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Delaware corporate and alternative entity statistical review 2011*

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The Delaware Counsel Group, (DECG),¹ conducts statistical studies on the types of corporate and commercial claims at issue in decisions rendered by the Delaware Court of Chancery (Chancery Court) over the course of a year. The studies investigate not only what types of claims are made but also how quickly the claims are resolved and through what type of proceeding.

There were a total of 98 decisions reviewed for the 2011 study which found that one third of Chancery Court decisions involved allegations that directors and other types of managers breached their common law fiduciary duties; one third of Chancery Court decisions involved challenges to rights and obligations of managers and stakeholders under specific Delaware business statutes; and one third of the Chancery Court decisions involved disputes between parties to commercial agreements.² These statistics were consistent with a prior study conducted in 2010. The most frequent procedural postures were; decisions on a motion to dismiss; decisions on a motion for summary judgment; and post-trial decisions. The average time it took the Chancery Court to render a decision ranged from 73 days for statutory claims to 100 days for certain types of fiduciary duty claims.³

Fiduciary duty litigation

Over three quarters of fiduciary duty decisions arose from transactional matters (87 per cent), and the types of transactions that were most frequently at issue were mergers and acquisitions (69 per cent). The remainder of the fiduciary duty decisions involved corporate governance matters (13 per cent). The types of corporate governance matters at issue included; the adoption of stockholder rights plans; annual meetings of stockholders; the authorisation of stock options; and the management of alternative entities. The average length of time for an opinion to be issued was 100 days for fiduciary duty litigation related to transactional matters and 88 days for fiduciary duty litigation arising from corporate governance matters.

Commercial litigation

A majority of the decisions involving contractual disputes arose from a transaction (66 per cent), and the types of transactional documents that were most frequently at issue were; merger agreements (37 per cent); purchase agreements (21 per cent); and indenture agreements (14 per cent). The remainder of the contractual disputes involved the interpretation of corporate governance provisions in organisational documents, such

as certificates of incorporation, by-laws and operating agreements. The average length of time for an opinion to be issued was 83 days for commercial litigation related to transactional documents and 94 days for commercial litigation arising from a governance document.

Statutory rights and obligations under Delaware business statutes

The types of rights of managers and stakeholders set forth in Delaware business statutes that were most frequently at issue were as follows: rights to the appointment of a receiver (24 per cent); rights upon dissolution (17 per cent); appraisal rights (16 per cent); and books and records inspection rights (13 per cent). These percentages differed drastically from the results of a 2010 study conducted by DECG which found that only five per cent of statutory cases involved the right to appoint a receiver. There were no cases involving dissolution in the 2010 study. The average time-frame for a decision to be rendered on a statutory matter in the current study was 73 days.

