

December 21, 2020

Delaware Supreme Court Affirms Order to Produce Documents and Submit to Deposition in Section 220 Litigation

Section 220 Demand Need Not State an Ultimate Objective When Investigating Corporate Wrongdoing, and Stockholders Need Not Show Possible Wrongdoing Is Actionable

SUMMARY

On December 10, 2020, the Delaware Supreme Court unanimously affirmed a Court of Chancery decision ordering wholesale drug-distributor AmerisourceBergen Corporation (“AmerisourceBergen” or the “Company”) to produce documents in response to a Section 220 books and records demand regarding AmerisourceBergen’s alleged involvement in the opioid crisis.¹ The Supreme Court held that, because the AmerisourceBergen stockholders sufficiently alleged a credible basis of corporate wrongdoing, they were not required to specify the ends to which they intended to use the books and records. Furthermore, the Supreme Court held that, where the stockholders sought the books and records for purposes not limited to litigation, they did not have to establish that the potential wrongdoing would be actionable. The Supreme Court also concluded that the Court of Chancery was within its discretion to grant the stockholders leave to depose a corporate representative to determine what books and records existed and who had them.

Delaware corporations and practitioners that were hopeful this rare Supreme Court review of a books and records decision might stem the expanding tide of books and records requests will be disappointed. The Supreme Court continues to admonish courts not to allow stockholders to use books and records requests for “indiscriminate fishing expedition[s].”² But, in holding that sufficient allegations of a credible basis to investigate possible wrongdoing may establish a stockholder’s proper purpose—regardless of whether the wrongdoing is legally actionable or whether the stockholder explicates its ultimate intended use of the materials—the *AmerisourceBergen* decision potentially circumscribes the available grounds for Delaware

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corporations to resist books and records demands. At the same time, the Supreme Court confirmed that a Delaware corporation may resist a Section 220 demand by challenging the *bona fides* of the stockholder's stated purpose, or by showing that any proposed litigation by the stockholder "faces an insurmountable procedural obstacle."³ Nevertheless, the *AmerisourceBergen* decision likely will firmly ensconce the already prevalent practice of invoking Section 220 demands in anticipation of future fiduciary litigation.

BACKGROUND

AmerisourceBergen is a wholesale drug company and one of the world's largest opioid distributors. It is currently the subject of extensive litigation, dating back to 2012. The Company has also been the subject of several government investigations and reports, including by the Drug Enforcement Administration, the attorneys general of forty-one states, and committees of both the House and the Senate. These lawsuits and investigations allege, among other things, that AmerisourceBergen failed to identify, investigate, report, and remediate suspicious opioid orders, in violation of federal law.

On May 21, 2019, AmerisourceBergen stockholders purporting to investigate the potential corporate wrongdoing and mismanagement at issue in these litigations and investigations served AmerisourceBergen with a demand for books and records under Section 220 of the Delaware General Corporation Law. The demand requested ten categories of documents relating to AmerisourceBergen's distribution of opioids, including formal and informal board and committee materials and officer-level documents, dating from May 1, 2010 to the present. The Company refused the demand in its entirety, asserting that the stockholders had no proper purpose and that the demand was far too broad. The stockholders filed suit.

On January 13, 2020, the Delaware Court of Chancery granted the stockholders' Section 220 petition, holding that (i) the stockholders did not need to state what they intended to do with the materials, (ii) a credible basis existed from which the court could infer wrongdoing, and (iii) the stockholders did not also have to prove that the cited wrongdoing was legally actionable.⁴ Vice Chancellor Laster ordered AmerisourceBergen to produce all formal board materials, and also *sua sponte* granted the stockholders leave to take a deposition under Delaware Rule of Civil Procedure 30(b)(6) to determine what books and records exist, how they are maintained, and who has them.⁵ The Court of Chancery reserved judgment, pending that deposition, on the stockholders' request for broader corporate records.

