Shareholder Class Action Litigation – *Recent Cases That Changed The Landscape And What Lies Ahead*

ACC National Capital Region

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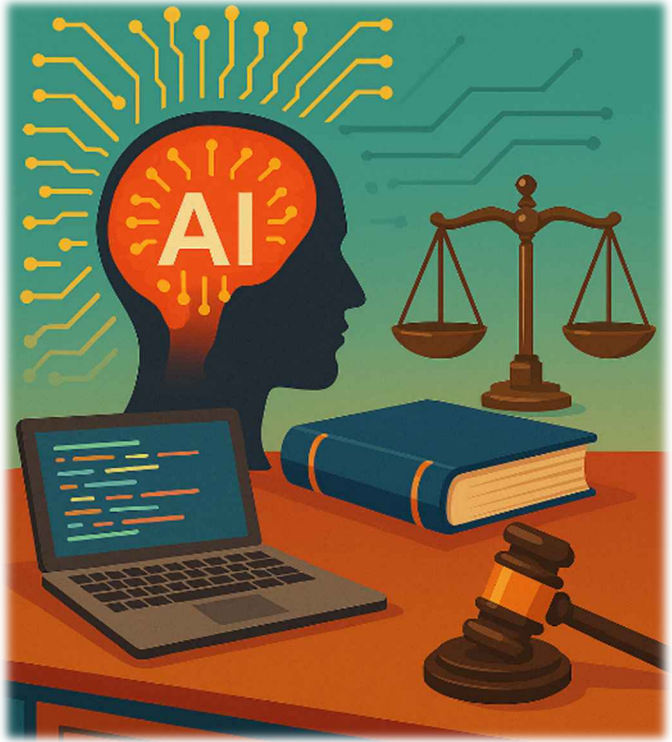
RECENT SECURITIES LITIGATION TRENDS

Surge in AI-Related Securities Litigation

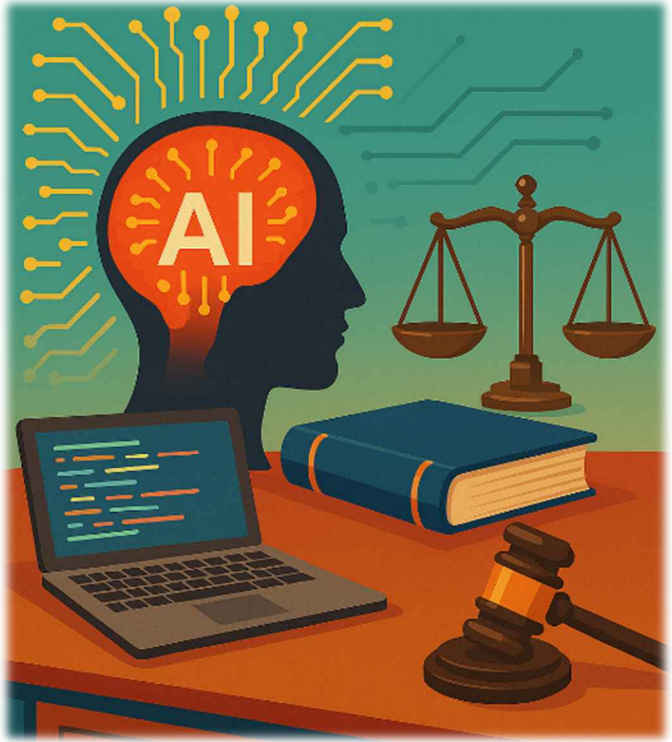
- AI washing is becoming a major litigation risk
- Private parties and government agencies are bringing an increasing number of lawsuits claiming AI was driving growth or demand when it was not.



Surge in AI-Related Securities Litigation

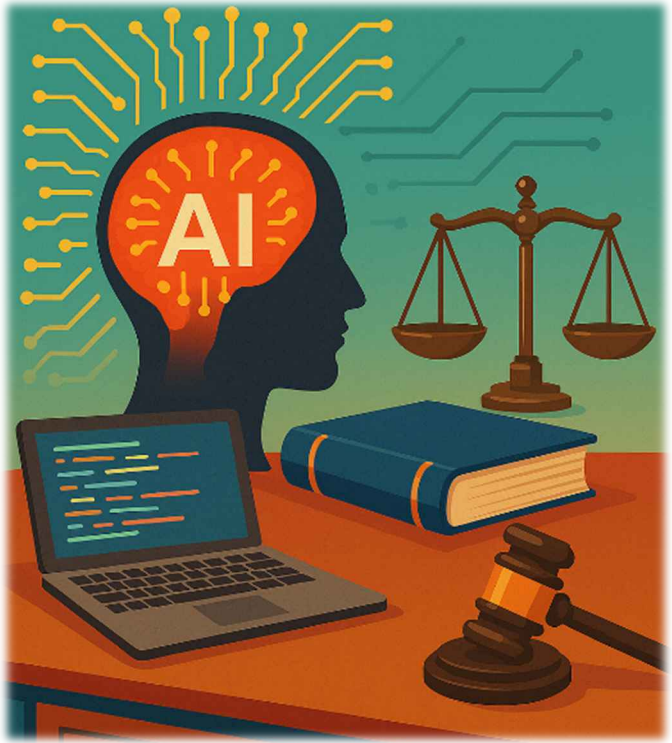
These claims accuse companies of various wrongdoing:

- Exaggerating AI capabilities or claiming work was done by AI when it was not
- Falsely claiming AI was driving growth or demand
- Failing to disclose technical challenges or limitations in AI development
- Misrepresenting or manipulating claims of third-party testing or validation
- Downplaying financial burden of AI integration
- Using generic or outdated risk disclosures regarding material risks related to AI
- Misrepresenting AI research, team size, or investment



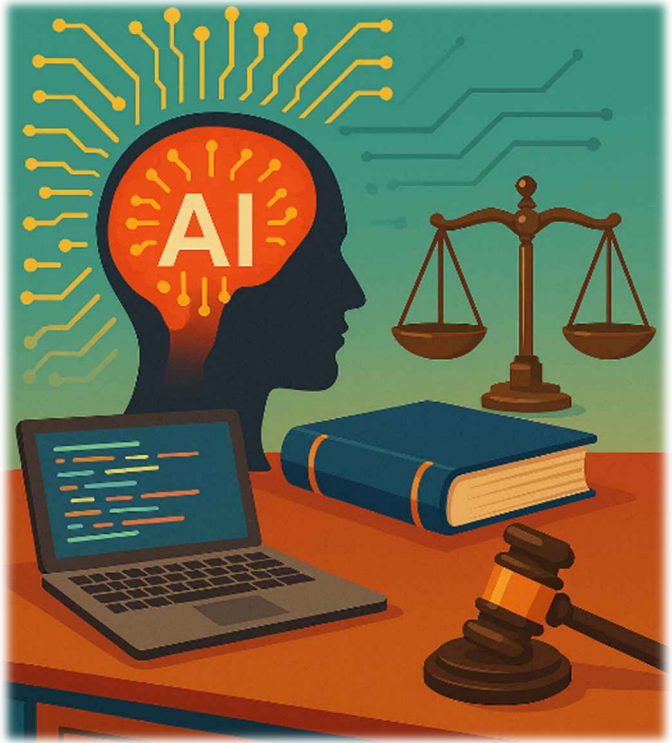
The Surge in AI-Related Securities Litigation

- Common themes in AI-related securities class actions:
  - Event-driven litigation, such as security issues, research reports, or regulatory actions
  - Missed projections stemming from publicly stated goals regarding AI development or usage
  - Significant stock price drops due to AI-related disclosures



The Surge in AI-Related Securities Litigation

- Companies should ensure AI-related disclosures are accurate and transparent
  - —Use consistent definitions when discussing AI
  - —Comply with regulatory requirements
  - —Maintain robust internal controls and identify any potential risks



ESG and Sustainability Disclosures Under the Microscope

Environmental, social, and governance (ESG) and sustainability claims, disclosures, and risk oversight remain major litigation and regulatory flashpoints.

Categories of critical ESG and sustainability litigation and regulatory risks include:

- State Attorney General (AG) and Multi-State Investigations into Asset Managers
- Greenwashing Claims Over Net Zero and Climate Commitments
- Securities Class Actions
- Antitrust / Competition Claims
- Derivative / Fiduciary Duty Suits Targeting Lax Oversight
- Fund Marketing and Names Rule Enforcement

ESG and Sustainability Disclosures Under the Microscope

- “Greenwashing” claims continuing to increase in frequency
- State AG enforcement is rising, especially in New York
  - New York has sued multiple companies over general statements they made regarding their environmental impacts
  - For example, PepsiCo was sued for its public statements about its efforts to reduce plastic pollution

ESG and Sustainability Disclosures Under the Microscope

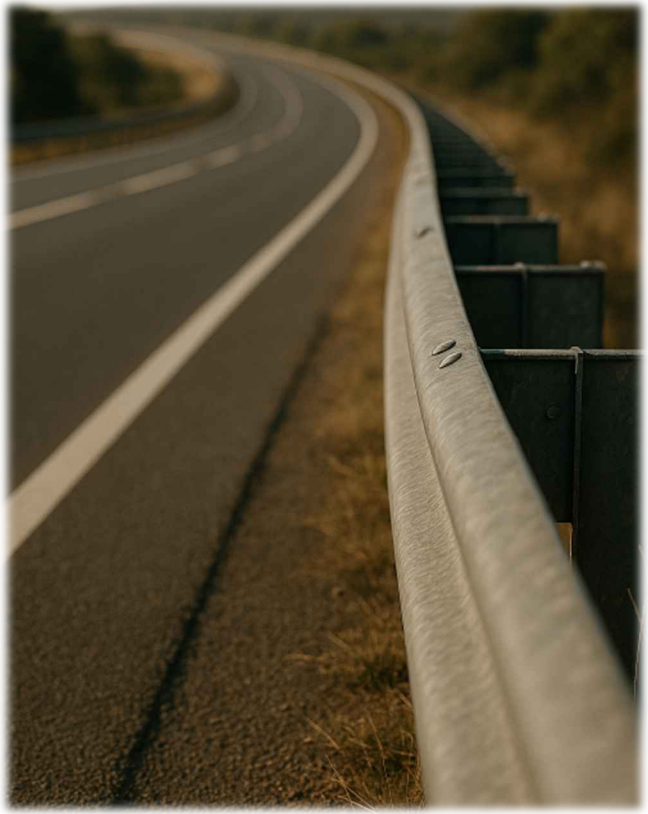
- Private lawsuits target among other things:
  - Broad claims like “carbon neutral,” “sustainable,” or “eco-friendly”
  - Use of carbon offsets or sustainability labels without clear substantiation
  - Alleged presence of PFAS in products marketed as “clean” or “safe”
  - Alleged failures of fiduciaries to oversee compliance with ESG disclosures
  - Pursuit by fiduciaries of ESG goals at the expense of financial returns