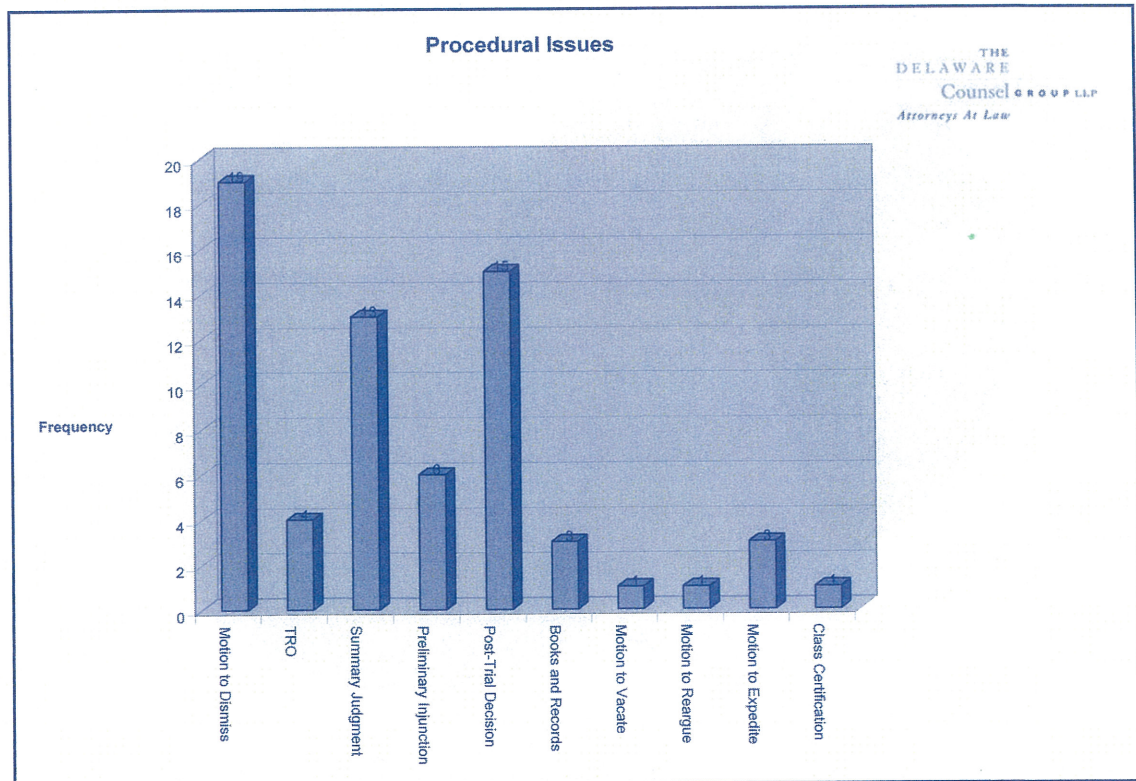
Merger litigation

Approximately 30 per cent of the decisions involved mergers in some fashion – the

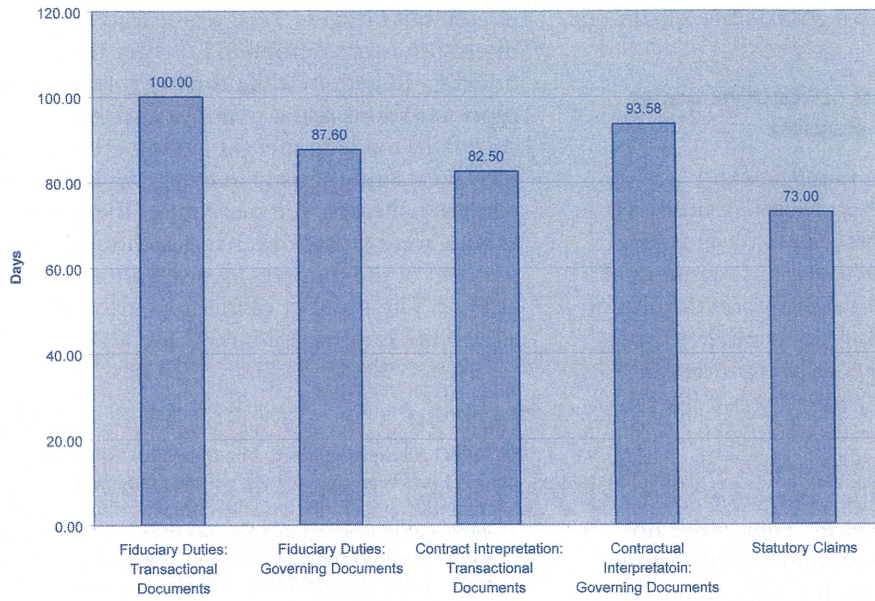
total number of merger-related statutory, contractual and fiduciary decisions amounted to 29 out of the 98 decisions surveyed. Most of the merger-related statutory claims involved the exercise of appraisal rights by stockholders in cash-out mergers. Deal protection and disclosure issues dominated merger-related fiduciary litigation, while the interpretation of representations and warranties and restrictive covenants made in merger agreements was most frequently at issue in merger-related contractual cases. Ten per cent of the mergers at issue were cross-border transactions, and 24 per cent of the mergers involved alternative entities. The number of mergers involving alternative entities doubled from 2010.

