

## WHAT'S GOING ON IN DELAWARE?

November 19, 2015

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## Why Delaware?



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## Why Delaware? (cont.)

- DGCL and other statutes

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## Why Delaware? (cont.)

- DGCL and other statutes
- Voluminous interpretive case law

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## Why Delaware? (cont.)

- DGCL and other statutes
- Voluminous interpretive case law
- Chancery Court

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## Why Delaware? (cont.)

- DGCL and other statutes
- Voluminous interpretive case law
- Chancery Court
- Division of corporations and filing efficiency

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## Why Delaware? (cont.)

- DGCL and other statutes
- Voluminous interpretive case law
- Chancery Court
- Division of corporations and filing efficiency
- State tax loopholes—intangibles

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## Why Delaware? (cont.)

- DGCL and other statutes
- Voluminous interpretive case law
- Chancery Court
- Division of corporations and filing efficiency
- State tax loopholes—intangibles
- Anonymity



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## Chancery Court and Case Law

Approx. 4,000 cases, incl. 1,000 civil

- Governance and internal affairs
- Investments and finance
- Third-party contracts
- Mergers and acquisitions
- Public company M&A



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## Chancery Court and Case Law (cont.)

Approx. 4,000 cases, incl. 1,000 civil

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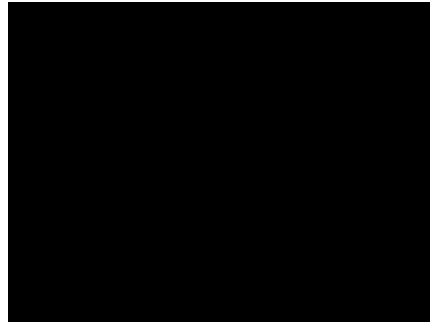
## *Winshall v. Viacom* *Delaware Supreme Court* *2013*

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013*


- Harmonix Music Systems → 



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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*


- Harmonix Music Systems → 
- Stock acquired by Viacom in 2006



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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*

- Harmonix Music Systems → 
- Stock acquired by Viacom in 2006
- \$175 million +  
earn out

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*

- Earn out based on Harmonix's product gross profit in 2007 and 2008 vs. target
  - Product gross profit"  $\cong$  all product revenue minus variable costs (incl. distribution fees)

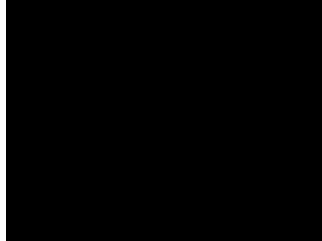
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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*

- As acquisition closes (2006), Harmonix is developing *Rock Band*



*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*

- As acquisition closes (2006), Harmonix is developing *Rock Band*



- Post-closing, Viacom/Harmonix contracts with Electronic Arts to distribute *Rock Band*



*Del. Sup. Ct. 2013 (cont.)*

Harmonix



Electronic Arts



- As acquisition closes (2006), Harmonix is developing *Rock Band*

- Post-closing Harmonix contracts with Electronic Arts to produce *Rock Band*



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*Winshall v. Viacom  
Del. Sup. Ct. 2013 (cont.)*



- Back to the earn out...
  - Achievement based on product gross profit in 2007 and 2008 vs. target

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Winshall v. Viacom  
Del. Sup. Ct. 2013 (cont.)



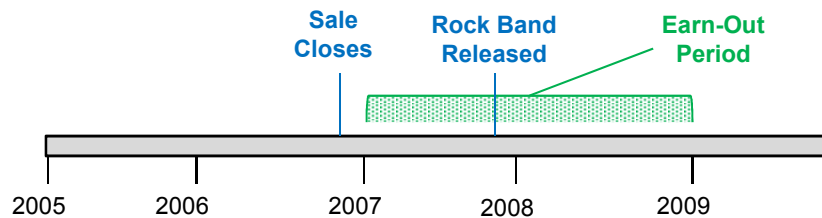
- Back to the earn out...
  - Achievement based on product gross profit in 2007 and 2008 vs. target
  - Target agreed before *Rock Band* hits market



Winshall v. Viacom  
Del. Sup. Ct. 2013 (cont.)



