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Delaware Court of Chancery's First Application of SB 21: Ayers v. Foley Provides Early Guidance on Director Independence

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On June 15, 2026, the Delaware Court of Chancery issued its decision in *Ayers v. Foley* (C.A. No. 2025-0650-LWW), the first opinion interpreting Section 144(d)(2) of the Delaware General Corporation Law (DGCL), as amended by Senate Bill 21 (SB 21). The Court held that this provision's heightened presumption of director disinterestedness is not limited to Section 144's safe harbors for conflicted transactions – it also applies when a court decides whether a stockholder plaintiff can skip demanding that the board act before filing suit (the "demand futility" test under Court of Chancery Rule 23.1). The decision gives early guidance on what a plaintiff must plead to overcome that presumption, and it highlights three practical lessons: define the transaction at issue clearly, keep the approval process demonstrably independent, and treat director self-compensation as its own, separate risk.

Background: SB 21's Heightened Presumption

SB 21, enacted in March 2025, creates a presumption that a director of an exchange-listed company is disinterested in a transaction to which the director is not a party, so long as the board has determined that the director meets the applicable exchange's independence standards (and, where relevant, is independent from any controlling stockholder). This presumption is "heightened" and can be overcome only by "substantial and particularized facts" showing that the director has a material interest in the transaction, or a material relationship with someone who does. Earlier this year, the Delaware Supreme Court upheld SB 21's constitutionality in *Rutledge v. Clearway Energy Group LLC* (Del. Feb. 27, 2026). With that challenge resolved, *Ayers* gave the Court of Chancery its first opportunity to interpret Section 144(d)(2).

The Facts

The case began as a stockholder derivative suit against the board of Fidelity National Financial, Inc. (FNF). The plaintiff challenged two matters: non-employee director compensation paid from 2022 through 2024, and a one-time $50 million equity grant to FNF's founder and non-executive chairman, William P. Foley II. The plaintiff alleged that the two decisions were part of a single quid pro quo, and that a majority of the board lacked independence from Mr. Foley because of overlapping board service, fees earned from other Foley-affiliated boards, minority co-investments in professional sports teams, and other business ties.

At an October 14, 2024, meeting, FNF's Compensation Committee approved the 2024 director compensation and conditionally approved Mr. Foley's equity grant, subject to sign-off from a separate Related Person Transaction (RPT) Committee. The RPT Committee later met on its own, without the Compensation Committee, reviewed its compensation adviser's independence and market data, obtained its own legal advice, and approved the equity grant roughly two weeks later.

The Court's Decision

The Court treated the non-employee director compensation and the equity grant as two separate transactions, since the approval processes diverged, even though both matters were discussed at the same meeting; and the Court found the complaint also failed to plead specific facts supporting the alleged quid pro quo. As a matter of first impression, the Court then held that Section 144(d)(2)'s presumption applies at the demand-futility stage, and not merely within Section 144's safe harbors. The Court reasoned that the legislature had used limiting language elsewhere in Section 144 but left subsection (d)(2) unrestricted, and read that omission as intentional. The Court further explained that "substantial" is a qualitative test, not a quantitative one: piling up numerous minor or immaterial allegations cannot, by sheer accumulation, establish a disabling conflict.

Applying that standard, the Court found that the plaintiff's allegations – overlapping board service, aggregate fees, minority co-investments, and other business ties – did not amount to substantial and particularized facts showing that a majority of FNF's board lacked independence. The Court also rejected the argument that the directors faced a substantial likelihood of liability: Section 144(a)(1)'s safe harbor, combined with FNF's exculpatory charter provision, required the plaintiff to plead particularized facts of bad faith, and the committee's own records, which were incorporated into the complaint, undercut that theory. The claims tied to Mr. Foley's equity grant were accordingly dismissed.

The self-compensation claims came out differently. Directors who set their own pay are parties to that transaction and are necessarily interested, so the disinterested-director safe harbor in Section 144(a)(1) did not apply. Because the compensation had not been approved by disinterested stockholders under Section 144(a)(2), the defendants instead relied on Section 144(a)(3), which protects a transaction that is fair to the company and its stockholders. The Court held that this statutory fairness inquiry tracks Delaware's traditional entire-fairness standard. At the pleading stage, the plaintiff had adequately alleged both unfair dealing and unfair price, allowing the fiduciary-duty claims to proceed against the Compensation Committee members who approved the pay. Those claims were dismissed as to directors who merely received the compensation without participating in its approval, though the related unjust-enrichment claims survived against every director who retained the challenged compensation.

Practical Takeaways

These twin holdings – director-friendly presumption for third-party transactions, but continued scrutiny of self-compensation – make the governance process and documentation more important than ever. Boards seeking the benefit of Section 144(d)(2) should maintain current, well-documented independence determinations tied to applicable exchange standards, including any analysis of a controlling stockholder or control group. Where related matters arise close in time, using genuinely separate committees, meetings, advisers, and minutes helps establish that the transactions are legally and factually distinct. Director self-compensation remains a separate risk area: exchange-based independence does not protect a director from a transaction to which they are a party, so companies should continue benchmarking pay with an independent compensation consultant, set meaningful limits, document thoroughly, and seek disinterested stockholder approval where appropriate.

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