Notes

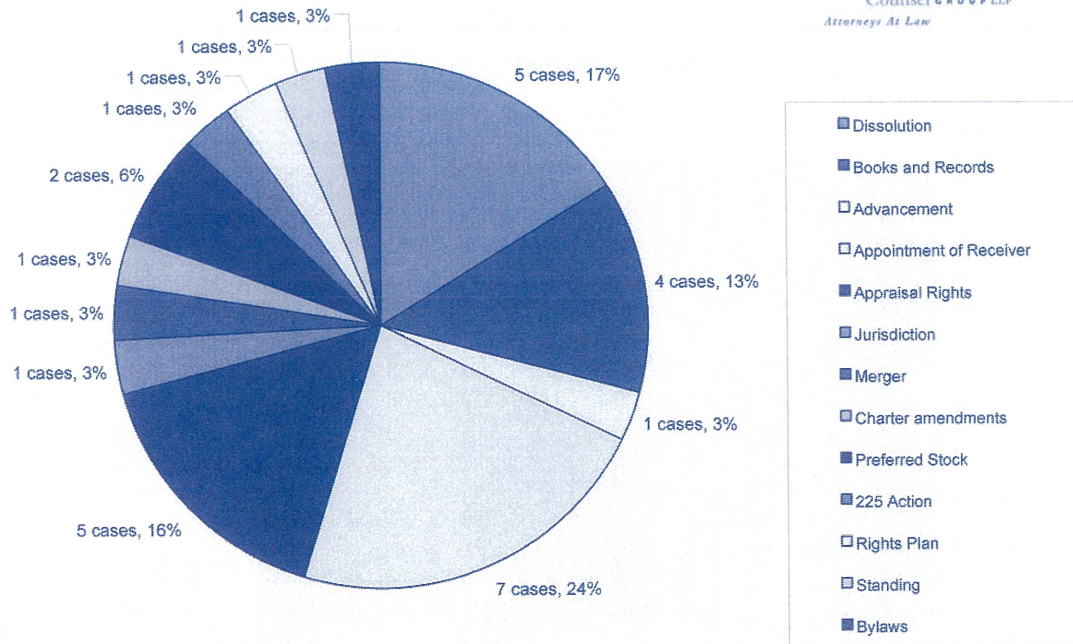
- * © 2011 All rights reserved, The Delaware Counsel Group.
- 1 DECG has been representing national and international clients in complex transactional and governance matters involving Delaware business entities since 2004. Through DECG's exclusive focus on Delaware corporate, alternative entity and commercial law, the firm has developed the expertise to guide and advise law firms, in-house counsel and business people regarding sophisticated Delaware legal issues.
- 2 Certain non-business related litigation, such as cases involving trust and estates and personal real estate matters, were not included in the study.
- 3 The study did not compare the length of time it took for a decision to be issued by procedure, ie, by preliminary injunction and summary judgment.



