

Preface for the 2026-2027 Edition

This year's additions to the Treatise reflect reactions and adjustments that came in the wake of landscape-shifting alterations of corporate law and governance embodied in statutory changes in 2025. Delaware adopted amendments to the General Corporation Law ("DGCL") geared to be favorable to corporate founders and controlling stockholders. Amendments to the Texas Business Organizations Code ("TBOC"), likewise intended to be founder-friendly, are operative in a context of fewer large public companies and guiding precedents. Additionally, the era's highest-visibility incident came to its end when shareholder litigation challenging the large award of stock options to Elon Musk made by Tesla's directors, which proceeded through the Delaware court system, concluded as Tesla exited Delaware, re-domesticated in Texas, and adopted a forum-selection bylaw designating Texas as the exclusive forum for derivative suits. The Delaware Supreme Court enforced the bylaw and dismissed the Delaware case. Separately, case-by-case litigation in Delaware courts continues to refine doctrine, in particular theories of liability that center on directors' lapses in oversight that are followed by major trauma for the corporate enterprise itself.

Several amendments to the DGCL carry implications for cases, including derivative suits, that focus on the conduct of controlling stockholders. For starters, as amended the DGCL expressly permits agreements among stockholders creating control mechanisms that operate independently of the corporation's board of directors. Under section 122(18), such a contract may (for example) require the approval or consent of one or more persons or bodies before the corporation may take specified actions. Additionally, amended DGCL section 144(e)(2) prescribes a numerical floor for non-majority control at one third of the voting power. One question left unaddressed by the statutory amendments is whether the acquisition of one-third or more of the voting power would constitute implied consent to the exercise of personal jurisdiction in Delaware. Since 1997, service as a director—and since 2002 service as an officer—by statute constitutes implied consent to personal jurisdiction. In *MacLaughlin v. Einheiber*, the founder/CEO of a drug development firm asserted direct and derivative claims against an investment company and its founder that had voting control of the firm. The Court of Chancery held that the investment company's founder consented to personal jurisdiction for claims related to his service as a director.

On the other hand, his affiliated investment company had engaged in no conduct that would trigger jurisdiction under Delaware's long-arm statute. As the court noted, the long-arm statute is the sole statutory basis for jurisdiction when a controlling party is neither an officer nor a director. The court also observed that the gap may become more pressing as "granular" control mechanisms, now explicitly permitted by statute, proliferate. A statutory solution may follow.

Amendments to the DGCL also bear on directors' duties, in particular when a board committee approves equity grants and other compensation to officers and to directors themselves. As amended, DGCL section 144(d)(2) elevates the burden requisite to rebutting a director's impartiality by requiring substantial and particularized allegations of a material interest in the transaction or relationship with a recipient who has a material interest. This is preceded by section 144(a)(1), which provides a safe harbor for any act or transaction authorized in good faith and without gross negligence by a majority of disinterested directors following disclosure of material facts. In *Ayers v. Foley*, the Court of Chancery differentiated between transactions approved by disinterested directors and those to which directors themselves are parties. When directors who are members of a committee approve their own compensation, they are necessarily interested in the transaction and bear the burden of proving its entire fairness. But directors who do not serve on the committee and who only receive the compensation are passive recipients who are not subject to liability unless they were aware that the award was wrongful, e.g. that it violated the terms of an incentive compensation plan. But perhaps, concluded the court in *Ayers*, restitutionary relief may be available against passive recipients when the directors who approved it acted in breach of their fiduciary duties.

As this Treatise illustrates, many derivative suits are preceded by a demand for information when a stockholder exercises statutory inspection rights to obtain corporate books and records. Influential precedents from the Delaware Supreme Court characterize inspection as one of the "tools at hand" to be utilized by a stockholder in drafting a complaint that is more likely to survive motions to dismiss. As the Treatise details, although inspection is a route toward litigation-relevant information, it is distinct from pre-trial discovery. As amended in 2025, the inspection process under DGCL section 220 requires more. A stockholder must make a written demand under oath and, if demanding more beyond the stock ledger or stockholder list, must make the demand "in good faith and for a proper purpose," and describe that purpose with "reasonable particularity." And the

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books and records sought must be “specifically related to the stockholder’s purpose.” Seeking records beyond the “books and records” defined by statute requires yet more, including showing a “compelling need” and, by clear and convincing evidence, that those records are “necessary and essential” to further the stated purpose.

In *Moran v. Unation, Inc.*, the challenge for the Master in Chancery was complicated because the corporation defaulted, doing nothing after being served with the stockholder’s inspection demand. Default undercuts the inspection process, inhibiting the court’s ability to determine whether the stockholder has met section 220’s requirements, including the requisite findings added by the 2025 amendment. In *Moran*, the consequence of default was that the Master in Chancery treated as true all well-pleaded facts in the complaint and all reasonable inferences to be drawn from them, awarding the stockholder almost all the records demanded. *Moran* underscores the baseline assumption that the corporation’s participation is integral to a well-functioning inspection process. Of course, how the court interprets and applies section 220 is also integral to the process. In *Roberta Ann K.W. Wong Revocable Trust v. Amazon.com, Inc.* the Delaware Supreme Court reversed the Court of Chancery, which had denied the plaintiff’s inspection demand on the basis that it lacked a proper purpose, finding it too broad. But the stockholder did not merely state a purpose of investigating possible wrongdoing but presented evidence that the Court of Chancery did not consider, erring in the Supreme Court’s assessment by failing to consider the specifics of the evidence in relation to the stockholder’s stated purpose for demanding inspection.