SEC Enforcement of the “Marketing Rule”

- In 2024, the SEC engaged in multiple enforcement “sweeps” using the Marketing Rule Written representations
- These sweeps primarily targeted investment advisers
- The SEC brought its first enforcement action under its new leadership on September 4, 2025
- Companies should be prepared to support marketing claims under the Marketing Rule’s substantiation requirement

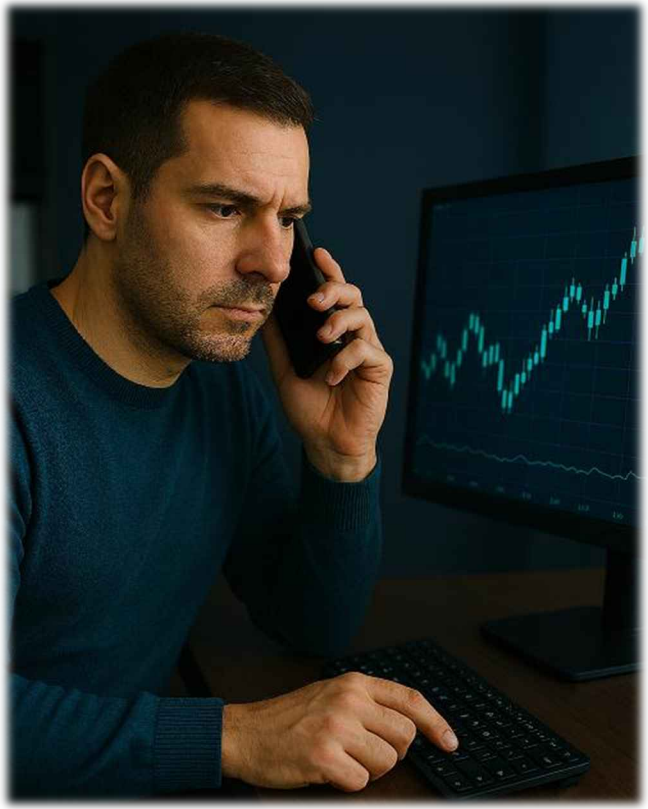
Scrutiny of Rule 10b5-1 Trading Plans

- Cooling-off periods
- Written representations
  - —Required from directors and officers when adopting or modifying plans
- Restrictions on multiple plans
- Single-trade plans
- Expanded good faith requirement



Scrutiny of Rule 10b5-1 Trading Plans

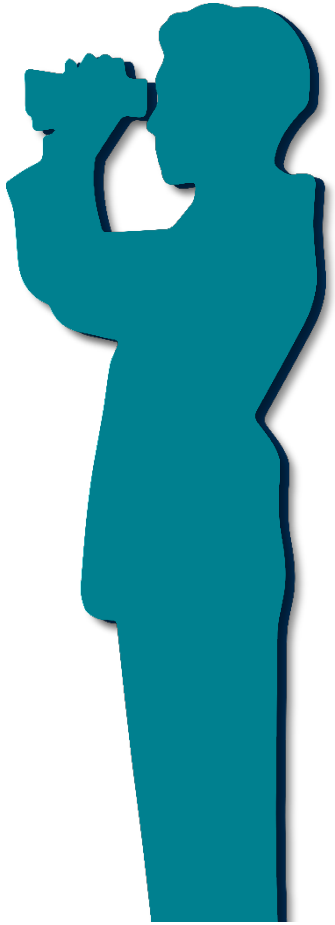
- Litigation & Enforcement
  - —The SEC has used the amendments as a basis for increased enforcement
  - —For example, the DOJ used an executive's failure to comply with the "cooling-off period" in an indictment for an insider trading scheme
  - —The DOJ has increased the use of data analysis efforts for Rule 10b5-1 Plan enforcement
  - —Anomalous trading activity is likely to raise questions and trigger more intense SEC enforcement scrutiny