Average Time

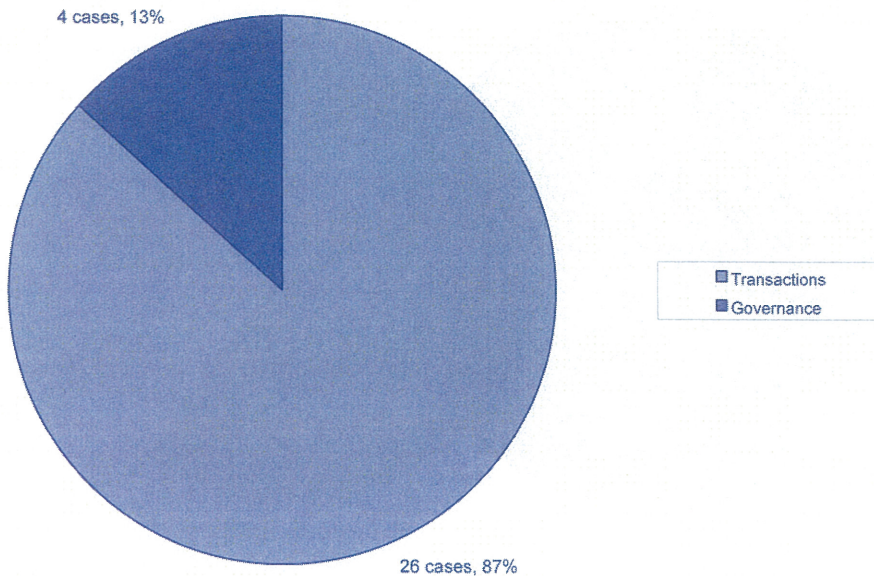


Statutory Claims Detail



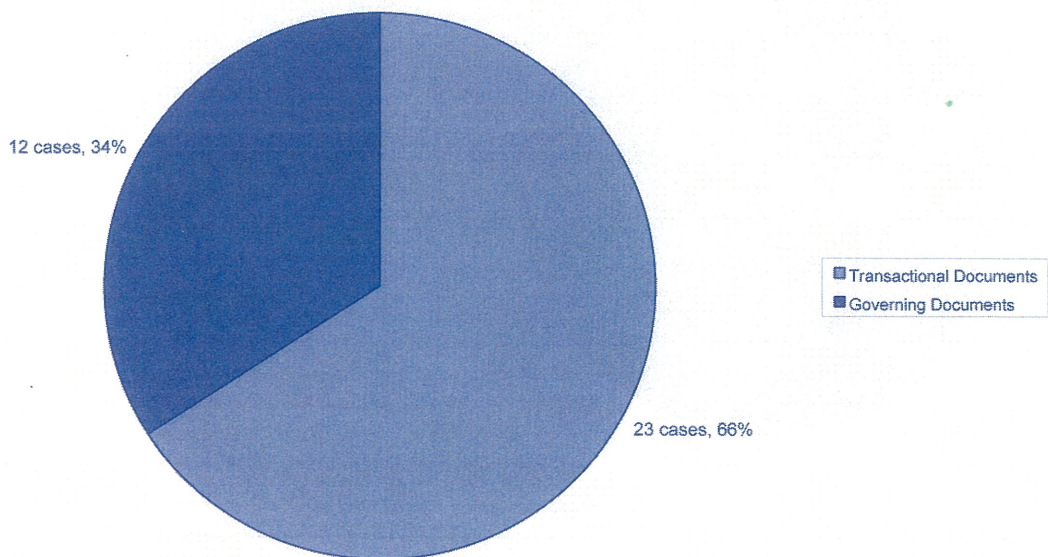
Fiduciary Duties: Overview

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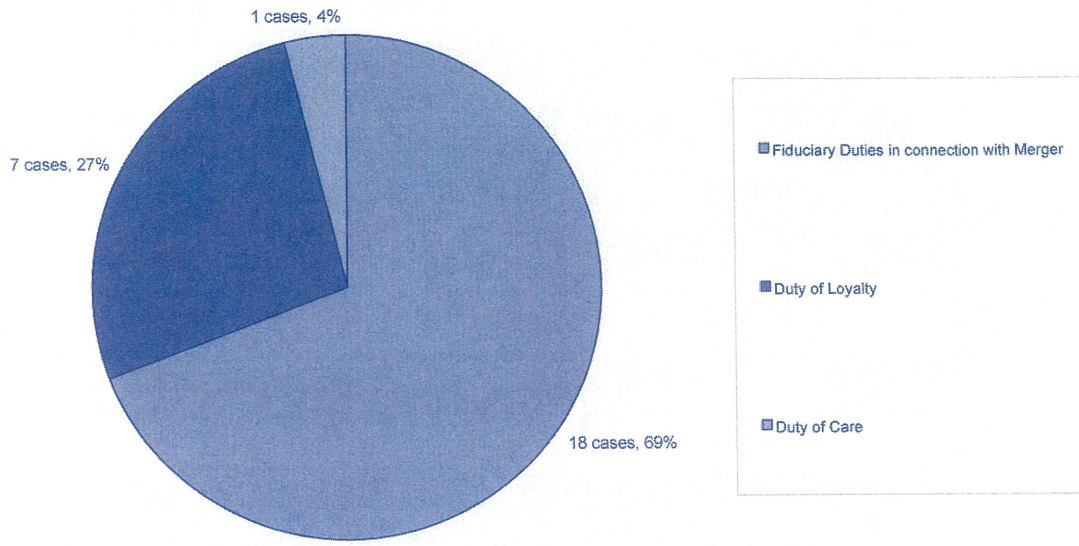
Contract Interpretation: Overview

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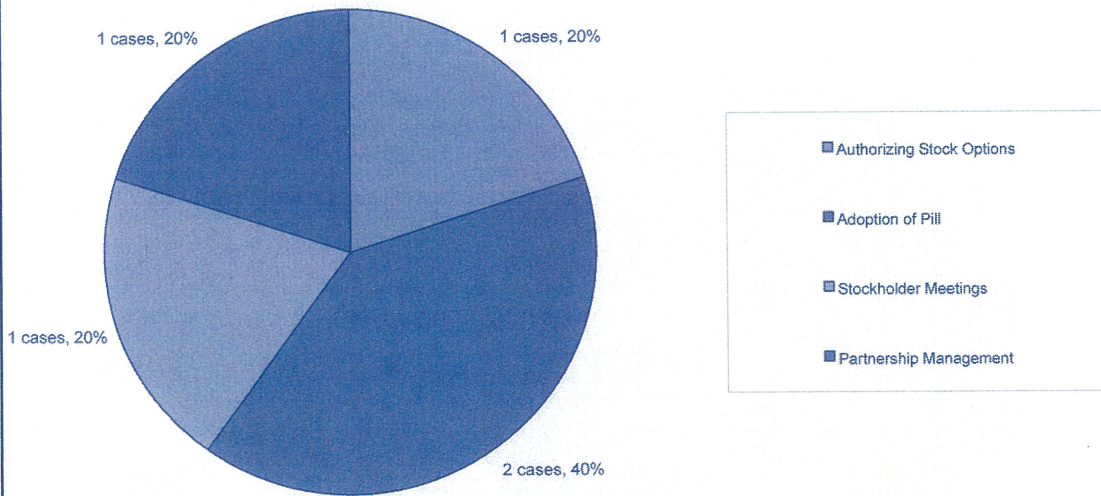
Fiduciary Duties: Transactional Documents