- Back to the earn out...
  - Achievement based on product gross profit in 2007 and 2008 vs. target
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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Back to the earn out...
  - Achievement based on product gross profit in 2007 and 2008 vs. target
  - Target agreed before *Rock Band* hits market
  - *Rock Band* released in 2007—has \$1 billion in sales in first 15 months

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Back to the earn out...
  - Achievement based on product gross profit in 2007 and 2008 vs. target
  - Target agreed before *Rock Band* hits market
  - *Rock Band* released in 2007—has \$1 billion in sales in first 15 months
  - Potential for massive earn-out payment

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Back to the earn out...
  - Viacom renegotiates distribution agreement with Electronic Arts in 2008



*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Back to the earn out...
  - Viacom renegotiates distribution agreement with Electronic Arts in 2008
  - Distribution fees payable to Electronic Arts for 2008 remain unchanged (reduced for 2009+)

*Product gross profit  $\cong$  all product  
revenue minus variable costs (incl.  
distribution fees)*



Winshall v. Viacom  
Del. Sup. Ct. 2013 (cont.)



- Back to the earn out...
  - Viacom renegotiates distribution agreement with Electronic Arts in 2008
  - Distribution fees payable to Electronic Arts for 2008 remain unchanged (reduced for 2009+)

*Product gross profit  $\cong$  all product revenue minus variable costs (incl. distribution fees)*

- Reportedly, sellers achieve **\$150 million** earn-out payment for 2007 and similar amount for 2008

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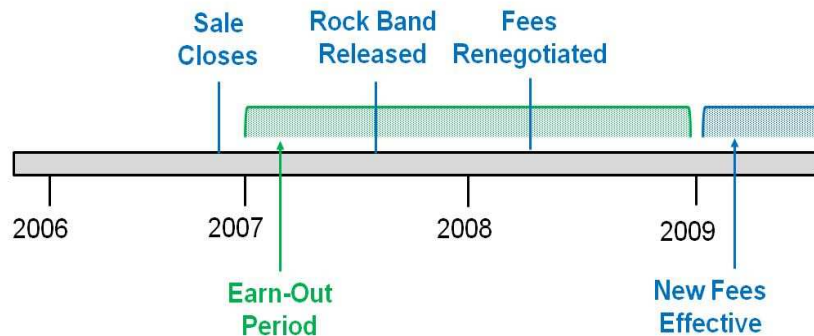
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Winshall v. Viacom  
Del. Sup. Ct. 2013 (cont.)



- Back to the earn out...



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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Sellers sue Viacom in 2010



*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Sellers sue Viacom in 2010
- Allege Viacom breached **implied covenant of good faith and fair dealing** under acquisition agreement



*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Sellers sue Viacom in 2010
- Allege Viacom breached **implied covenant of good faith and fair dealing** under acquisition agreement
  - Viacom did not renegotiate lower Electronic Arts distribution fees using *Rock Band* leverage

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Important Facts
  - Sellers did not negotiate any earn-out protections in purchase agreement

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Important Facts
  - Sellers did not negotiate any earn-out protections in purchase agreement
  - Viacom's 2008 renegotiation of Electronic Arts distribution agreement had no impact on earn out

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Delaware Supreme Court upholds Chancery Court's dismissal of sellers' claim:

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- Delaware Supreme Court upholds Chancery Court's dismissal of sellers' claim:
  - *"Implied covenant of good faith and fair dealing" does not give "parties protections that they failed to secure for themselves at the bargaining table"*

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- What would have been a violation?
  - Viacom agrees to double Electronic Arts' fees in 2008 in exchange for no fees in 2009

