

Rural shareholders sued, alleging breach of fiduciary duties by the directors and aiding and abetting of that breach by RBC and MC. The Rural directors and MC settled with the shareholders for \$6.6 million and \$5 million respectively, but the complaints against RBC proceeded to trial.

ISSUE PRESENTED Did the Rural directors breach their fiduciary duties to the shareholders? If so, did the financial advisors aid and abet that breach?

SUMMARY OF OPINION The Delaware Court of Chancery explained that corporate fiduciaries must abide by a standard of conduct defined by duties of loyalty and care. The court acknowledged that there were potential upsides to the rushed sale, such as piquing the interest of EMS buyers, who could account for a future acquisition of Rural in their bids for EMS, and the historically high value of the Rural stock in December 2010. Nonetheless, the court found that the Rural directors failed the enhanced scrutiny test applicable to a sale of a corporation for cash. The special committee had initiated the sales process without board authorization; RBC had failed to disclose to the committee that the parallel sales process with EMS benefitted RBC; the board had pursued the sale of Rural while EMS was still in auction mode; and the board had approved the Warburg Pincus bid even though the directors did not obtain a valuation of Rural at any point during the three-month sale process until the night before the Warburg Pincus offer was due to expire. As a result, the circumstances surrounding the board's approval of Warburg Pincus's bid fell outside the range of reasonableness.

The court explained that "directors cannot be passive instrumentalities during merger proceedings."¹⁰ They must provide "active and direct oversight" by "becoming reasonably informed about the alternatives available to the

10. 88 A.3d at 89 (quoting *Cede & Co. v. Technicolor, Inc.* [Technicolor Plenary II], 634 A.2d 345, 368 [Del. 1993]).

company" and by "acting reasonably to learn about actual and potential conflicts faced by directors, management, and their advisors." The directors failed to place any meaningful restrictions on RBC. For example, the board provided no guidance for when the buy-side financing discussions should commence or cease. It also did not impose any "practical check on RBC's interest in maximizing its fees."

As for RBC, it was liable for aiding and abetting the directors' breach because it knowingly created an informational vacuum regarding the corporation's value, thereby misleading the board. RBC failed to disclose its interest in obtaining a role in financing the acquisition of EMS. "Most egregiously," RBC never disclosed to the board its continued interest in buy-side financing and its plans to engage in "last minute lobbying" of the buyer.

RESULT RBC was liable for aiding and abetting the Rural board's breach of its fiduciary duties. Damages would be set after the submission of additional briefs on the subject.

COMMENT The court acknowledged that "[d]irectors are not expected to have the expertise to determine a corporation's value for themselves, or to have the time or ability to design and carry out a sale process. Financial advisors provide these expert services. In doing so, they function as gatekeepers. . . ." This role makes it especially important for the advisors to disclose any potential conflicts of interest to their clients.

20-1b Duty to Exercise Reasonable Supervision

As fiduciaries, directors have a responsibility to exercise reasonable supervision over corporate operations. In the leading case *In re Caremark International Inc. Derivative Litigation*,¹¹ the Delaware Court of Chancery held that directors cannot satisfy their obligation to be reasonably informed concerning the corporation's compliance with the law and its business performance unless they assure themselves that the organization has in place reasonably designed information and reporting systems to provide senior management and the board itself with timely and accurate information as a matter of ordinary operations. The level of detail required is a question of business judgment. Although even a rationally designed information and reporting system will not eliminate the possibility that

the corporation will violate laws or regulations, the board is required to exercise a good faith judgment that the corporation's information and reporting system is, in concept and design, adequate to assure the board that appropriate information will come to its attention in a timely manner.¹² Failure to exercise adequate supervision may, in theory at least, render a director liable for losses caused by noncompliance with applicable legal standards.¹³

In the following case, the court considered whether the board of Citigroup could be held personally liable in a shareholder derivative suit for the bank's massive losses on its subprime mortgage portfolio. (A **shareholder derivative suit** is a suit brought by a shareholder on behalf of the corporation.)

12. See *C.D.T.S. v. UBS AG*, 2013 WL 6576031 (S.D.N.Y. Dec. 13, 2013).

13. The Court of Chancery noted that the federal Organizational Sentencing Guidelines offer powerful incentives for corporations to have in place compliance programs to prevent and detect violations of law, promptly report violations to appropriate public officials when discovered, and take prompt voluntary remedial actions. 698 A.2d at 969.

11. 698 A.2d 959 (Del. Ch. 1996).