

"Separate accrual approach" offers a Goldilocks regime: Delaware Court of Chancery Approach to Timeliness of Breach of Fiduciary Duty Red-Flag *Caremark* Claims

In a case of first impression, the Delaware Chancery Court considered defendants' motion to dismiss premised upon the "timeliness" of claims brought against directors and officers for breaches of fiduciary duties as expressed within *Caremark* and *Massey* (more information on *Caremark* and *Massey* below).

The opinion, written by Vice Chancellor Travis Laster, holds that the "separate accrual approach" – in which a series of related decisions and conscious nondecisions may be viewed as a sequence of wrongful acts, each giving rise to a separate limitations period – is the appropriate methodology for determining the accrual date for *Caremark* and *Massey* claims.

In adopting this approach, the court denied the motion to dismiss, concluding that plaintiffs could assert claims for conduct that occurred within a three-year period that pre-dated their Books & Record Demand. *Lebanon County Employees' Retirement Fund v. Collis*, 287 A.3d 1160 (Del. Ch. 2022).

Background

The defendant in the *Lebanon County* case is wholesale opioid pain medicine distributor AmerisourceBergen Corporation. In a 2021 settlement, AmerisourceBergen paid over \$6 billion to resolve numerous lawsuits accusing it and other drug distributors of ignoring red flags and helping ignite the devastating opioid epidemic that contributed to addiction and deaths nationwide.

The plaintiffs in the *Lebanon County* case are stockholders of AmerisourceBergen. In *Lebanon County*, the plaintiffs allege that the directors and officers of AmerisourceBergen "breached their fiduciary duties by making affirmative decisions and conscious non-decisions that led ineluctably to the harm that the Company has suffered. The plaintiffs seek to shift the responsibility for that harm from AmerisourceBergen to the human fiduciaries that caused it to occur."

Plaintiff's Two Theories of Liability

Caremark Claim

The plaintiff's first theory of liability is referred to as a "*Caremark* claim." This is a claim for breach of fiduciary duty against directors or officers based on a **failure of oversight or intervention despite various "red flags" showing improper conduct**. *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). One type of *Caremark* claim can be defined as:

Having implemented such a system or controls, directors and officers consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention (**referred to as a "Red Flags Claim"**).

In *Lebanon County*, the plaintiffs allege a "**Red Flags Claim**" of liability in that the corporation's directors and officers observed and witnessed numerous red flags that should have alerted them to problems or risks that required their attention and action. Some of the red flags in this matter were "subpoenas from various law enforcement officials, congressional investigations, lawsuits by state attorneys general, and a deluge of civil lawsuits – and the fact that no action was taken by the corporate directors and officers until the 2021 settlement."

Massey Claim

The plaintiffs second theory of liability falls under what is referred to as a "Massey claim" from the case *In re Massey Energy Co.*, 2011 WL 2176479, *20 (Del. Ch. May 31, 2011). A Massey claim alleges that the directors and officers of the corporation made **intentional decisions to prioritize profits of the company over legal compliance**.

The plaintiffs in *Lebanon County* allege that the corporation's officers and directors, between 2010-2015, "took a series of actions which, when viewed together, support a pleading-stage inference that **they knowingly prioritized profits over law compliance**" (emphasis added).

Reasoning and Decision in *Lebanon County*

The defendants moved to dismiss the plaintiff's suit based on two separate grounds, one of which was the assertion that the claims were not brought in a timely manner. The court analyzed the timeliness of the claims under the equitable doctrine of laches since claims for breach of fiduciary duties are equitable claims. The doctrine of laches examines the following factors: (1) whether the plaintiff has sued within a reasonable amount of time, and (2) whether there has been any prejudice to the defendants as a result of the amount of time that has passed.

However, "[w]hen a plaintiff seeks money damages as a remedy for a breach of fiduciary duty, the court looks to the limitations period that would apply to an analogous claim at law," the court said. The comparable statute of limitations for these types of claims at law would be three years. Therefore, the court would need to **determine the date when the claims "accrued," i.e., the date when the events were known or should have been known by the plaintiffs**, thereby starting their statute of limitations period to bring claims against defendants.

The court said that "no Delaware court has addressed how to determine when a Red-Flags Claim or a Massey Claim accrues." As a case of first impression, the Delaware Court of Chancery analyzed how to determine the accrual date for different types of breach of fiduciary claims. The court noted that there are three different methods by which to analyze when a *Caremark* Red-Flag Claim or a Massey claim accrues:

1. **Discrete act method** - "When a plaintiff contends that fiduciaries have breached their duties by making a specific decision that was complete when made, **that decision constitutes a discrete wrongful act that causes the claim to accrue.**" The court held that the "discrete act approach dramatically constrains the stockholders' ability to sue, because an initial decision to ignore a red flag or pursue an illegal business plan often will be difficult to detect and will not have discernable consequences. But once some information about the decision reaches the public sphere, the time for suit begins to run." The *Lebanon County* court **considered this method too-defendant-friendly**.
2. **Continuing wrong method** - This method of determining timeliness **"treats a series of inextricably related decisions and conscious non-decisions as a continuing wrong."** "To apply the statute of limitations, the court determines when the wrongful conduct stopped, counts forward from that point to calculate when the limitations period ends, and checks whether the plaintiff filed suit within the limitations period." The *Lebanon County* court **considered this method too-plaintiff-friendly**.
3. **Separate accrual method** - This method treats a series of related decisions (or conscious non-decisions) as **a sequence of wrongful acts, each of which gives rise to a separate limitations period.** "To apply the statute of limitations, the court determines when the plaintiff filed suit, looks back from that point over the length of the limitations period, and checks whether the actionable conduct took place within that period," the court said. **"The separate accrual approach best suits the gravamen of the claim and the nature of the harm, serves the twin goals of equity and efficiency, and fulfills the policy goals associated with the statute of limitations."** The *Lebanon County* court considered this method neither too-defendant-friendly nor too-plaintiff-friendly but instead considered it "just right" and dubbed it the "Goldilocks regime."

Takeaways and Practical Guidance

Timing Method

The court determined the separate accrual method of determining timeliness of claims was the appropriate method for the *Caremark* and *Massey* claims brought in this case. What does this mean in practical terms? **This decision could provide plaintiff shareholders more time to bring a lawsuit against directors and officers for breach of fiduciary claims** under the *Caremark* and *Massey* theories of liability.

Evidence Pre-Dating Actionable Period

It is critical to note that the court empathized that relevant evidence can be considered from a pre-actionable time period: "It bears emphasizing that a starting date for the actionable period does not mean that evidence from earlier periods is irrelevant," the court said. "To determine whether the Company's business plan during the actionable period wrongfully prioritized profit over law compliance, the court must determine what business plan the officers and directors were pursuing. Answering that question requires an understanding of the situation leading up to the actionable period. Likewise, to evaluate whether officers and directors acted in bad faith by ignoring red flags during the actionable period, the court must understand what they knew and understood when they made those decisions, **which can take into account matters pre-dating the actionable period.**"

Damages

Regarding damages, the court concluded that "liability must turn on what the officers and directors did during the actionable period, and damages are limited to harms that the Company suffered during the actionable period" (Emphasis added).

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