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Delaware Judges Set To Hold Court With Pension Investors

By PHYLLIS PLITCH
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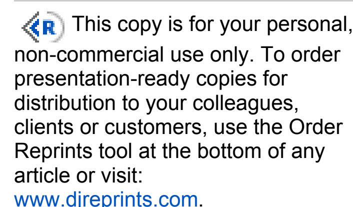
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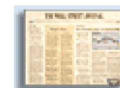

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NEW YORK -- Here come the judges.

Later this week, four Delaware chancery court judges are set to travel to Washington, D.C. to hold court with pension fund investors.

On tap at the Council of Institutional Investors' annual spring meeting is a discussion of a wide range of hot-button corporate governance topics of vital interest to the institutional investor community: executive compensation, the interaction of federal and state corporate law, investor access to corporate proxies, binding shareholder proposals and doctrines governing director conduct.

Although members of the influential bench have shown up increasingly at various legal forums in recent years, it's fairly uncommon to see four of five sitting judges address a gathering simultaneously - made even more noteworthy by the event's investor orientation.

Although some members of the Washington-based group met with the judges in Delaware two years ago, it will be the first time they will address one of two semi-annual Council meetings. The organization represents pension funds with over $3 trillion in assets.

"They (the judges) are trying to become sensitive to the issues of the institutional investors," said Charles Elson, director of the Weinberg Center for Corporate Governance at the University of Delaware.

Understanding the views of "those who the company is ultimately designed to benefit," he added, "makes their administration of justice and resolution of disputes much more informed and effective."

The visit by the chancery panel, sans chancellor William B. Chandler, also comes amid a growing perception that Delaware judges are becoming increasingly shareholder-friendly in their rulings.

"I think there is a real shift in Delaware to a much more balanced approach to managerial-shareholder disputes," said Elson. "Delaware has really moved to the middle and I think it's quite important."

Legal experts point to several rulings, both by the chancery court and the Delaware Supreme Court, as evidence that courts in the state - a magnet for public company incorporations - have raised the bar on corporate behavior. Moreover, speeches and articles from both panels have also added to the view that the Delaware judiciary has gotten more sensitive to shareholder concerns and tougher on managers and directors.

One of the oft-cited opinions along those lines is a spring 2003 opinion by Vice Chancellor Leo E. Strine Jr., refusing to throw out a shareholder action against Oracle Corp. (ORCL) officers and directors. At issue was the independence of a special litigation committee set up to look into stock sales by executives and directors in response to shareholder lawsuits. In strong words, Strine said that instead of creating a committee "free from bias-creating relationships, Oracle formed a committee fraught with them."

Around the same time, Chandler handed down a ruling that sent a chill through corporate boardrooms. In May 2003, he gave the green light to a lawsuit filed against directors of Walt Disney Co. (DIS) alleging a breach of fiduciary duty in connection with approval of a $140 million cash and stock severance package paid to former President Michael Ovitz. Chandler wrote that if the facts as alleged were true, they suggest that the directors "consciously and intentionally disregarded their responsibilities, adopting a 'we don't care about the risks' attitude concerning a material corporate decision."

Months before that decision, Norman Veasey, chief justice of the state Supreme Court, caused a stir by raising the prospect of directors being held legally liable under certain circumstances.

"If directors claim to be independent by saying, for example, that they base decisions on some performance measure and don't do so, or if they are disingenuous or dishonest about it, it seems to me that the courts in some circumstances could treat their behavior as a breach of the fiduciary duty of good faith," Veasey said at an October 2002 forum.

Despite these and other tough-sounding words coming from Delaware, legal experts say the judges aren't really changing established doctrine in such disputes, but are adjusting to the new, scandal-scarred corporate environment.

"I think they are applying the same rules that were always applied, but applying them with a rigor that reflects the new expectations directors face following the events of the last two years,' said Stephen A. Radin, a partner at Weil, Gotshal & Manges LLP in New York.

As such, traditional rules requiring due care and good faith are being applied in the context of new expectations, he suggested.

"The circumstances of the world have changed," he said. "When the Delaware courts have looked at what directors have done, they are looking through the lens of 2004."

Moreover, too much shouldn't be read into the judges decision to address the Council, suggested William Allen, former Delaware chancellor, now director of New York University's Center for the Study of Law and Business.

Given the stresses on the system from Enron Corp. (ENRNQ) and other scandals, "such appearances are meant to assure all of the various constituencies that the Delaware courts 'feel your pain,' that they are alert to the problems and thinking about them."

"I don't personally think attendance at the institutional investor meeting this week can be read as a signal of any substantive point," he continued, "but rather a reflection of the Delaware judges' willingness to appropriately and occasionally have direct interactions with various constituencies interested in the corporate law."

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