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



- What would have been a violation?
  - Viacom agrees to double Electronic Arts' fees in 2008 in exchange for no fees in 2009
  - Viacom intentionally pushes revenue out of the earn-out period

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



### Four Take-Away Points:

1. Sellers need to negotiate specific earn-out protections. Court will not do it for you.

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- "use its reasonable best efforts to enable the Corporation to achieve the Minimum Pre-Tax Profits during the Earn-Out Period..."
- "provide the Corporation with sufficient liquidity in order to make the budgeted capital expenditures..."
- "Purchaser will ensure the Corporation's product and sourcing plans are consistent with preserving the reputation and market position..."
- "The Corporation shall not be wound up, dissolved, or merged..."
- "Separate books and records will be maintained..."
- "...will not accelerate or delay the recognition of revenue or expense or delay investment in working or fixed capital, but shall account of such items in accordance with GAAP..."
- "not divert business generated by the Company away from the Company..."

- "use its reasonable best efforts to enable the Corporations to achieve the Minimum Pre-Tax Profits during the Earn-Out Period..."
- "provide the Corporation with sufficient liquidity in order to make the budgeted capital expenditures..."
- "Purchaser will ensure the Corporation's product and sourcing plans are consistent with preserving the reputation and market position..."
- "The Corporation shall not be wound up, dissolved, or merged..."
- "Separate books and records will be maintained..."
- "...will not accelerate or delay the recognition of revenue or expense or delay investment in working or fixed capital, but shall account of such items in accordance with GAAP..."
- "not divert business generated by the Company away from the Company..."

**On the other hand:**

"Following the Closing, Purchaser shall have sole discretion with regard to all matters relating to the operation of the Company, and Purchaser has no obligation to operate the Company, or take any other action or step, in order to achieve any Earn-out Payment or to maximize the amount of any Earn-out Payment..."



*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



Four Take-Away Points:

1. Sellers need to negotiate specific earn-out protections. Court will not do it for you.



*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



Four Take-Away Points:

1. Sellers need to negotiate specific earn-out protections. Court will not do it for you.
2. The *Implied Covenant* is narrow, but may still obligate parties not to act with intentional bad faith.



*Winshall v. Viacom  
Del. Sup. Ct. 2013 (cont.)*



Four Take-Away Points:

3. Sellers should keep earn-out calculations near the top of the income statement.

Four

3. Sellers should keep earn-out calculations near the top of the income statement.

ABC Corp.	Income Statement	
Revenue		
Gross Revenue		181,683
(Less sales returns and allowances)		(10,000)
Net Sales		171,683
Cost of Goods Sold		152,600
Gross Profit (Loss)		19,083
Expenses		
Advertising		120
Employee benefits		750
Furniture and equipment		243
Insurance		312
Rent		658
Salaries and wages		1965
Software		36
Travel		45
Utilities		25
Other		156
Total Operating Expenses		4,310
EBITDA		14,773
(Less interest expense)		(5,214)
(Less depreciation and amortization)		(4,689)
(Less income tax expense)		(1,069)
Net Income		3,801



*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



Four Take-Away Points:

3. Sellers should keep earn-out calculations near the top of the income statement.

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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



Four Take-Away Points:

3. Sellers should keep earn-out calculations near the top of the income statement.
4. Do not let anyone film you playing *Rock Band*.



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*Winshall v. Viacom*  
*Del. Sup. Ct. 2013 (cont.)*



Points:



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## *Delaware Rapid Arbitration Act* *("DRAA")*

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## Delaware Rapid Arbitration Act

- Signed into law April 2015

### **Title 10 - Courts and Judicial Procedures**

#### **Part IV Special Proceedings Chapter 58**

#### **DELAWARE RAPID ARBITRATION ACT**

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## Delaware Rapid Arbitration Act (cont.)

