

MORRIS NICHOLS ARSHT & TUNNELL



KENNETH J. NACHBAR
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PRACTICE AREAS

Corporate & Business Litigation
Alternative Dispute Resolution
Alternative Entities
Appraisals & Business Valuations
Business & Contract Litigation
Class & Derivative Actions
Contests for Corporate Control
Mergers, Acquisitions & Divestitures
Special Committees
Statutory Proceedings under
Delaware's Business Statutes
Stockholder Activism

EDUCATION

J.D., 1981, New York University
School of Law
Member, *New York University Review
of Law and Social Change*, 1980-1981
B.A., economics, 1978, Haverford
College

ADMISSIONS

Delaware, 1981
U.S. District Court for the District of
Delaware, 1982
U.S. Court of Appeals for the Third
Circuit, 1987
U.S. Supreme Court, 2010

Ken Nachbar's practice focuses on cases involving mergers and acquisitions, control contests, shareholder class and derivative actions, and contractual disputes. He advises corporate clients and boards of directors with respect to litigation and transactional matters including structuring of corporate transactions, defensive mechanisms and representation of special negotiating committees and special litigation committees.

As both lead and co-counsel, Ken has litigated many of the seminal cases involving Delaware corporate law for clients such as The Dow Chemical Company, Facebook, Inc., Barclay's Bank Delaware, FedEx Corporation, Oracle Corporation, Allergan, Inc., Air Products and Chemicals, Inc. and KFC Corporation, as well as many private companies. Ken has also advised special committees of the boards of companies such as Ralph Lauren Corporation, TripAdvisor, Inc., Massey Corporation and MoneyGram International, Inc.

Ken is a Fellow of the American College of Trial Lawyers. *Chambers USA* has listed Ken in its top band for Delaware Court of Chancery since its inception (2002-2018). Clients and peers describe him as "a terrific Chancery Court lawyer" who has a "tremendous effect on the courts in Delaware." He "has the rare combination of a substantive command of the law and the ability to get up there and effectively argue cases." "You know you must bring your 'A' game when you are against him."

Honors

- *Chambers USA: America's Leading Lawyers for Business*, Ranked Band 1 in Delaware for Chancery work (2007-2018)
- *The Legal 500 US*, Recognized among the "Leading Lawyers" in the United States for M&A litigation disputes (2014-2018)
- *Benchmark Litigation*, Named a Delaware "Litigation Star" in general commercial area (2013-2017)
- *The Best Lawyers in America*, Listed in various categories, including commercial and M&A litigation (2006-2019); Designated Delaware "Lawyer of the Year" for bet-the-company litigation (2015 and 2018)
- *Lawdragon Magazine*, 500 Leading Lawyers in America
- *Who's Who Legal*, Listed among top corporate attorneys (2014-2018)

Professional Activities

- American College of Trial Lawyers (Fellow)
- American Bar Association
- Delaware Board on Certified Court Reporters (Former Chairman)
- Delaware State Bar Association
- U.S. District Court for the District of Delaware (Former member, Rules Committee)