DEVELOPMENTS IN FEDERAL PLEADING STANDARDS AND PRECEDENT

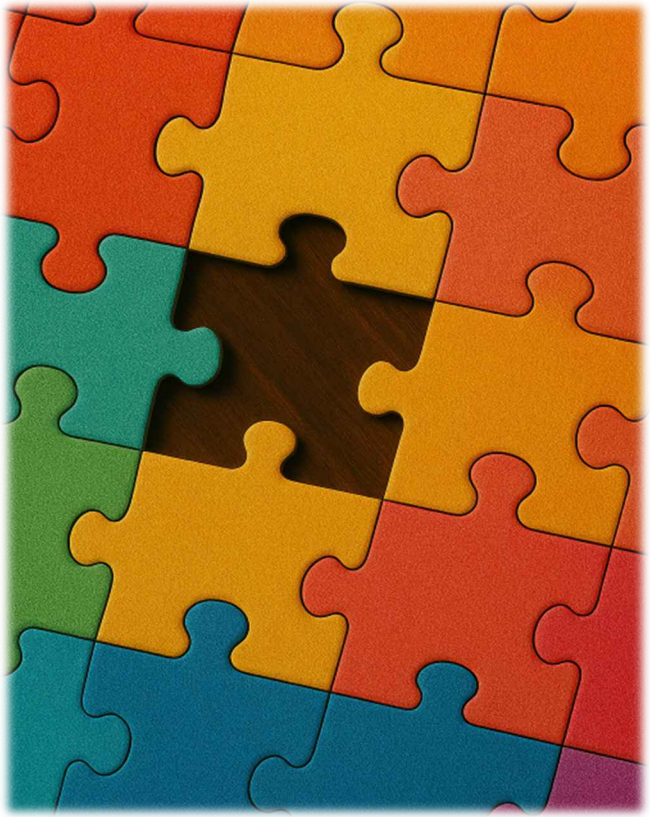
“Fraud by Hindsight” Doctrine

Courts are increasingly skeptical of claims relying on **post hoc reasoning**, especially where risk disclosures were made but later proved inadequate.



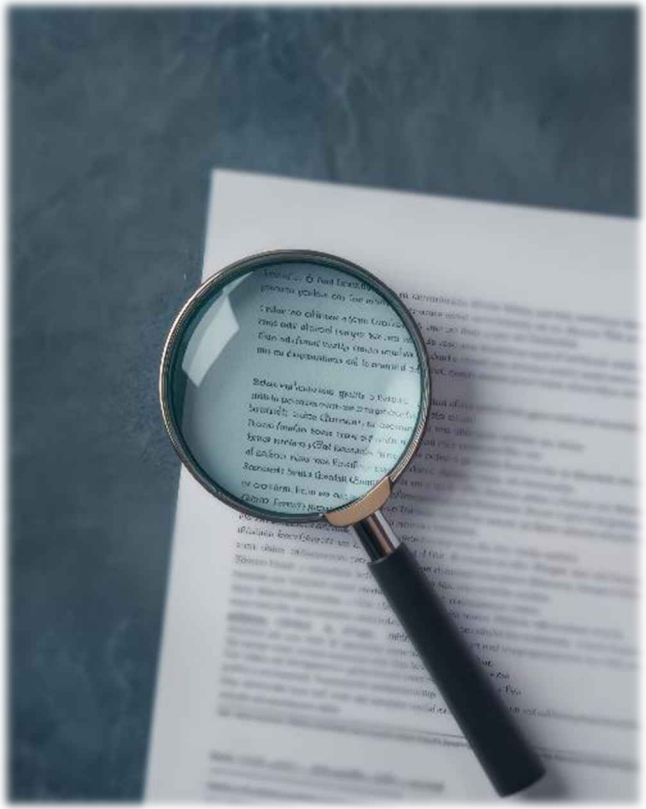
The “Pure Omissions” Battleground after *Macquarie v. Moab*

- Rule 10b-5(b) covers misstatements and half-truths, not pure omissions
  - A half-truth is a statement that is technically true but omits critical qualifying information
  - Pure omissions may still be actionable under Section 11 of the Securities Act of 1933, which explicitly prohibits omissions in registration statements



The “Pure Omissions” Battleground after *Macquarie v. Moab*

- The decision narrows the scope of private securities fraud claims under Rule 10b-5(b).
- A half-truth is a statement that is technically true but omits critical qualifying information
  - Securities class actions based solely on omissions are rare, so the practical impact may be limited
  - Plaintiffs must now identify an affirmative statement to pursue claims under Rule 10b-5(b)



The “Pure Omissions” Battleground after *Macquarie v. Moab*

- Areas left undecided by the Supreme Court:
  - What qualifies as a “statement made” under Section 10(b).
  - When does a statement becomes misleading as a “half-truth”
  - Whether Rule 10b-5(a) or (c) can support liability for pure omissions

Materiality Standard for Auditors' Statements of Compliance

- There was a pending Supreme Court *certiorari* petition in *BDO USA, LLP* about whether a false statement that an auditor complied with professional audit standards is per se material under § 10(b)/Rule 10b-5, or whether plaintiffs must allege a more specific connection to misstatements in the financials.
- This case raises a circuit split on how broadly "materiality" can be treated when the alleged misstatement is "standard compliance" vs. more specific audit findings.

Materiality Standard for Auditors' Statements of Compliance

- The Second Circuit arguably broadened securities fraud liability for external auditors in *New England Carpenters Guaranteed Annuity & Pension Funds v. DeCarlo*
  - —After a rehearing, the court reversed its prior decision and ruled that misstatements in an audit certification may be material to investors, even if the audit certification simply reflects standardized language

Whistleblower Retaliation Standard Under SOX (Sarbanes-Oxley Act)

Murray v. UBS Securities, LLC (2024) clarified that whistleblowers under SOX must show that their protected activity was a "contributing factor" in a personnel action, but need not prove "retaliatory intent."