- Signed into law April 2015
- Based on earlier (now enjoined) Delaware law allowing confidential arbitration before sitting judges

### **Title 10 - Courts and Judicial Procedures**

#### **Part IV Special Proceedings Chapter 58**

#### **DELAWARE RAPID ARBITRATION ACT**

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## Delaware Rapid Arbitration Act (cont.)

- Signed into law April 2015
- Based on earlier (now enjoined) Delaware law allowing confidential arbitration before sitting judges
- Not intended to replace traditional arbitration

**Title 10 - Courts and Judicial Procedures**

**Part IV  
Special Proceedings  
Chapter 58**

**DELAWARE RAPID ARBITRATION ACT**

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## Delaware Rapid Arbitration Act (cont.)

- Signed into law April 2015
- Based on earlier (now enjoined) Delaware law allowing confidential arbitration before sitting judges
- Not intended to replace traditional arbitration
- Geared towards speedy resolution of business disputes

**Title 10 - Courts and Judicial Procedures**

**Part IV  
Special Proceedings  
Chapter 58**

**DELAWARE RAPID ARBITRATION ACT**

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## Delaware Rapid Arbitration Act (cont.)

- DRAA seeks to cure existing issues
  - Lack of speed and efficiency



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## Delaware Rapid Arbitration Act (cont.)

- DRAA seeks to cure existing issues
  - Lack of speed and efficiency
    - Procedural gamesmanship among parties



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## Delaware Rapid Arbitration Act (cont.)

- DRAA seeks to cure existing issues
  - Lack of speed and efficiency
    - Procedural gamesmanship among parties
    - Arbitrators maximize compensation



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## Delaware Rapid Arbitration Act (cont.)

- DRAA seeks to cure existing issues
  - Lack of speed and efficiency
    - Procedural gamesmanship among parties
    - Arbitrators maximize compensation
  - Lack of qualified, independent arbitrators



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## Delaware Rapid Arbitration Act (cont.)



- Improvements in DRAA
  - Summary 30-day proceeding for arbitrator appointment

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## Delaware Rapid Arbitration Act (cont.)



- Improvements in DRAA:
  - Summary 30-day proceeding for arbitrator appointment
  - Arbitrator fully vested with authority to decide all issues (*e.g.*, discovery, subpoenas, etc.)

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## Delaware Rapid Arbitration Act (cont.)



- Improvements in DRAA:
  - Summary 30-day proceeding for arbitrator appointment
  - Arbitrator fully vested with authority to decide all issues (e.g., discovery, subpoenas, etc.)
  - Arbitrator empowered to issue injunctions

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## Delaware Rapid Arbitration Act (cont.)



- Improvements in DRAA:
  - Summary 30-day proceeding for arbitrator appointment
  - Arbitrator fully vested with authority to decide all issues (e.g., discovery, subpoenas, etc.)
  - Arbitrator empowered to issue injunctions
  - All matters decided within 120 days of arbitrator appointment (extend up to 180 days)
    - Forfeiture of arbitrator's fees

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## Delaware Rapid Arbitration Act (cont.)



- Improvements in DRAA:
  - Summary 30-day proceeding for arbitrator appointment
  - Arbitrator fully vested with authority to decide all issues (*e.g.*, discovery, subpoenas, etc.)
  - Arbitrator empowered to issue injunctions
  - All matters decided within 120 days of arbitrator appointment (extend up to 180 days)
    - Forfeiture of arbitrator's fees
  - No need for judicial confirmation of award; limited appeal

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## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA: Selecting an arbitrator
  - Agreement names an arbitrator
  - Agreement provides selection process
  - Parties otherwise agree

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## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA: Selecting an arbitrator
  - Agreement names an arbitrator
  - Agreement provides selection process
  - Parties otherwise agree

If these fail → Chancery Court selects

## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?

## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



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## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



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Delaware Rapid Arbitration Act (cont.)  
Using the DRAA: Who can be an arbitrator?



Delaware Rapid Arbitration Act (cont.)  
Using the DRAA: Who can be an arbitrator?



## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



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## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



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## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



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## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



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## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



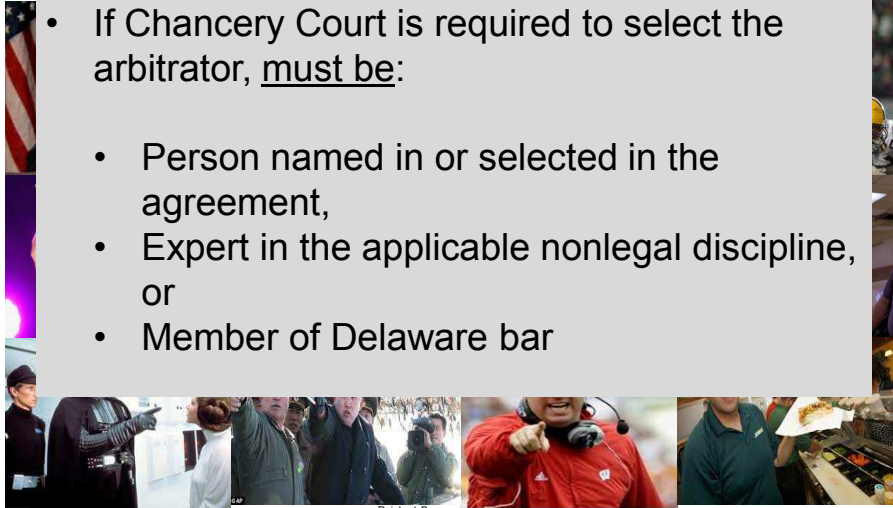
## Delaware Rapid Arbitration Act (cont.)

Using the DRAA: Who can be an arbitrator?



## Delaware Rapid Arbitration Act (cont.)

- If Chancery Court is required to select the arbitrator, must be:
  - Person named in or selected in the agreement,
  - Expert in the applicable nonlegal discipline, or
  - Member of Delaware bar



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## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA
  - Business disputes only (no consumers)

## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA
  - Business disputes only (no consumers)
  - No monetary thresholds

## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA
  - Business disputes only (no consumers)
  - No monetary thresholds
  - Written agreement to arbitrate
    - Signed by all parties in dispute to be arbitrated

## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA
  - Business disputes only (no consumers)
  - No monetary thresholds
  - Written agreement to arbitrate
    - Signed by all parties in dispute to be arbitrated
    - Governed by Delaware law

## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA
  - Business disputes only (no consumers)
  - No monetary thresholds
  - Written agreement to arbitrate
    - Signed by all parties in dispute to be arbitrated
    - Governed by Delaware law
    - Refer to DRAA by name

## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA
  - Business disputes only (no consumers)
  - No monetary thresholds
  - Written agreement to arbitrate
    - Signed by all parties in dispute to be arbitrated
    - Governed by Delaware law
    - Refer to DRAA by name
    - One party: Delaware entity or principal offices in Delaware

## Delaware Rapid Arbitration Act (cont.)

- Using the DRAA
  - Business disputes only (no consumers)
  - No monetary thresholds
  - Written agreement to arbitrate
    - Signed by all parties in dispute to be arbitrated
    - Governed by Delaware law
    - Refer to DRAA by name
    - One party: Delaware entity or principal offices in Delaware
    - Freedom of contract: agreement may sculpt the proceeding

## Delaware Rapid Arbitration Act (cont.)

- Appeals
  - Agreement may waive right to appeal arbitrator's award

## Delaware Rapid Arbitration Act (cont.)

- Appeals
  - Agreement may waive right to appeal arbitrator's award
  - Agreement may provide for "appellate arbitrator"

