

Questioning Delaware's Control Over Controlling Stockholders

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Delaware cases dealing with transactions involving controlling stockholders are often concerned with the *standard of review* to be applied. See, e.g., *Tornetta v. Musk*, 250 A.3d 793 (2019). Some cases engender a different question - what duties, if any, are owed by a controlling stockholder? In *In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation*, 309 A.3d 474 (Del. Ch.), *modified on reargument* (Del. Ch. 2024), Vice Chancellor J. Travis Laster concluded that a controlling stockholder essentially owed two duties - a duty of loyalty (*i.e.*, do no harm intentionally to the corporation or its stockholders) and a duty of care (*i.e.*, a duty not to harm the corporation or its stockholders by grossly negligent actions). If a controlling stockholder breaches its fiduciary duties, a Delaware court can hold the stockholder liable for damages, as it did in the *Sears* litigation. This leads me to two questions.

A taut tautology

First, on what is the legal source of these duties? A director's fiduciary duties ultimately arise from his or her statutory obligation of management. 8 Del. Code § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . ."). An officer's fiduciary duties presumably have their basis in the officer's agency and contractual relationships to the corporation. A controlling stockholder, however, has no such statutory responsibility and is not an agent per se of the corporation. Some might point to the "internal affairs doctrine" which holds that "the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs". *VantagePointe Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (2005). At this point, however, rationale for imposing Delaware's fiduciary duties on controlling stockholders becomes somewhat circular: controlling stockholders owe fiduciary duties because the internal affairs doctrine applies and the internal affairs doctrine applies because controlling stockholders owe fiduciary duties.

In some cases, the shoe may not fit

Second, what is the basis for Delaware asserting personal jurisdiction over a controlling stockholder? In the case of directors and officers, Delaware can at least point to its "deemed consent" statute, which may be of questionable constitutionality. See [Can Delaware Exercise Jurisdiction Over Rupert Murdoch?](#) There is no "deemed consent" statute that applies to controlling stockholders. Therefore, a plaintiff would need to establish sufficient contacts with the State of Delaware such that the

maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (U.S. 1945) (*quoting Milliken v. Meyer*, 311 U.S. 457 (1941)). Depending upon the facts of a particular case, this could prove to be a steep hill to climb.

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