- The Supreme Court's decision is not just limited to whistleblower protections under the Sarbanes-Oxley Act
- The decision also outlines how an employer can avoid liability
  - —This is known as the "same action" defense
- The Sarbanes-Oxley Act adopted the burden of proof from AIR 21, legislation enacted in 2000 to improve airline safety
  - —That law uses a "contributing factor" standard
  - —This is a broad and forgiving standard—any factor that tends to affect the outcome qualifies

SEC Mandatory Arbitration Policy Announcement

The SEC announced a significant change in regulatory policy by abandoning its opposition to mandatory arbitration provisions

- On September 17, 2025, the SEC published a policy statement essentially stating that it would no longer oppose mandatory arbitration provisions in organizational documents
- Previously, the SEC had an unwritten policy of not accelerating registration statements that included mandatory arbitration clauses, citing investor protection concerns under Section 8(a) of the Securities Act of 1933

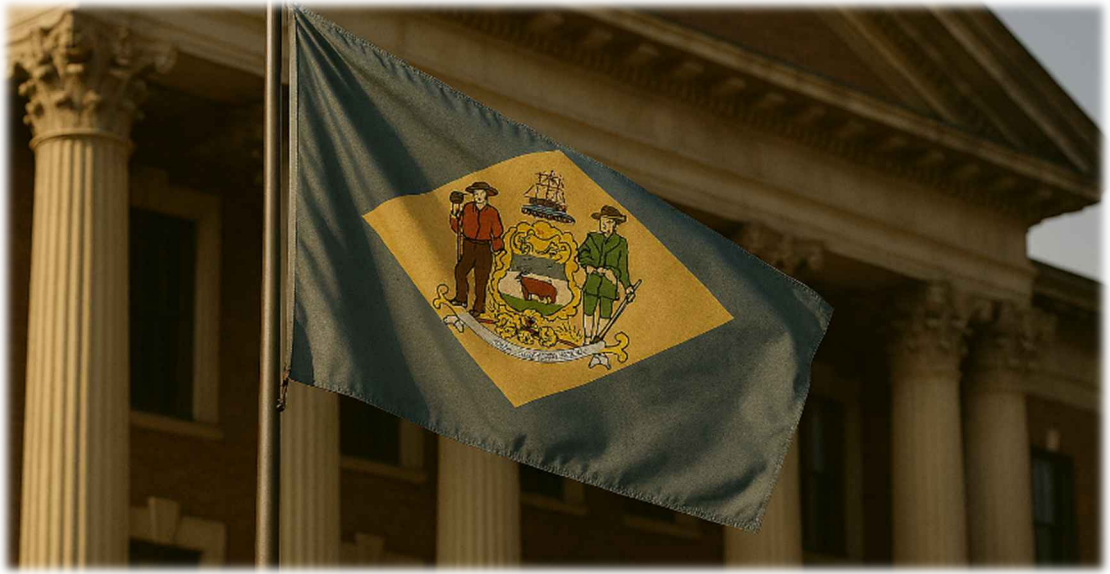
SEC Mandatory Arbitration Policy Announcement

- The policy change has significant implications for companies and investors
  - —Companies will have more flexibility to require arbitration instead of allowing shareholder class actions in court
- However, state laws and investor sentiment will still influence whether companies adopt these provisions

DEVELOPMENTS IN STATE (DELAWARE) SECURITIES AND DERIVATIVE LITIGATION

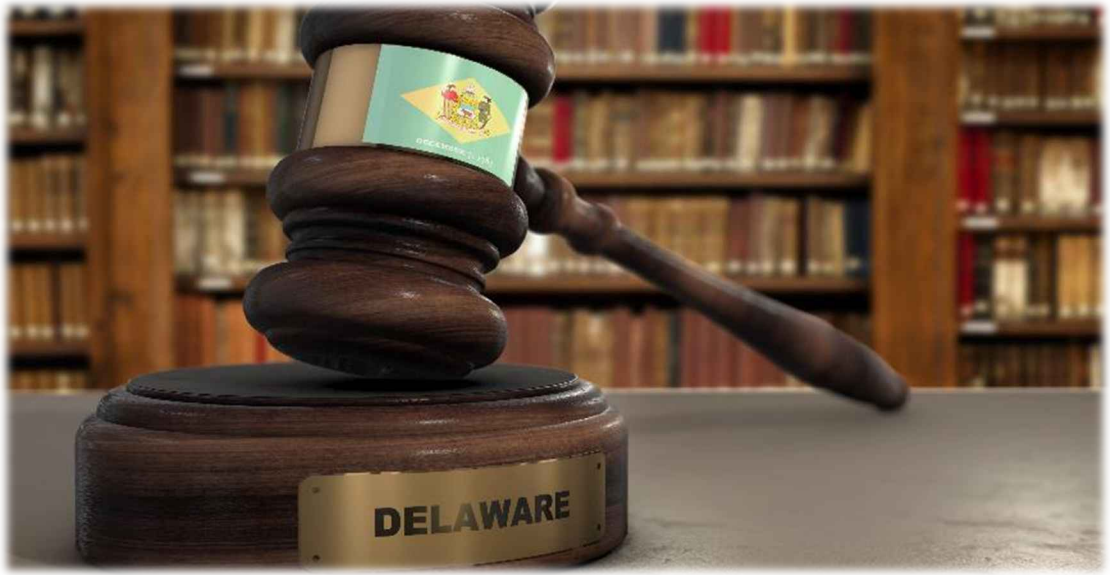
Recent Early Dismissals of Derivative Litigation

- *In Re The Trade Desk, Inc. Derivative Litigation* – Early dismissal of a complaint for failure to plead demand futility applying the new *Zuckerberg* test



Recent Early Dismissals of Derivative Litigation

- *In re Skillsoft Stockholders Litigation* – Dismissal of claims pre-discovery after applying entire fairness review