THE DELAWARE SUPREME COURT DECISION

The Delaware Supreme Court affirmed the Court of Chancery decision in all respects.

First, the Supreme Court found that, "when the purpose of an inspection of books and records under Section 220 is to investigate corporate wrongdoing, the stockholder seeking inspection is not required to specify the ends to which it might use the books and records."⁶ AmerisourceBergen asserted that the stockholders' only logical purpose behind the inspection was to pursue derivative litigation and that the Court of Chancery

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erred in finding that the stockholders' purpose included "all possible courses of action that their investigation might warrant pursuing."⁷ The Supreme Court disagreed, holding that investigating "meritorious allegations of possible mismanagement, waste, or wrongdoing . . . serves the interests of all stockholders" regardless of the uses to which the materials might be put.⁸ The Supreme Court underscored that a stockholder's "mere statement of suspicion" would be "inadequate" to demonstrate a proper purpose.⁹ Nonetheless, if the stockholder establishes a "credible basis from which the court can infer wrongdoing or mismanagement," which the court described as requiring a "low burden of proof," "a stockholder's purpose will be deemed proper."¹⁰ Having met that threshold, the stockholder will still be limited to the "books and records that are necessary and essential to accomplish" that purpose.¹¹

Although concluding that, when investigating corporate wrongdoing, a stockholder "is not required to specify the ends to which it might use the books and records," the Supreme Court also warned that "[t]his is not to say that the stockholder's intended uses are irrelevant."¹² The Supreme Court admonished stockholders that it is "advisable, in the interest of enhancing litigation efficiencies[,] to state the intended uses in the stockholder's demand," and the Supreme Court confirmed that "a corporation may challenge the *bona fides* of a stockholder's stated purpose and present evidence from which the court can infer that the stockholder's stated purpose is not its actual purpose."¹³

Second, the Supreme Court rejected AmerisourceBergen's assertion that the stockholders were required to state a credible basis of *actionable* wrongdoing.¹⁴ The Company maintained that the stockholders were "only seeking to investigate" a failure of oversight claim and that no actionable wrongdoing existed because the AmerisourceBergen directors were exculpated from liability under Delaware General Corporation Law Section 102(b)(7), and because any such claim was time-barred by laches.¹⁵

The Supreme Court stated that a "fair reading of the Demand" showed that the stockholders had "purposes *other than* litigation," which "dispose[d] of AmerisourceBergen's 'actionability' argument."¹⁶ Nonetheless, the Supreme Court stated that it wished to "take this opportunity to dispel the notion that a stockholder who demonstrates a credible basis from which the court can infer wrongdoing or mismanagement must demonstrate that the wrongdoing or mismanagement is actionable."¹⁷ Once a stockholder "show[s], by a preponderance of the evidence, a credible basis"¹⁸ of wrongdoing or mismanagement, "a stockholder does not have to introduce evidence from which a court could infer the existence of an *actionable* claim."¹⁹ In so ruling, the Supreme Court still preserved a defense for corporations. Specifically, where a stockholder solely seeks "to pursue litigation and a purely procedural obstacle, such as standing or the statute of limitations, stands in the stockholder's way" that would render "the anticipated litigation dead on arrival," denial of the inspection "may be justified."²⁰ The court distinguished these "procedural obstacle[s]" from "merits-based defenses" for which "consideration" should be "defer[red]."²¹

Third, the Supreme Court found that the Court of Chancery did not abuse its discretion in granting the stockholders leave to take a Rule 30(b)(6) deposition.²² AmerisourceBergen asserted that the Court of

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Chancery decision relieved the stockholders of their burden of proving what documents are essential to their investigation.²³ The Supreme Court disagreed, reasoning that the Court of Chancery found merely that the stockholders had met their burden of proving that one category of documents were essential, and the trial court was within its discretion in allowing limited discovery while reserving judgment whether a broader inspection of other document categories might be appropriate.²⁴

IMPLICATIONS

AmerisourceBergen is a rare decision from the Delaware Supreme Court regarding the scope and application of stockholder books and records inspection rights. The decision likely will firmly ensconce, if not accelerate, the growing trend of stockholders resorting to books and records demands in anticipation of future fiduciary litigation involving Delaware corporations.

