Delaware Court Reminder: Boards Should Be Careful When Setting Their Own Pay

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A recent Delaware Court of Chancery decision, *Ayers v. Foley*, serves as an important reminder that when a board votes to set its own compensation, courts will not simply accept the board's own assessment that the compensation was fair.

In *Foley*, a shareholder of Fidelity National Financial ("***FNF***") brought suit against the company's directors, alleging that the compensation they voted to award themselves from 2022 to 2024 was excessive. The shareholder alleged that the directors' compensation substantially exceeded that paid by comparable companies, even though FNF was underperforming those other comparable companies on measures such as market capitalization, revenue, and net income. The court held that this was enough to let the claim move forward, rejecting the company's argument that strong performance on a different, self-selected metric resolved the issue as a matter of law.

Any time a public company's board sets its own compensation, that decision should be expected to face a heightened standard of review and comparison against peer company practices. Companies and their directors can reduce the risks of this type of litigation by including maximum grant limitations for director grants in their plans that are approved by shareholders when the plan is adopted or amended and ensuring that their compensation decisions are reasonable, well documented, and supported by the company's overall performance, rather than by a single favorable metric.

A copy of the case available here.