Tada Images - stock.adobe.com

Fiduciary Duties in the Water

Do directors of Delaware corporations owe fiduciary duties only to stockholders of their specific corporation or to a broader group of stakeholders?

BY DOUG RAYMOND

In *James McRitchie v. Mark Zuckerberg, et al.*, Vice Chancellor Travis Laster of the Delaware Court of Chancery waded back into the shareholder vs. stakeholder debate and reaffirmed that, at least for Delaware corporations, directors owe "firm-specific fiduciary duties" to their stockholders only and that these fiduciary duties require directors to seek to maximize for the benefit of those stockholders the value of the corporation they serve over the long term. The vice chancellor, in an extended discussion, rejected the proposition that boards should manage the corporation for the benefit of stockholders' broader interests in other companies or in the economy as a whole.

McRitchie v. Zuckerberg arose from a stockholder lawsuit brought against the board of Meta Platforms Inc., its officers and controlling stockholder Mark Zuckerberg. The plaintiff alleged that Meta's directors owed fiduciary duties to the corporation and its stockholders as "diversified equity investors," not just as investors in Meta (i.e., the stockholders' interests as investors across the entire market, not only in Meta). He argued that the directors had breached these fiduciary duties by prioritizing Meta's particular financial performance over broader economic and social impacts, such as the spread of misinformation via Meta's platforms and the potential harms to users' mental health, which harmed the diversified portfolios of Meta's diversified stockholders.

The central issue that Vice Chancellor Laster addressed has been at the heart of much of the ESG debate, namely whether directors' fiduciary duties run only to the stockholders of the specific corporation where they are on the board or extend to include

broader economic impacts, including those affecting stockholders holding shares of companies across the economy. The latter theory assumes that prudent investors diversify their investments across a broad spectrum of companies, and that therefore the law should recognize this and require that directors owe fiduciary duties to diversified investors in their capacities as such. And, as a result, directors should consider external factors and seek to maximize the return of all investments, taking into account the effect of their decisions on society and the economy as a whole. In effect, boards should adopt practices "…designed to curtail corporate activities that externalize [i.e., fail to incorporate] social and environmental costs that are likely to decrease the returns of portfolios that are diversified… even if such curtailment could decrease returns at the externalizing company."

Meta moved to dismiss this lawsuit and Vice Chancellor Laster granted the motion, unmoved by the plaintiff's theory. As Vice Chancellor Laster wrote, borrowing the words of David Foster Wallace, the conclusion that the Delaware formulation of director fiduciary duties contemplates a single-firm model "is so basic that no Delaware decisions have felt the need to say it. Fish don't talk about water." However, in light of the continuing ESG debate and broader discussions about corporate purpose and the role corporations and their directors should play in being stewards of the environment, the economy and the greater community, this case serves as an important reminder that directors have a fiduciary duty to above all else — while acting within the bounds of the law — seek to maximize the value of their corporation over the long term for the ultimate benefit of their stockholders.

> The central issue that Vice Chancellor Laster addressed has been at the heart of much of the ESG debate, namely whether directors' fiduciary duties run only to the stockholders of the specific corporation where they are on the board or extend to include broader economic impacts.

This does not mean, however, that directors should ignore other stakeholder interests or broader economic or societal concerns in their decision-making process. The *McRitchie v. Zuckerberg* decision acknowledges the importance of such interests and concerns but refocuses the consideration of such stakeholder interests and external economic or societal concerns through the lens of promoting the value of the corporation over the long term. As Vice Chancellor Laster aptly noted, "Directors who cause their corporation to become a pariah because its actions consistently or profoundly harm the broader economy will not be able to create durable long-term value for firm-specific stockholders."

For those concerned that a firm-specific model focuses on maximizing a corporation's value, potentially at the expense of the interests of other stakeholders or stockholders in other capacities, Vice Chancellor Laster reminds us that Delaware's governance model is flexible and accommodates, for example, corporations that may want to follow a diversified-investor approach, as it allows corporations to tailor director duties through the provisions they can include in their certificates of incorporation. And in some jurisdictions outside Delaware, including Pennsylvania and Nevada, the corporation laws expressly reject the primacy of shareholders as the focus of the board's fiduciary duties.

He also suggested that, if there is a desire for other constituencies to be given more protection and rights, then rather than try to provide these protections and rights through reinterpreting long-standing principles of corporate law, a "more effective and direct way to protect interests such as the environment, workers and consumers would" be to push for stronger statutes and regulations to address such externality risks and concerns.

McRitchie v. Zuckerberg may not have created new standards for directors, but directors should nonetheless take note, as the case reaffirmed the fundamental truth under Delaware corporate law that "within the limits of their discretion, directors must make stockholder welfare their sole end, and . . . other interests may be taken into consideration only as a means of promoting stockholder welfare." ■

***Doug Raymond** is a partner at Faegre Drinker Biddle & Reath LLP (www.faegredrinker.com). He can be reached at douglas.raymond@faegredrinker.com. **Amelia Brett**, also a partner in the firm, assisted in preparing this column.*

© MLR Media • 1845 Walnut Street, Suite 900 • Philadelphia, PA 19103-4710 • (215) 567-3200 • www.directorsandboards.com