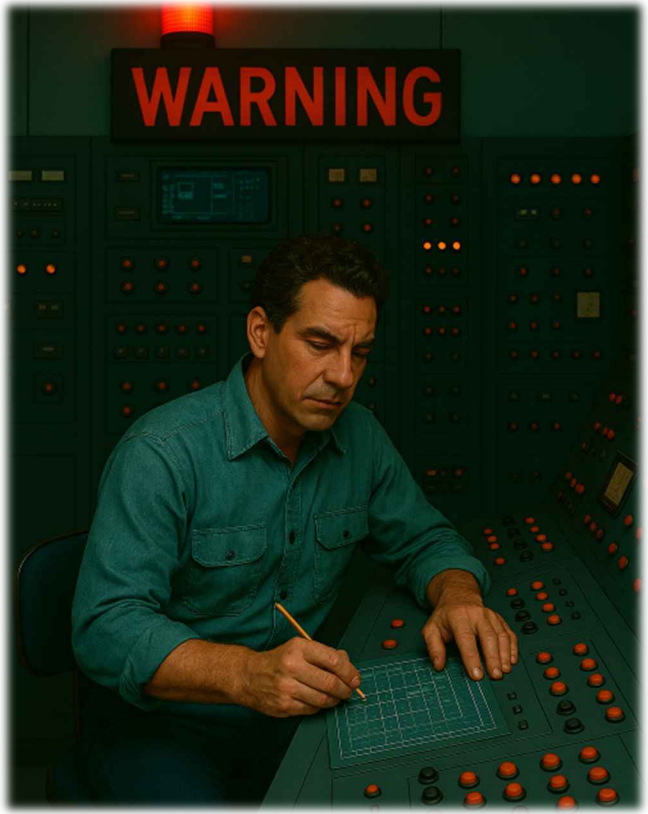


Evolving Standards for Board Oversight under *Caremark*

- *Caremark* claims cover liability for failures of oversight at a corporation
  - —These claims have a high pleading standard and are among the most difficult theories in corporation law for plaintiffs to succeed on
- plaintiffs must show:
  - —Utter failure to implement reporting or control systems
  - —Conscious failure to monitor or oversee existing systems

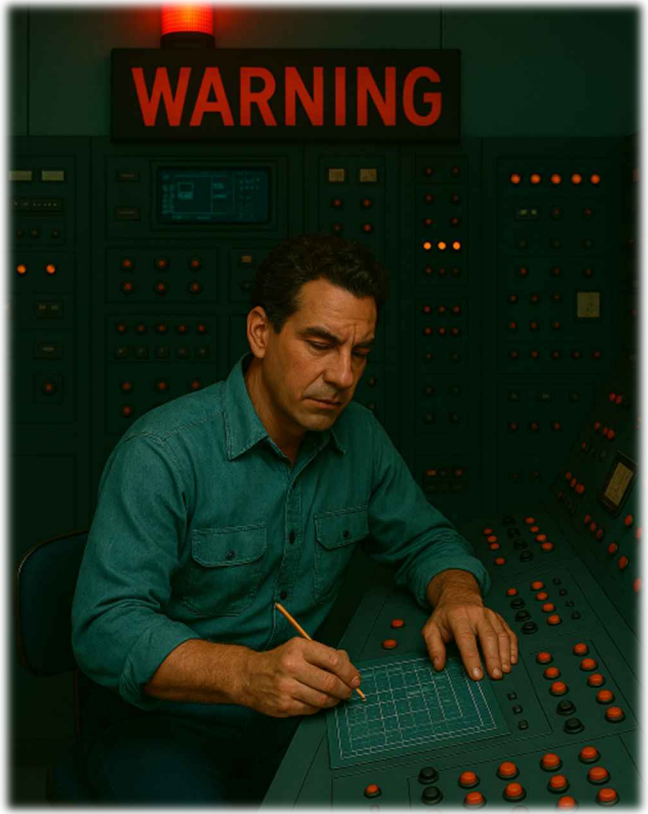
Evolving Standards for Board Oversight under *Caremark*

- Courts have allowed more *Caremark* claims to proceed past the pleading stage, increasing the risk of liability for corporate boards
  - —In fact, in the last five years, more *Caremark* claims have survived dismissal than they did *in the prior 23 years*



Evolving Standards for Board Oversight under *Caremark*

- Overall, oversight duties are expanding
  - —Delaware courts are scrutinizing whether boards respond appropriately to red flags
  - —Companies should maintain robust compliance systems and document oversight efforts
  - —Bad faith remains a key element
    - This ensures not every failure or poor decision qualifies



Evolving Standards for Board Oversight under *Caremark*

- Under the *Caremark* framework, Delaware courts have become more willing to allow plaintiffs to pursue claims that directors breached their duty to oversee risk management and compliance
  - —Directors are most vulnerable to lawsuits in two situations:
    - Where they have not established appropriate oversight processes for monitoring risks in "mission critical" aspects of their business
      - —However, a plaintiff must allege there was bad faith on the part of the director
    - When boards should have been alerted by "red flags" to looming problems
      - —This includes illegal corporate conduct, a lack of compliance with internal procedures, and employees reporting risks to the company's operations

Evolving Standards for Board Oversight under *Caremark*

- The *Caremark* framework envisions some board oversight of the daily management of their companies
  - Delaware law recognizes that directors are not necessarily involved in the day-to-day management of their companies
  - However, corporate boards must ensure their compliance system is adequate
  - They must also monitor the compliance system
  - There cannot be blind deference to management

