

March 20, 2013

**Seitz Ross Delaware Corporate Law Update:
Delaware Supreme Court Construes “Parity Pusher” Provision**

Yesterday, in [*Bank of New York Mellon v. Commerzbank Capital Funding Trust II, No. 372, 2012 \(Del. Mar. 19, 2013\)*](#) (decision attached), the Delaware Supreme Court issued an important ruling involving trust preferred securities (“TruPS”), hybrid instruments with characteristics of both debt and equity that many financial institutions issued in the last decade to raise Tier I capital. The case involved a series of TruPS that had a profit-based payment trigger, but were also protected from being treated unequally to “Parity Securities,” a defined contractual term. At issue was whether capital payments on hybrid securities obtained in Commerzbank’s 2009 acquisition of Dresdner Bank “pushed” payments on the Commerzbank TruPS.

The Court of Chancery granted summary judgment for defendants in a [2011 decision](#), holding that the definition of “Parity Securities” unambiguously excluded the Dresdner securities. The Supreme Court disagreed, concluding that the definition was ambiguous. While courts generally consider extrinsic evidence to resolve ambiguity, the Court found such evidence “unhelpful,” as the contracts at issue “d[id] not fit the conventional model” of “negotiated” contracts because the holders were not consulted. Slip Op. 24. Instead, the Court resolved the ambiguity using the principle of *contra proferentem*—*i.e.*, “that ambiguities in a contract will be construed against the drafter.” *Id.* at 25. The Court explained that “a specialized application” of *contra proferentem* “requires that a contract which creates rights in public securities investors be interpreted to give effect to those investors’ reasonable expectation,” because “an issuer is ‘better able to clarify unclear . . . contract terms in advance . . .’” *Id.* (Notably, the Court “caution[ed] against liberal use” of this principle as a “short cut” in interpreting contracts. *Id.* at 25-26.)

The Supreme Court accordingly held that capital payments made on the Dresdner securities “pushed” payments on the Commerzbank TruPS, even though Commerzbank had not been profitable in the relevant years. In so doing, the Supreme Court rejected defendants’ argument that the Court should deviate from the plain language of the contract’s “parity pusher” provision to avoid causing a supposedly indefinite cycle of pushed payments. The Court gave this argument “no weight,” stating that “[d]efendants’ ‘domino theory’ of pusher payments . . . could be terminated at various points,” and, in any event, “the [d]efendants are bound to the terms of the LLC Agreement that they drafted.” *Id.* at 30 n.61. The Court also found that Commerzbank’s restructuring of one series of Dresdner securities breached a related support undertaking, justifying an award of specific performance. *Id.* at 33-37.

Commerzbank is a reminder that Delaware courts will hold sophisticated parties to the plain language of their contracts. The case also highlights the risk that a lack of clarity in non-negotiated commercial offering documents will be held against the drafter.