

## NEW DELAWARE COURT DECISION PLACES ADDED RESPONSIBILITY ON CORPORATE OFFICERS

### Background

As we have noted in the past, the courts of many states often look to the case law interpreting the Delaware corporation, limited liability company (LLC) and limited partnership statutes. There are many reasons for this. The statutes of many states are modeled, at least in part, on the corresponding Delaware statutes. The body of case law interpreting these Delaware statutes is substantial and judges of the Delaware Chancery Court

are nationally recognized for their expertise. For those and other reasons, decisions of the Delaware courts are important even if your company does not do business in the State of Delaware.

Delaware law has long held that directors of a Delaware corporation owe a fiduciary duty of “oversight” to the corporation and its stockholders. However, somewhat surprisingly, there is no Chancery Court case that has established a similar duty with respect to officers of a Delaware corporation. That changed in January 2023, when the Delaware Chancery Court ruled in *In re McDonald’s Corporation Stockholder Derivative Litigation* that the fiduciary duty of oversight extended to corporate officers, as well as directors.



### The McDonald’s Decision

This case was brought as a so-called derivative action by a group of stockholders on behalf of the corporation. It alleged widespread and increasingly frequent incidents of sexual harassment being reported, with little remedial action being taken by the company. In its 1996 decision establishing a fiduciary duty of oversight by directors, the court noted that there were two components to this duty. First, there was a duty to ensure that proper information reporting systems are in place within the company. Secondly, that the company appropriately addresses “red flags” that suggest wrongdoing within the system.

The court went on to say that the scope of an officer's duty of oversight is a function of his or her position and responsibilities within the company. For instance, with some exceptions, an officer in the legal department probably would not be found to have an oversight duty with respect to a person in the finance function; nor would the chief financial officer have any oversight duty with respect to a person in the company's legal department. Conversely, the President or CEO of the company would likely to be found to have a much broader duty of oversight.

### Some Practical Takeaways

First, it would be prudent for officers and directors of Delaware corporations to review their current director and officer liability insurance to ensure that officers are covered and the scope of coverage for both officers and directors. If they do not have such insurance, this is probably a good time to consider getting it. Contracts between the corporation and its officers should also be revisited, as well as bylaws and charter documents, to see if the officers are indemnified by the company in the event of any such claims. Officers and directors need to understand the scope of these contracts and any exceptions to the indemnification provisions.

It is also worth noting that the Delaware General Corporation Law was recently amended to permit corporations to include in their certificates of incorporation provisions that exculpate officers from personal liability for money damages for certain (but not all) types of breaches of their fiduciary duty.

Finally, while the *McDonald's* case deals with a Delaware corporation, it seems likely that a similar analysis would come to the same conclusion with respect to officers of Delaware LLCs and limited partnerships.

If you have questions or would like further information, please contact PLDO Partner William F. Miller at 508-420-7159 or email [wmiller@pldolaw.com](mailto:wmiller@pldolaw.com).



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