First, the decision concludes that a books and records demand does not have to state the intended end use of documents obtained, at least when the stated purpose of the demand is to investigate potential corporate misconduct. Instead, the requisite proper purpose is established by a “credible showing” that “possible wrongdoing or mismanagement can be inferred.”²⁵ Nevertheless, the Supreme Court warned that it will likely be “advisable” for stockholders to state their intended use of the materials and that the corporation remains free to “challenge the *bona fides* of a stockholder’s stated purpose and present evidence from which the court can infer that the stockholder’s stated purpose is not its actual purpose.”²⁶ Delaware corporations facing Section 220 requests may wish to request from the stockholder–plaintiff, or seek in discovery in any Section 220 litigation, information about the stockholder’s intended use of any information and to test the veracity of the stockholder’s stated purpose.

Second, resolving a split of authorities from the Court of Chancery, and overruling a prior summary affirmance from the Supreme Court suggesting otherwise, the Supreme Court ruled that a corporation may not resist books and records demands seeking to investigate alleged wrongdoing on the ground that the targeted conduct is not legally actionable. The Supreme Court confirmed, however, that where “a purely procedural obstacle, such as standing or the statute of limitations, stands in the stockholder’s way” such that any “anticipated litigation will be dead on arrival,” a claimed purpose to investigate that conduct to pursue such litigation may lack a proper purpose.²⁷ The dividing line between “procedural obstacles” and legal defenses will require further development.

Third, the Supreme Court did not address the appropriate scope of the materials that will be subject to Section 220 inspections going forward, acknowledging only that this issue was “committed to the [trial] court’s sound discretion.”²⁸ The Court of Chancery to date allowed only discovery of formal board documents, and the prevailing view from Delaware courts is that, in the usual case, the “starting point (and often the ending point) for an adequate inspection” will be formal board materials.²⁹ This decision further

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emphasizes the continued need for companies to pay careful attention to the record being built at the board level.

Finally, the Supreme Court's affirmance that the Court of Chancery was within its discretion in ordering that AmerisourceBergen submit to a deposition regarding its records and record-keeping could be a troublesome development for Delaware corporations. The Court of Chancery suggested that the corporation should have shared this information prior to litigation or in discovery; presumably the same rules will apply to the stockholder supplying the objectives of its investigation.

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ENDNOTES

- 1 *AmerisourceBergen Corp. v. Lebanon Cty. Emps.' Ret. Fund*, 2020 WL 7266362 (Del. Dec. 10, 2020).
- 2 *Id.* at *3.
- 3 *Id.* at *9.
- 4 *Lebanon Cty. Emps.' Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *11–19 (Del. Ch. Jan. 13, 2020).
- 5 *Id.* at *27.
- 6 *AmerisourceBergen Corp.*, 2020 WL 7266362, at *7.
- 7 *Id.* at *6.
- 8 *Id.*
- 9 *Id.*
- 10 *Id.*
- 11 *Id.* at *5.
- 12 *Id.* at *7.
- 13 *Id.*
- 14 *Id.* at *13.
- 15 *Id.* at *8.
- 16 *Id.*
- 17 *Id.*
- 18 *Id.* at *13.
- 19 *Id.* at *8 (emphasis added).
- 20 *Id.* at 14.
- 21 *Id.*
- 22 *Id.* at *14–15.
- 23 *Id.* at *14.
- 24 *Id.* at *15.
- 25 *Id.* at *6.
- 26 *Id.* at *7.
- 27 *Id.* at *14.
- 28 *Id.* at *15.
- 29 *Lebanon Cty.*, 2020 WL 132752, at *24.

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