In 2025, as noted above, Texas enacted substantial amendments to the TBOC, including a statutory codification of the business judgment rule. Additionally, Texas enacted an opt-in barrier to derivative suits. As amended, section TBOC 21.552(a)(3) permits corporations to adopt a bylaw requiring that stockholders own at least a 3% interest to be eligible to bring a derivative suit. In *Gusinsky v. Reynolds*, the federal district court barred a derivative suit although the plaintiff was a stockholder as of the time of the alleged wrong. The suit followed a well-publicized incident in which Southwest Airlines announced it would eliminate policies that many of its customers enthusiastically supported, followed by a significant drop in its stock price. In *Gusinsky*, the stockholder made a books-and-records demand before the corporation adopted its 3% bylaw, but the corporation then adopted its 3% bylaw before the plaintiff filed the derivative suit. In the court’s reading, the ownership requirement imposed by the

bylaw applied as of the time the stockholder filed suit, not the earlier point of making demand or, even earlier, the time of the alleged wrong. And under TBOC section 21.552(a)(3) the relevant time is when the stockholder files or maintains a derivative suit.

Cases from the Delaware Court of Chancery continue to develop the law defining directors' and officers' duties in situations that might be termed "corporate trauma." In general, they involve fact patterns in which the corporation and its stockholders suffer loss in the wake of lapses in oversight at the board (or senior officer) level concerning conduct that occurs deeper within the corporation when the conduct risks serious harm when its occurrence and its consequences come to light. Cases already noted in this Treatise differentiate alleged lapses in the design and implementation of oversight mechanisms from failures to respond appropriately to "red flags" indicative of the potential for serious harm if left unaddressed. As the caselaw evolves, it demonstrates the potential breadth of these theories of liability. Liability is not limited to situations in which the underlying conduct poses serious threats to human life or health, as in earlier cases. Liability may extend to harm suffered by the corporation and its stockholders when a senior officer/founder who is credibly accused of serious wrongdoing instigates the corporation's acquisition on terms favorable to the accused but financially detrimental to stockholders. But substantial stockholders who do not serve as officers or directors are not subject to liability under "oversight" and "red flags" theories. To characterize their inaction as a breach of oversight obligations would make new law, beyond the scope of the liability recognized in prior cases, which may implicitly be linked to the defined positions of authority that directors and officers hold within the corporation.

Richards v. Turner illustrates directors' potential liability stemming from harm to the corporation allegedly caused by bank directors who, once aware of illegal overdraft fees, delayed responding until management identified sources of fee revenue to offset the loss of the illegal fees. The Court of Chancery held that the complaint's particularized allegations sufficiently connected the corporate trauma, which followed once bank regulators intervened, to the board's inaction on a "red flags" theory. The requisite connection is comparable to doctrines of proximate cause in tort law, requiring sufficient similarity between the alleged corporate trauma and the misconduct implied by the red flags ignored by the board. The facts alleged in *Richards* may heighten an inference that the board acted in bad faith because the board learned about the illegal practices from a draft complaint sent by a whistleblower, the bank's former Deputy General Counsel, characterized by the bank's CEO as a person who "created

problems.”

Richards v. Turner is also noteworthy because the defendants sought certification of an interlocutory appeal to the Delaware Supreme Court following the Court of Chancery’s denial of their motion to dismiss. The Court of Chancery declined to certify the interlocutory appeal, and the Supreme Court affirmed. Granting the application for an interlocutory appeal would not terminate the litigation because the Court of Chancery did not rule on the plaintiff’s alternate theory of liability: by intentionally delaying the bank’s elimination of the illegal overdraft fees, the bank’s directors intentionally caused it to continue to violate the law. This distinct theory of liability is derived from the Court of Chancery’s 2017 opinion in *Massey Energy Co.*, discussed in full in the Treatise. Denying certification of the interlocutory appeal, the Court of Chancery noted that the plaintiff’s *Massey* claim would warrant significant analysis on remand. In the exercise of its discretion, the Supreme Court denied the application for interlocutory review, stressing the absence of “exceptional circumstances” meriting review, as well as the fact that the potential benefits of interlocutory review would not outweigh the disruptions and costs it would entail. More generally, it is open to empirical inquiry whether defendants seek interlocutory review at a relatively constant rate over time, or whether the rate varies with time, the underlying theory of liability, the magnitude of potential liability, or other factors.

