous wage and hour and child labor investigations by the DOL's Wage & Hour Division, including wage and hour compliance audits

## Representative Reported Cases

- Lakes Regional Healthcare and Lakes Regional Healthcare Nurses Assn., 13 HO 8430 (Iowa Pub. Emp. Rel. Bd. 2013)
- C & L Industries, Inc. v. Kiviranta, 13 Neb. App. 604 (Neb. Ct. App. 2005)
- Millard Refrigerated Services, Inc. and United Food & Commercial Workers Local Union 230, 345 NLRB No. 95 (2005)
- St. Luke's Health System, Inc. and United Food and Commercial Workers Local Union 222, 340 NLRB No. 139 (2003)
- Millard Refrigerated Services, Inc. and United Steelworkers of America, AFL–CIO–CLC, 326 NLRB No. 156 (1998)
- Iowa State Bank of Hamburg v. Trail, 234 Neb. 59, 449 N.W.2d 520 (1989)

## Professional & Civic Affiliations

- Fellow of The College of Labor and Employment Lawyers
- Nebraska State Bar Association, member and former Chair of its Labor Relations and Employment Law section
- American Bar Association, Labor and Employment Law Section
- Legal Counsel for the University of Nebraska at Omaha Alumni Association
- Board of Directors and Legal Counsel for the Better Business Bureau serving Nebraska, South Dakota, The Kansas Plains, and Southwest Iowa
- Legal Counsel for Heartland Family Service
- Former board member, Metropolitan Community College Foundation and Westside Community Schools Foundation
- Former Counsel for the Human Resources Association of the Midlands

## Selected Recent Publications

- "OSHA Inspections: A Survival Guide, " (co-written with Joseph P. Paranac, Jr.) USLAW Magazine, Fall/Winter 2013
- "Direct Care Workers to Receive Minimum Wage and Overtime Protections, " Labor & Employment Law Update, November 2013

R.J. (Randy) Stevenson
**Tel: 402.636.8226**
Fax: 402.344.0588
*rstevenson@bairdholm.com*