## Delaware Rapid Arbitration Act (cont.)

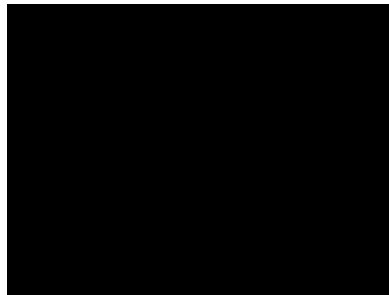
- Appeals
  - Agreement may waive right to appeal arbitrator's award
  - Agreement may provide for "appellate arbitrator"
    - Agreement can specify specific arbitrator or selection process

## Delaware Rapid Arbitration Act (cont.)

- Appeals
  - Agreement may waive right to appeal arbitrator's award
  - Agreement may provide for "appellate arbitrator"
    - Agreement can specify specific arbitrator or selection process
  - If silent: 15-day period to appeal final decision to Delaware Supreme Court

## Delaware Rapid Arbitration Act (cont.)

- Other considerations
  - Proceedings are confidential (unless appealed to Delaware Supreme Court)



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## Delaware Rapid Arbitration Act (cont.)

- Other considerations
  - Proceedings are confidential (unless appealed to Delaware Supreme Court)
  - Occur anywhere in the world

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## Delaware Rapid Arbitration Act (cont.)

- Other considerations
  - Proceedings are confidential (unless appealed to Delaware Supreme Court)
  - Occur anywhere in the world
  - Cannot be used in corporate charters or By-Laws (need signatures of all parties to dispute)

## *Great Hill v. SIG Growth Del. Chancery Ct. 2014*



*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014*

- Attorney-client privilege
  - Protects communications between attorney and client (or potential client) for purpose of seeking legal advice

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Attorney-client privilege
  - Protects communications between attorney and client (or potential client) for purpose of seeking legal advice
  - May only be asserted by holder of privilege
    - Who is the client?

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

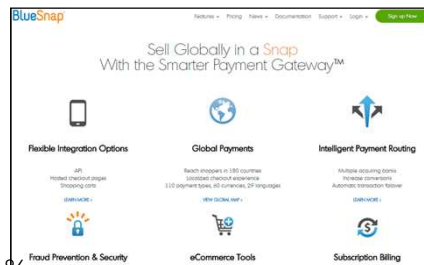
- Attorney-client privilege
  - Protects communications between attorney and client (or potential client) for purpose of seeking legal advice
  - May only be asserted by holder of privilege
    - Who is the client?
  - How can it be lost?
    - Other parties (accountants, bankers)
    - Other side

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP (*Memorandum Opinion: November 26, 2014*)

*Great Hill v. SIG Growth  
Del. Chancery Ct. 2014 (cont.)*

- Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP (*Memorandum Opinion: November 26, 2014*)
- Plimus = e-commerce payment processing business; now known as Blue Snap



"Supports 180 Countries,  
110 Payment Types, 60  
Currencies & 29  
Languages."

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*Great Hill v. SIG Growth  
Del. Chancery Ct. 2014 (cont.)*

- Plimus—private company owned primarily by SIG Growth and co-founders

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Plimus—private company owned primarily by SIG Growth and co-founders
- 2010: board explores sale of the company
  - Perkins Coie and Raymond James

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Plimus—private company owned primarily by SIG Growth and co-founders
- 2010: board explores sale of the company
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- 2011: Great Hill gets exclusivity at  $\cong$  \$115 million

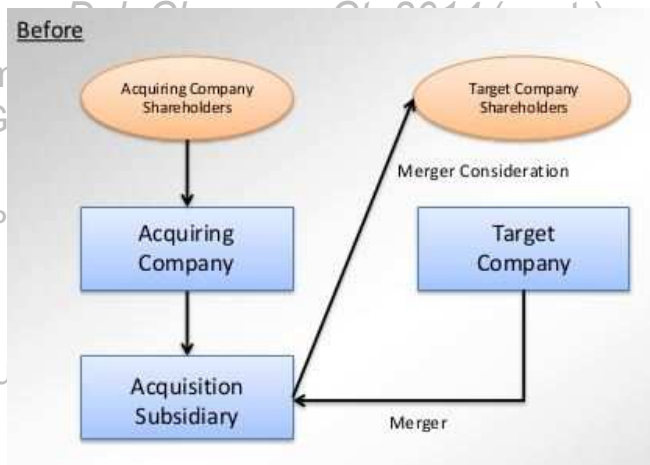
*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Plimus—private company owned primarily by SIG Growth and co-founders
- 2010: board explores sale of the company
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- Structured as merger of Plimus with buyer