Substantial flaws in the board’s response to career-threatening misconduct by the corporation’s CEO underlie the claims in *Sjunde AP-Fonden v. Activision Blizzard, Inc.*. The alleged trauma to the corporation and its stockholders stemmed from the board’s knowing acquiescence in a merger with a business partner, negotiated “under the cloud” of breaking news about pervasive sexual harassment at the corporation, allegedly known to the CEO and preceded by an employee walkout aimed to secure the CEO’s ouster. In the rush, although the terms of the merger assured a soft landing for the CEO following the transaction, the transaction was daunted by several legal flaws, while its terms allegedly underpriced the corporation. The Delaware Court of Chancery declined to dismiss the plaintiff’s central claim: that the corporation’s directors breached their fiduciary duties by allowing the CEO to rush the corporation into a merger to keep his job, secure his change-of-control payments, and insulate himself against liability, all the while tainting the sale process to secure these personal benefits. Additionally, each director allegedly knew that the CEO was under siege and thus acted in bad faith by approving a hasty sale that allegedly undervalued the company but

served the CEO's interests.

The Court of Chancery has also differentiated among potential defendants in cases premised on these theories of liability. To extend the reach of liability from directors and officers to substantial stockholders, who may hold effective voting control, would extend the range of potential defendants beyond prior law, arguably unmooring liability for inaction from the corporate roles occupied by directors and officers that entail the responsibility to take action. In *Los Angeles City Employees' Retirement System (LACERS) v. Sanford*, the complaint alleged that the CEO, directors, and controlling stockholders of a multi-level real-estate marketing company actively covered up a company culture that promoted sexual assault against real estate agents. The company's pyramid-like structure for compensation meant that its CEO, in particular, received and retained substantial financial benefits from the perpetrators, while the directors allegedly failed to respond to numerous red flags. The court dismissed the complaint as against the control group of stockholders but refused to dismiss as against the CEO and the directors, noting the major move that would be entailed by imposing oversight obligations on controlling stockholders and concluding that allegations in the complaint did not support an inference that the control group of stockholders had usurped board-level or managerial power.

LACERS (an opinion from the Chancellor) is also noteworthy because it contains an extensive critique of an opinion from a Vice Chancellor issued the preceding month. In *Brola v. Lundgren*, the court granted the defendant's motion to dismiss a derivative suit filed by the corporation's other stockholder. The complaint in *Brola* alleged that the defendant, a director and officer of the closely held corporation, sexually harassed two of its employees, leading to his termination and monetary judgments against him and the corporation. The *Brola* complaint alleged that, additionally, the defendant's misconduct constituted a breach of fiduciary obligation that injured the corporation and thus its other stockholder. The court held that liability for breach of fiduciary duty did not extend to "interpersonal workplace disputes," governed by employment (and tort) law. But the *Brola* opinion goes further, challenging at least the scope of liability recognized by the court in 2023 in *In re McDonald's Stockholder Derivative Litig.*, discussed at length in the Treatise. In general, *Brola* argues, "fiduciary liability is not a catch-all for every wrong committed simply because the perpetrator happens to hold a title;" the complaint does not allege that the defendant "abused the specific authority of his corporate office." One month later, in *LACERS* the Chancellor responded at length, focusing in particu-

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lar on the implication in *Brola* that *McDonald's* constituted an expansion of Delaware law. *LACERS* instead emphasizes that *McDonald's*, far from establishing a categorical rule for sexual misconduct, “applied settled principles” of fiduciary liability “to a slightly different fact pattern than the cases that came before.”

This year’s additions to the Treatise also include a case that raises intriguing questions about the defendant’s litigation strategy. In *Houghton v. Malibu Boats, Inc.*, the plaintiffs were the sole stockholders in a corporate boat dealership that was an authorized dealer for the defendant, a boat manufacturer. Both plaintiffs suffered substantial financial loss after the defendant terminated their dealership, leading to their corporation’s failure and its exit from business. Both plaintiffs were personal guarantors on corporate debt; lenders foreclosed on properties the plaintiffs owned, forcing them to declare bankruptcy. The plaintiffs alleged that the defendant withheld the information that it had decided not to renew the dealership agreement, leading them to refinance their properties and also to accept a large number of boats from the soon-to-end model year. The plaintiffs recovered a jury verdict (for \$900,000) against the defendants. Following the jury verdict, and for the first time in the litigation, the defendant raised the issue of the plaintiffs’ standing, arguing that the proper party was the corporation, not its individual stockholders. The trial court characterized the issue as one of “constitutional or statutory standing” and thus a non-waivable problem and dismissed the suit. The Tennessee Court of Appeals reversed and was affirmed by the Tennessee Supreme Court. Looking to the nature of the action and the claims, the Court of Appeals held that standing issue was prudential, not jurisdictional. The Supreme Court underscored that the issue went only to the merits of the case, rather than the court’s authority to adjudicate it. Thus, any alleged defect in shareholder standing was waivable, which the defendant did by not raising the point until after the jury reached a verdict for the plaintiffs. The Supreme Court also taxed the costs of the appeal to the defendant and its surety.

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