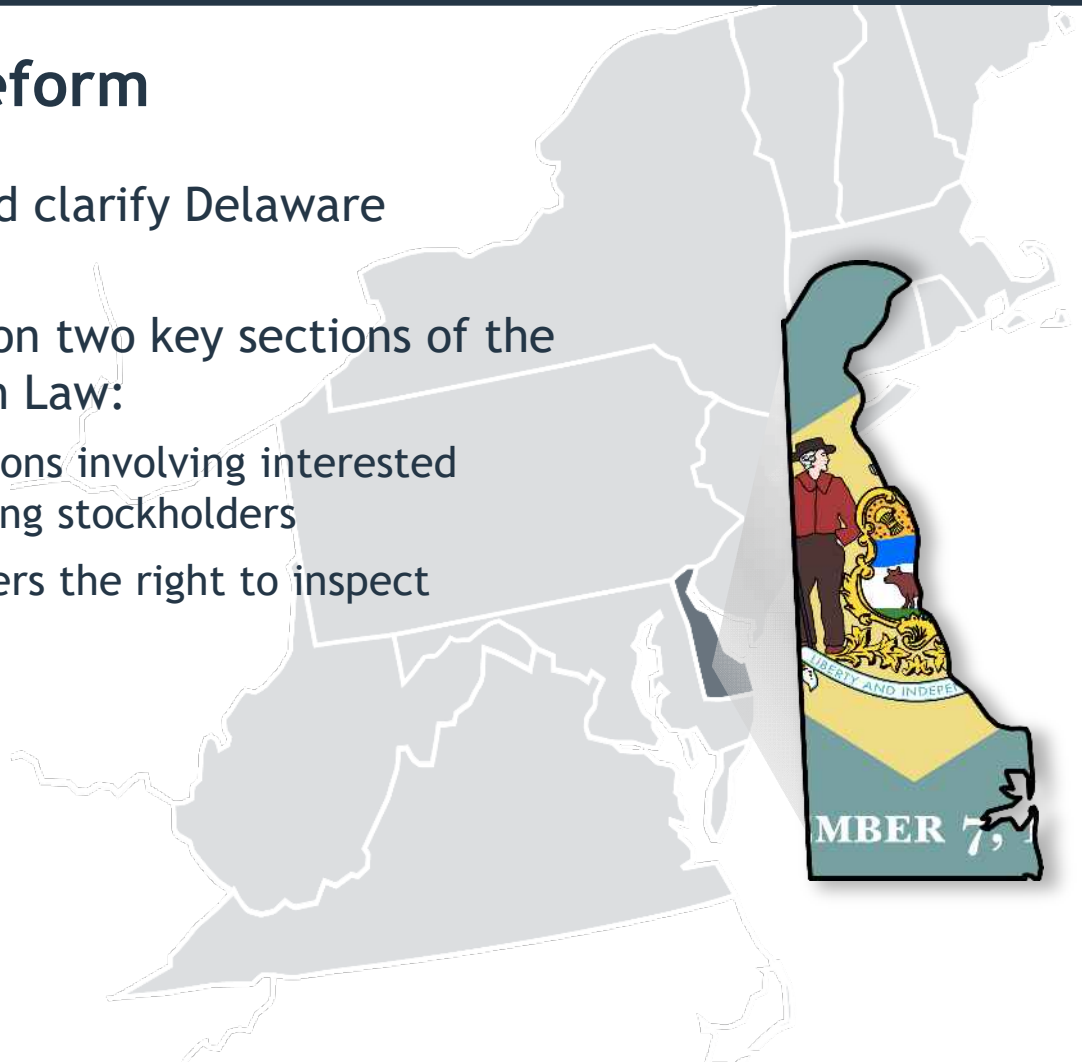
Delaware Supreme Court Refining Standards for Aiding/Abetting & "Knowledge" in Mergers

In *In re Columbia Pipeline Group Inc Merger Litigation*, the Delaware Supreme Court overturned a $199 million damages award, holding that the acquirer (TC Energy) could not have liability for assisting the seller's breach of fiduciary duty absent proof of actual knowledge of the breach

- The decision has important implications for M&A transactions under Delaware law
  - —Sets a high bar for proving aiding and abetting liability
  - —Buyers are protected unless they knowingly participate in a breach
  - —Reinforces that arm's-length bargaining is generally shielded under Delaware law

Delaware Legislative Reform

- SB 21 sought to modernize and clarify Delaware corporate law
- Recent Amendments focused on two key sections of the Delaware General Corporation Law:
  - Section 144, governing transactions involving interested directors, officers, and controlling stockholders
  - Section 220, granting shareholders the right to inspect corporate books and records



Delaware Legislative Reform

- Amendments to Section 144:
  - Now provides a safe harbor for conflicted transactions and clarifies that the safe harbor applies to transactions involving controlling stockholders
  - If transactions are approved by either
    - an informed majority of the corporation's disinterested directors acting in good faith
    - Or an informed majority of the corporation's disinterested directors

    then courts will evaluate the fairness of the transaction under the business judgment rule instead of the more stringent "entire fairness" standard
  - Defines the term "controlling stockholder" and limits the liability of such stockholders