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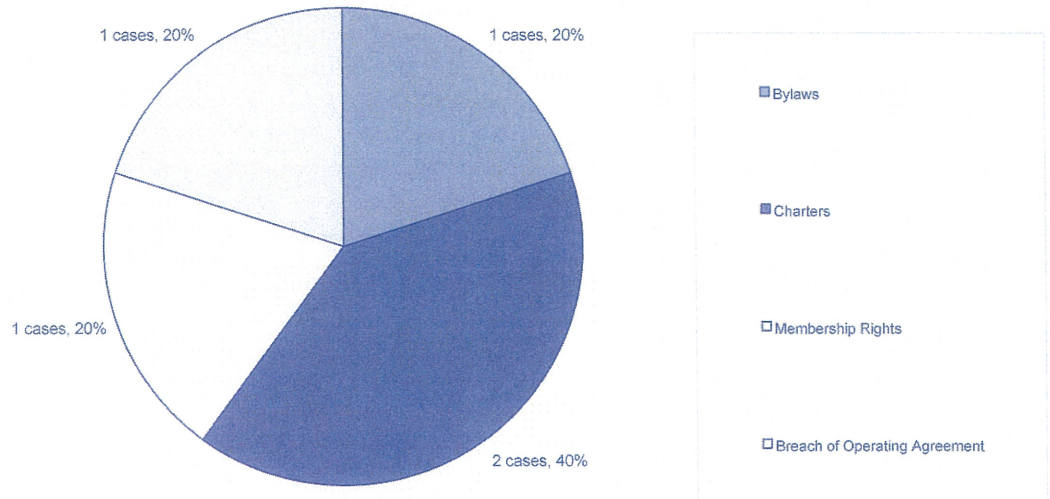
Fiduciary Duties: Governing Documents

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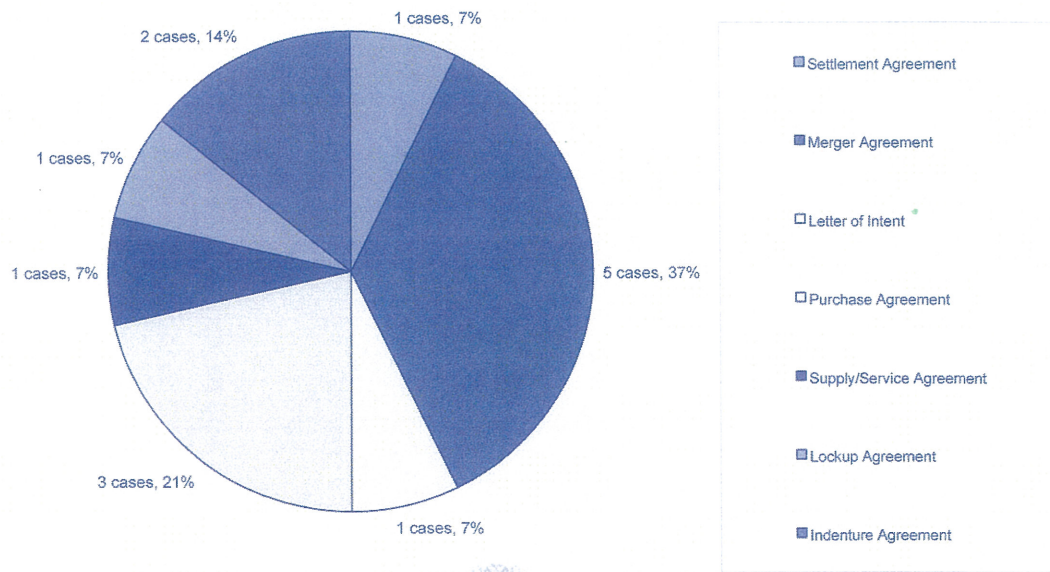
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