

New Jersey Supreme Court Offers Guidance on the Scope of Shareholders' Document Inspection Rights

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On May 15, 2019, the New Jersey Supreme Court affirmed the judgment of the Appellate Division in *R.A. Feuer v. Merck & Co., Inc.*, 455 N.J. Super. 69 (App. Div. 2018), adopting a narrow interpretation of the scope of a shareholder's document inspection rights under New Jersey's Business Corporation Law, N.J.S.A. 14A:1-1 et seq. (the "BCL") and common law. The events leading to the case in question began when a Merck shareholder raised allegations of misconduct in connection with Merck's acquisition of another pharmaceutical corporation, Cubist Pharmaceuticals, Inc. Merck's board of directors refused to take action with respect to the allegations, and, in response, the shareholder, R.A. Feuer, requested to inspect twelve broad categories of documents in an effort to discover evidence of Merck's alleged wrongful conduct in acquiring Cubist.

Merck's board appointed a "Working Group" of its members to evaluate and recommend a response to Feuer's inspection demands. After consideration by the Working Group, Counsel for the Working Group informed Feuer that all of his demands were rejected. After submitting several demands and questions without reply, Feuer demanded to inspect another twelve categories documents relevant to Merck's acquisition of Cubist and the Working Group's activities. Feuer's demand made express reference to Section 5-28(4) of the BCL, which pertains to a shareholder's right to inspect the "books and records of account and minutes, and record of shareholders of a corporation." After Feuer consented to certain confidentiality restrictions, Merck's board of directors provided him with copies of certain minutes of the board and Working Group, but otherwise rejected his demands.

In response, Feuer filed a complaint against Merck, contending that its board of directors violated his rights under Section 5-28 of the BCL and New Jersey's common law to inspect the documents he requested. The trial judge granted Merck's motion to dismiss Feuer's complaint, holding that although Feuer had a "proper purpose" in making his demand, the documents he sought were beyond the scope of what could be requested under the BCL and common law.

On appeal, the Appellate Division affirmed the trial court's order dismissing Feuer's complaint. Judge Ostrer, writing for the court, first described three pertinent sections of the BCL dealing with shareholder's inspection rights. First, a corporation is required to maintain "books and records of account and minutes of the proceedings of its shareholders, board and executive committee", as well as records of its shareholders under Section 5-28(1) of the BCL. Second, certain shareholders, upon showing a "proper purpose", have the right to copies of the minutes of the proceedings of a corporation's shareholders and a record of the shareholders under Section 5-28(3) of the BCL. Third, and finally, Section 5-28(4) of the BCL empowers a court to permit a

shareholder to inspect the books and records of account, minutes and record of shareholders of a corporation, subject to limits or conditions a court may impose.

The court then held that “minutes” refers to a memorialization of a meeting, but not necessarily the documents presented at such a meeting. Perhaps more importantly, the appellate panel also observed that the phrase “books and records of account” pertains to financial or accounting records and does not “encompass any and all records, books, and documents of a corporation.” Judge Ostrer reasoned: “Reading the statute sensibly, it does not impose such a vaguely defined record-keeping obligation on corporations, nor does it grant courts the power to grant an equally vague scope of inspection to shareholders.”

The Appellate Division also rejected Feuer’s claim that New Jersey’s common law granted him the right to inspect all of the documents he requested. While the court acknowledged that the common law inspection right is “simultaneously both broader and more restrictive” than the statutory inspection right under the BCL, it held that Feuer nonetheless failed to establish “good faith, a germane purpose, and facts to substantiate the concern about mismanagement”, noting that the New Jersey Supreme Court had previously held that bare allegations that a corporation overpaid for certain acquisitions are insufficient to establish a document inspection claim under the common law. The appellate panel also observed that the extent of a shareholder’s holdings is an important consideration in “balancing a corporation’s burden of compliance with the shareholder’s interest in inspection.” The court further observed that Feuer demanded to inspect documents that Merck created in response to Feuer’s own demands, concluding that the common law does not require a corporation to furnish such documents. Finally, the panel declined to decide whether the BCL abrogated the common law.

The Supreme Court granted Feuer’s petition for certification. In a short *per curiam* opinion, the Court affirmed the Appellate Division’s judgment substantially for the reasons expressed in Judge Ostrer’s opinion.