

“Non-Delaware Lawyers Giving Advice on Delaware Law to
Delaware Corporations Can Be Sued in Delaware”

By: Francis G.X. Pileggi*

The Delaware Chancery Court recently issued an opinion that should be of interest to the many non-Delaware lawyers around the country who routinely provide advice on Delaware law to Delaware corporations and their directors. In Sample v. Morgan, 2007 WL 4207790 (Del. Ch., Nov. 27, 2007), the Chancery Court provided a thorough analysis of Delaware’s long-arm statute, and determined that a non-Delaware lawyer at a non-Delaware law firm who provided advice on Delaware law to a Delaware corporation, and who caused a charter amendment to be filed with the Delaware Secretary of State, are both subject to personal jurisdiction in Delaware courts. See Sections 3104 (c)(1) and 3104 (c)(3) of Title 10 of the Delaware Code. This opinion also addresses the issue about when a corporate officer or its advisors may satisfy the prerequisites for engaging in a conspiracy with the corporation that they serve, and under what circumstances a corporate act can also create liability for those who caused the corporation to act.

Several quotes from the court’s opinion provide much better insight into the decision than any summary could hope to do. For example, the court’s reasoning included the following:

For sophisticated counsel to argue that they did not realize that acting as a de facto outside general counsel to a Delaware corporation and regularly providing advice about Delaware law about matters important to that corporation and its stockholders might expose it to this Court’s jurisdiction fails the straight-face test. The moving defendants knew that the propriety of the corporate action taken in reliance upon its advice and through its services would be determined under Delaware corporate law and likely in a Delaware court.

This opinion and its reasoning is notable in light of the many non-Delaware lawyers throughout the country who regularly provide advice on Delaware corporate law. As one wag suggested, there are

more lawyers in New York City who provide advice on Delaware corporate law than there are lawyers in the State of Delaware who do so.

The court summarized the issues that it addressed as follows:

The question presented is a straightforward one. May a corporate lawyer and his law firm be sued in Delaware as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law when the lawyer and law firm: i) prepared and delivered to Delaware for filing a certificate amendment under challenge in the lawsuit; ii) advertise themselves as being able to provide coast-to-coast legal services and as experts in matters of corporate governance; iii) provided legal advice on a range of Delaware law matters at issue in the lawsuit; iv) undertook to direct the defense of the lawsuit; and v) face well-pled allegations of having aided and abetted the top managers of the corporation in breaching their fiduciary duties by entrenching and enriching themselves at the expense of the corporation and its public stockholders? The answer is yes.

The court acknowledged that the facts in this case were “highly unusual” and that in “most fiduciary duty cases, it will be exceedingly difficult for plaintiffs to state an aiding and abetting claim against corporate counsel.” The opinion includes many detailed facts which are necessary to understand the holding. Additional detailed facts are available in a prior opinion in which the court denied a Motion to Dismiss by the directors (finding among other things, that the purportedly independent directors were too passive to enjoy the benefits of the business judgment rule). See Sample v. Morgan, 2007 WL 177856 (Del. Ch., Jan. 23, 2007).

One of the key sections of the court’s reasoning in this opinion deserves to be quoted as opposed to summarized. The court described the public policy aspects of its decision as follows:

Delaware has no public policy interest in shielding corporate advisors from responsibility for consciously assisting the managers of Delaware

corporations in breaching their fiduciary duties. If well-pled facts can be pled that support the inference that a corporate advisor knowingly assisted corporate directors in breaching their fiduciary duties, Delaware has a public policy interest in ensuring that its courts are available to derivative plaintiffs who wish to hold that advisor accountable to the corporation. The precise circumstances when corporate advisors should be deemed responsible to the corporation or its stockholders for their role in advising directors and officers should be determined by decisions addressing the merits of aiding and abetting claims, not by decisions about motions to dismiss for lack of personal jurisdiction. Lawyers and law firms, like other defendants, can be sued in this state if there is a statutory and constitutional foundation for doing so.

There is much more that can be written about this opinion and many more details that can be discussed, but in this very short summary these highlights will identify the importance of the court's ruling and provide an opportunity for those interested to refer to the complete opinion.

Two nationally prominent corporate law professors have commented on the case so far, during the short period since its release. Professor Larry Ribstein's comments are on his blog at the following link:

<http://busmovie.typepad.com/ideoblog/2007/12/so-you-want-to.html> and Professor Stephen Bainbridge's comments can be found on his blog at this link:

http://www.businessassociationsblog.com/lawandbusiness/comments/were_all_delaware_lawyers_now/

A copy of the decision is also available on my blog at the following link:

<http://www.delawarelitigation.com/2007/12/articles/chancery-court-updates/nondelaware-lawyers-can-be-sued-in-delaware-for-giving-advice-on-delaware-law/>

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