Representative Matters

- Successfully argued motion to dismiss stockholder merger challenge. *Nicholas Olenik v. Frank A. Lodzinski, et al.*, C.A. No. 2017-0414-JRS (Del. Ch. July 20, 2018)
- As lead counsel, obtained judgment on the pleadings in favor of stockholders entitled to earnout payments under a merger agreement, and successfully defended that judgment on a subsequent appeal. *Greenstar IH Rep LLC v. Tutor Perini Corp.*, 2017 WL 5035567 (Del. Ch. Oct. 31, 2017), *aff'd*, 2018 WL 2186582 (Del. May 18, 2018)
- As lead counsel, successfully defended Invenergy Wind LLC in a \$126 million breach of contract claim. *Leaf Invenergy Company v. Invenergy Wind LLC*, 2018 WL 1882746 (Del. Ch. Apr. 19, 2018)
- Secured a favorable decision on behalf of the Zohar Companies in a highly contentious action involving the disputed ownership of the companies' stock. *Zohar II 2005-1, Ltd v. FSAR Holdings*, 2017 WL 5956877 (Del. Ch., Nov. 30, 2017)
- Successfully argued a motion to dismiss a derivative action against the directors of Duke Energy Corporation alleging that the directors acted improperly and caused Duke to suffer fines and other regulatory consequences as a result of a significant environmental incident in which coal ash entered the Dan River in North Carolina, and successfully defended a subsequent appeal. *In re Duke Energy Corporation Coal Ash Deriv. Litig.*, 2017 WL 5256305 (Del. Ch. Dec. 8, 2016), *aff'd* 177 A.3d 47 (Del. 2017)
- Successfully argued a motion to dismiss derivative claims accusing United Parcel Service Inc. directors of faulty oversight that led to an alleged scheme to haul untaxed cigarettes. *Horman v. Abney*, 2017 WL 242571 (Del. Ch., Jan. 19, 2017)
- Successfully argued for dismissal of a claim of "wrongful refusal" of a Rule 23.1 demand. *Friedman v. Maffei*, 2016 WL 1555331 (Del. Ch. Apr. 13, 2016)
- As lead counsel, successfully represented plaintiff in an appraisal/unfair dealing case, obtaining a judgment that was more than double the value advocated by defendants. *Owen v. Cannon*, 2015 WL 3819204 (Del. Ch. June 17, 2015)
- Argued the insurers' appeal of a several hundred million dollar asbestos coverage dispute, successfully obtaining certification to the NY Court of Appeals of a threshold issue on which the trial court had ruled against the insurers. *In re Viking Pump, Inc.*, 2015 WL 3618924 (Del. June 10, 2015)
- Successfully argued threshold motions in connection with plaintiffs' complaint seeking mandatory redemption of preferred stock. *TCV VI, L.P. v. TradingScreen Inc.*, 2015 WL 1598045 (Del. Ch. February 26, 2015)
- Successfully represented The Men's Wearhouse in expedited litigation, leading to its acquisition of Jos. A Bank Clothiers, Inc. *The Men's Wearhouse, Inc. v. Wildrick, et al.*, Del. Ch. No. 9383
- As lead counsel, successfully tried a case involving control of a public company, Biolase Inc., and successfully defended the trial court's decision on appeal. *Biolase, Inc. v. Oracle Partners, L.P.*, 97 A.3d 1029 (Del. 2014)
- Successfully argued the first Delaware case upholding a forum selection bylaw. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013)
- Successfully represented Allergan, Inc., and its directors in procuring the dismissal of derivative litigation. *Pyott v. Louisiana Mun. Police Employees' Retirement System*, 74 A.3d 612 (Del. 2013)
- As co-lead counsel, advised Air Products in connection with a \$7 billion takeover transaction, including trial of an action challenging the defensive tactics of the board of directors of Airgas and defense of an action by Airgas challenging certain bylaw amendments proposed by Air Products. *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 2010 WL 3960599 (Del. Ch.)
- As lead counsel for the outside directors of Barnes & Noble, Inc. successfully defended through trial an action brought by an 18 percent stockholder seeking to invalidate Barnes & Noble's rights plan. *Yucaipa American Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. 2010)
- As lead counsel for the major sports leagues and the NCAA, successfully

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challenged Delaware's proposed sports betting scheme. *Office of the Commissioner of Baseball v. Markell*, 579 F. 3d. 293 (3d Cir. 2009)

- As lead Delaware counsel, successfully obtained summary judgment in favor of Dow on a contract claim and in defense of \$700 million counterclaim. *Dow Chemical Canada v. HRD Corp.*, 656 F. Supp. 2d 427 (D. Del 2009)
- Successfully defended the acquiror against preliminary injunction motion challenging a proposed \$4 billion going-private merger. *In re Lear Corp. Shareholders Litig.*, 926 A.2d 94 (Del. Ch. 2007)
- Successfully defended acquiror in trial seeking specific performance of a merger agreement. *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027 (Del. Ch. 2005)
- Successfully argued and obtained summary judgment in favor of Larry Ellison in \$900 million insider trading case. *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904 (Del. Ch. 2004)

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