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*Great Hill v. SIG Growth*



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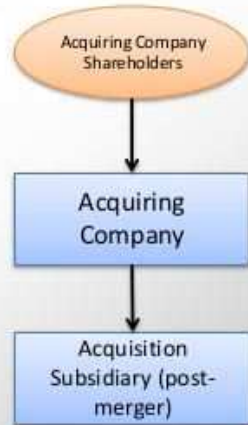
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### *Great Hill v. SIG Growth*

*Del. After*

(cont.)

- Plimus—priv  
SIG Growth
- 2010: board  
– Perkins Co
- 2011: Great  
\$115 million
- Structured a



primarily by  
company  
at  $\cong$   
with buyer

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### *Great Hill v. SIG Growth*

*Del. Chancery Ct. 2014 (cont.)*

- Plimus—private company owned primarily by  
SIG Growth and co-founders
- 2010: board explores sale of the company  
– Perkins Coie and Raymond James
- 2011: Great Hill gets exclusivity at  $\cong$   
\$115 million
- Structured as merger of Plimus with buyer
- Closing: September 2011

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*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Great Hill ultimately sues:
  - Payment processor relationships
    - PayPal and Paymentech

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Great Hill ultimately sues:
  - Payment processor relationships
    - PayPal and Paymentech
  - Relationships deteriorated during sale process
    - Breaches of processor agreements

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Great Hill ultimately sues:
  - Payment processor relationships
    - PayPal and Paymentech
  - Relationships deteriorated during sale process
    - Breaches of processor agreements
  - Not disclosed to Great Hill

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*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Great Hill ultimately sues:
  - Payment processor relationships
    - PayPal and Paymentech
  - Relationships deteriorated during sale process
    - Breaches of processor agreements
  - Not disclosed to Great Hill
  - Fraud

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*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Great Hill finds e-mails on Plimus's computers
  - Between SIG, Plimus officers/directors and Perkins Coie

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Great Hill finds e-mails on Plimus's computers
  - Between SIG, Plimus officers/directors and Perkins Coie
- SIG asserts attorney-client privilege

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

Chancellor Strine:

Section 259 of the DGCL provides that following a merger, "*all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation...*"

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Privilege owned by Plimus (now owned by Great Hill (buyer))

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Privilege owned by Plimus (now owned by Great Hill (buyer))
  - Privilege is Plimus's corporate asset

*Great Hill v. SIG Growth*  
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  - No provision in merger agreement addressing privilege

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

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  - Privilege is Plimus's corporate asset
  - No provision in merger agreement addressing privilege
  - No action by SIG to segregate/protect e-mails

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*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

- Privilege owned by Plimus (now owned by Great Hill (buyer))
  - Privilege is Plimus's corporate asset
  - No provision in merger agreement addressing privilege
  - No action by SIG to segregate/protect e-mails
- Great Hill may use e-mails to advance fraud claim against SIG/sellers

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*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

Takeaways for sellers:

1. Consider who is client—target? Selling Stockholders? Board of Directors?

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

Takeaways for sellers:

1. Consider who is client—target? Selling Stockholders? Board of Directors?
2. Merger/stock purchase—include provision addressing ownership of privilege

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

Takeaways for sellers:

1. Consider who is client—target? Selling Stockholders? Board of Directors?
2. Merger/stock purchase—include provision addressing ownership of privilege
3. Asset purchase
  - "Privilege" and e-mails as "Excluded Assets"
  - Consider fate of servers

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*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

Takeaways for sellers:

4. Pre-closing:
  - a. Segregate communications
    - Use noncorporate e-mail addresses

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*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

Takeaways for sellers:

4. Pre-closing:
  - a. Segregate communications
    - Use noncorporate e-mail addresses
  - b. Be aware of including third parties (e.g., accountants and bankers)

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

Takeaways for sellers:

4. Pre-closing:
  - a. Segregate communications
    - Use noncorporate e-mail addresses
  - b. Be aware of including third parties (e.g., accountants and bankers)
  - c. Pick up the phone

*Great Hill v. SIG Growth*  
*Del. Chancery Ct. 2014 (cont.)*

Takeaways for sellers:

4. Pre-closing:
  - a. Segregate communications
    - Use noncorporate e-mail addresses
  - b. Be aware of including third parties (e.g., accountants and bankers)
  - c. Pick up the phone
5. Post-closing: avoid waiver

*Delaware LLC Act*  
*Fiduciary Duty Waivers*

Delaware LLC Act  
Fiduciary Duty Waivers

- Delaware corporate law fiduciary duties
  - Directors and controlling stockholders

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Delaware corporate law fiduciary duties
  - Directors and controlling stockholders
  - Duty of care/duty of loyalty

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Delaware corporate law fiduciary duties
  - Directors and controlling stockholders
  - Duty of care/duty of loyalty
  - History of judicial refinement

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Delaware corporate law fiduciary duties
  - Directors and controlling stockholders
  - Duty of care/duty of loyalty
  - History of judicial refinement
  - Nonwaivable
    - Director exculpation under DGCL §102(b)(7)
    - Corporate opportunity waivers under DGCL §122(17)

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Delaware LLC fiduciary duties
  - Managers and controlling members

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Delaware LLC fiduciary duties
  - Managers and controlling members
  - Waivable

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Delaware LLC fiduciary duties
  - Managers and controlling members
  - Waivable
  - Line of cases in recent years

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Delaware LLC fiduciary duties
  - Managers and controlling members
  - Waivable
  - Line of cases in recent years
  - Silent LLC agreement: default duties apply?

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- 2013: Delaware legislature acts
  - Amends §18-1104 of the Delaware LLC Act

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- 2013: Delaware legislature acts
  - Amends §18-1104 of the Delaware LLC Act
  - Default fiduciary duties apply unless limited in LLC agreement
    - §18-1101: "Implied contractual covenant of good faith and fair dealing" remains unwaivable

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Significance
  - Fiduciary duty claims are abundant
    - Example: *Wiggs v. Summit Midstream Partners*

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Significance
  - Fiduciary duty claims are abundant
    - Example: *Wiggs v. Summit Midstream Partners*
  - "Aiding and abetting" breach of fiduciary duty
    - Increase investor exposure
    - Outside D&O

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Practice tips
  - Default duties apply unless waived

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Practice tips
  - Default duties apply unless waived
  - Waivers must be clear and explicit

Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Practice tips
  - Default duties apply unless waived
  - Waivers must be clear and explicit
  - Cannot waive "Implied contractual covenant of good faith and fair dealing"

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Delaware LLC Act  
Fiduciary Duty Waivers (cont.)

- Practice tips
  - Default duties apply unless waived
  - Waivers must be clear and explicit
  - Cannot waive "Implied contractual covenant of good faith and fair dealing"
  - "Limitation of Liability" and "Indemnification" sections of LLC agreement
    - Minefield for "waiver" language

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## Delaware LLC Act Fiduciary Duty Waivers (cont.)

- Practice tips
  - Default duties apply unless waived
  - Waivers must be clear and explicit
  - Cannot waive "Implied contractual covenant of good faith and fair dealing"
  - "Limitation of Liability" and "Indemnification" sections of LLC agreement
    - Minefield for "waiver" language
    - Sections must dovetail with each other and fiduciary duties under the Delaware LLC Act

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**Questions?**



**THANK YOU!**

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