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**Seitz Ross Delaware Corporate Law Update:  
Supreme Court of Delaware Clarifies Scope of *Brophy* Claims**

Earlier this week, the Supreme Court of Delaware in [\*Kahn v. Kolberg Kravis Roberts & Co., L.P.\*, No. 436, 2010 \(June 20, 2011\)](#) (decision attached), rejected the notion that a plaintiff must show that a corporation suffered actual harm before bringing a *Brophy* claim (*i.e.*, a loyalty-based claim that a fiduciary improperly used the corporation's material, non-public information). The Supreme Court's decision rejects the requirement of actual harm to the corporation articulated in the Court of Chancery's 2010 decision in [\*Pfeiffer v. Toll\*, 989 A.2d 683 \(Del. Ch.\)](#), and is likely to impact cases in which "other litigants have raised the *Brophy* issue in actions now pending before the Court of Chancery." *Kahn*, Slip Op. 9-10.

*Kahn* involved a shareholder *Brophy* claim alleging that Kolberg Kravis Roberts & Co., L.P. ("KKR"), which controlled a majority of Primedia Inc.'s common stock and appointed five directors to the Primedia board, and KKR's director designees breached their fiduciary duties in connection with KKR's purchases of Primedia preferred stock while in possession of material, non-public information. In the decision below, the Court of Chancery granted the Primedia special litigation committee's motion to dismiss the claim.

In reversing, the Supreme Court declined to adopt what it described as the Court of Chancery's "thoughtful, but unduly narrow, interpretation of *Brophy* and its progeny" articulated in *Pfeiffer*. *Kahn*, Slip Op. 18. The Supreme Court interpreted *Brophy* as holding that "it is inequitable to permit the fiduciary to profit from using confidential corporate information" and that "[e]ven if the corporation did not suffer actual harm, equity requires disgorgement of that profit." *Id.* at 13. The Supreme Court also refused to limit the disgorgement remedy in *Brophy* cases to actions involving usurpation of a corporate opportunity or use of confidential corporate information by an insider to compete directly with the corporation. *Id.* at 19. The Supreme Court remanded for determination of whether the Court of Chancery's dismissal was based on *Pfeiffer*'s "actual harm" requirement or other grounds. *Id.* at 23-24.

The Court of Chancery's focus on "actual harm" in *Pfeiffer* had sought, in part, to address the argument that "*Brophy* is a misguided vehicle for recovering the same trading losses that are addressed by the federal securities laws." *Pfeiffer*, 989 A.2d at 701. The Supreme Court in *Kahn* was not disturbed by the potential for overlap, finding "no reasonable public policy ground to restrict the scope of disgorgement remedy in *Brophy* cases—irrespective of arguably parallel remedies grounded in federal securities laws." *Kahn*, Slip Op. 20. The Supreme Court's holding thus highlights that, at least in some circumstances, such state law claims may overlap with remedies available under the federal securities laws.