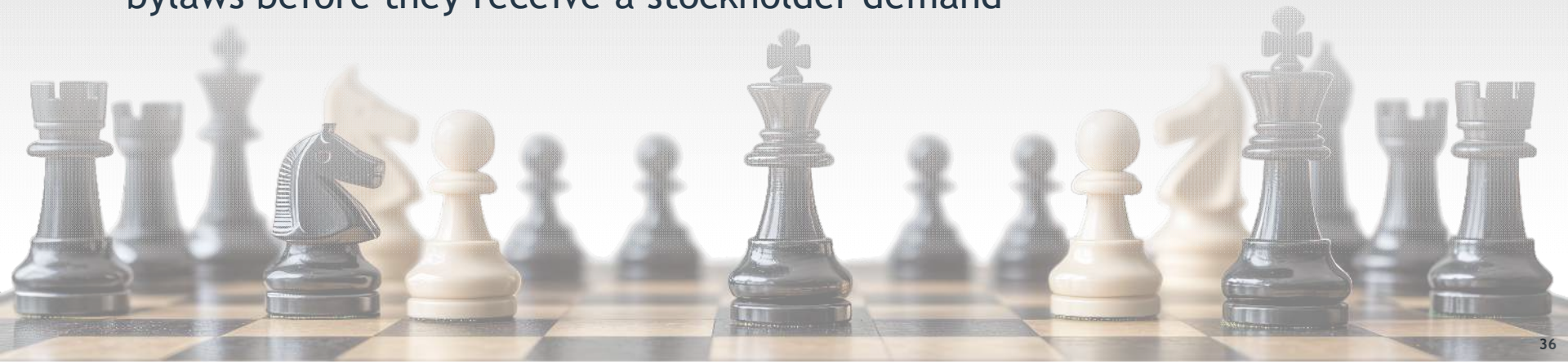
Delaware Legislative Reform

- Amendments to Section 220:
  - Limits the scope of the right of shareholders to inspect corporate books and records
    - Only covers formal corporate documents
    - Excludes emails, texts, and informal communications
    - Allows corporations to impose reasonable restrictions on record use and distribution
    - Imposes a higher standard of particularity for a shareholder's purpose for seeking access to corporate books and records

Corporate Governance Maneuvers

Litigation over advance notice bylaws, board entrenchment, and corporate conversions (e.g., Delaware to Texas or Nevada) has intensified.

- Plaintiffs' firms have set their sights on advance notice bylaws
- The firms are motivated by a fee award reserved for stockholders' counsel under Delaware law
- In light of these claims, it may be wise for companies to review their own bylaws before they receive a stockholder demand



Corporate Governance Maneuvers

- In *In re Edgio, Inc. Stockholders Litigation*, the Delaware Court of Chancery held that where stockholders moved to enjoin a board's defensive measures, courts should apply enhanced scrutiny
  - Enhanced scrutiny requires that fiduciary defendants bear the burden of persuasion that their motivations were proper and not selfish, and that their "actions were reasonable in relation to their legitimate objective."
- This means that, even with a fully informed vote of disinterested stockholders, where a stockholder moves to enjoin corporate action entrenching the directors, enhanced scrutiny will apply

Corporate Governance Maneuvers

- In *Dennis Palkon, et al. v. Gregory B. Maffei, et al.*, TripAdvisor and its controlling corporation, both Delaware companies, announced plans to convert to Nevada corporations

Corporate Governance Maneuvers

- However, the Delaware Supreme Court in *Maffei v. Palkon* reversed the Court of Chancery and applied the less onerous business judgment rule to the conversions.

NEW TEXAS BUSINESS COURTS AND LEGISLATION

Texas Business Courts – A New Contender

- The Texas Legislature established new Texas Business Courts in 2023, which commenced operations on September 1, 2024.
- The Texas Business Courts are designed to provide a specialize venue for complex commercial disputes with the intent of providing fast(er) resolutions.
- The jurisdiction of these specialized courts is limited, except as to public corporations.
- Parties retain the right to a jury trial when required by the Texas Constitution.
- In addition to creating the Texas Business Courts, the Texas Legislature also recently passed legislation relevant to Texas corporations and governance.
  - These statutory standards will be used and interpreted by the Texas Business Courts, thus leading to less of a "common law" court than the Delaware Court of Chancery.

New Texas Legislation – SB29

Fiduciary Duties and Derivative Litigation:

- Formally codifies the "business judgment rule" providing a safe harbor for directors if decisions are made in good faith, on an informed basis, in furtherance of corporate interests, and in obedience to law or governing documents, with a presumption of compliance for public companies or those that opt-in.
- Permits publicly listed corporations (or those opting in with 500+ shareholders) to set minimum ownership percentages (not more than 3%) for derivative lawsuit standing, which must be in the certificate of formation or bylaws.

New Texas Legislation – SB29

Fiduciary Duties and Derivative Litigation:

- Implements a novel mechanism allowing corporations to ask the Texas Business Court (or district court) to assess the independence and disinterestedness of special committee members prior to a proposed transaction, unlike Delaware where this is typically assessed during litigation
- Prohibits recovery of attorney's fees when a dispute's resolution only results in additional or amended disclosures to shareholders, aiming to deter non-substantive derivative lawsuits.

New Texas Legislation – SB29

Stockholder Information Rights:

- Restricts the scope of stockholder information requests, exempting email, text messages, and social media from such requests, with limited exceptions.
- Permits public corporations to limit requests during active or pending derivative proceedings against the corporation.