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Del. Judge Reshuffling Won't Rock First State

By **Matt Chiappardi**

Law360, Wilmington (June 10, 2014, 9:22 PM ET) -- Delaware's bench has seen a dramatic reshuffling in only a few months, with three retirements on the Supreme Court and a new chief in the Chancery Court, and even more may come. That could be a recipe for volatility anywhere else, but practitioners expect the stability of the First State's corporate law and process to trump the potential for wild swings in the courts' philosophy.

Appearances indicate there's a major shakeup going on in two of Delaware's courts, where some of the nation's highest-profile — and highest-stakes — corporate disputes are hashed out. The first domino fell in September when former Chief Justice Myron T. Steele **announced his retirement** and was **replaced** with then-Chancellor Leo E. Strine Jr.

That led to litigator Andre G. Bouchard **coming on** as the head of the Chancery Court, and just over the past week two more justices — Carolyn Berger and Jack B. Jacobs — have announced they're stepping down.

So far, Gov. Jack Markell has **tapped** another working attorney, Skadden Arps Slate Meagher & Flom LLP's Karen Valihura, to fill Justice Jacobs' seat, but a replacement for Justice Berger, who announced her retirement Monday, has yet to be chosen, and many suspect there could be one or even two more vacancies coming before 2014 is over.

If true, there's the potential for an entirely new panel on the Supreme Court in 2015, but that shift, as dramatic as it might be, is not going to fundamentally change how corporate law works or is litigated in Delaware, says Lawrence A. Hamermesh, a professor at Widener University School of Law.

"With a retirement, or even multiple retirements, I don't think that's going to change the basic modus operandus the courts have used or their basic attitudes," said Hamermesh, who was one of the candidates for Justice Jacobs' seat. "Delaware doesn't function that way, and corporate law isn't terribly ideological — not yet, thank goodness."

Unlike a change at the U.S. Supreme Court, where the addition of a judge of a certain political stripe can alter its course, Delaware's high court is constitutionally bound to strike a balance, with three justices required to be from one major political party and two from the other.

"Those who drafted [Delaware's] constitution really made sure we have balance and things don't get out whack," said Stuart M. Grant, managing director of Grant & Eisenhofer PA and a member of the governor's judicial nominating committee. "There are a lot of challenges Delaware faces, but having a good judiciary is not one of them."

Add to that a tradition in Delaware where political agendas are largely absent from the judiciary at that level, and a history in First State corporate law that has favored

incremental moves rather groundswell revolution, and stability becomes the rule.

"When it comes to substantive legal changes, Delaware has always been very good at keeping politics out of it, whether we are talking about changes to the [Delaware General Corporation Law] or case law," said John Reed, a partner at DLA Piper.

But that doesn't mean Delaware law is set to atrophy under the weight of its own tradition.

The overall philosophy and direction of the court might not be poised to swing, but some of the ways the high court approaches its procedures could be in for some fine-tuning.

William M. Lafferty of Morris Nichols Arsht & Tunnell LLP said he would not be shocked if the court is willing to entertain longer oral arguments, which are now rigidly timed and usually capped at a total of 45 minutes, especially since the new chief justice comes from a court where arguments can take several hours or even days.

Even so, if the time were to be extended, he doesn't expect it to lengthen by much.

"I don't foresee some great seismic shift," he said.

A related change could be a proposal to allow the justices to discuss a particular case among themselves before oral arguments come before the panel, some sources said.

The high court's procedures prohibit it, but sources who practice in Delaware say that if the change were to come to fruition, it would streamline arguments before the panel, which are often pulled in several directions by justices' questions based on their own individual interests.

Another change in tone could come from the chief justice himself — known as much for his forceful personality as for his voluminous opinions — and how he interacts with the even newer faces.

Veteran litigator David J. Margules of Ballard Spahr LLP predicts that Valihura will provide both the perfect partner and counterpoint to Chief Justice Strine, fostering the same type of exchanges to which he was accustomed in the Chancery Court.

"Strine likes those big, broad, philosophical discussions, and [Valihura] will be a partner in that process," Margules said. "I suspect we'll see a little more of that type of interchange."

The retirements also mark a bit of a generation shift on the high court, which, coupled with the governor's choice of a practicing attorney to fill Justice Jacobs' seat, appears set to keep the panel in touch with not just innovations in law, but with the day-to-day reality of being a corporate lawyer, Delaware practitioners said.

For example, none of the sitting justices was practicing when recent developments such as the practices related to e-discovery came along.

"They only know about it from afar," Grant said. "Valihura knows the burdens, pitfalls and importance of e-discovery — the importance of remembering what private practice was like."

But as procedures, or even character, alters to some degree, practitioners are expecting Delaware's courts to continue on the course they've been on for decades: stable, incremental and sober evolution of the state's corporate law.

"Delaware courts have developed a sterling reputation for delivering prompt and fair rulings, and that isn't going to change," said Steven M. Haas, partner at Hunton & Williams

LLP. "All of the jurists recognize that predictability and stability are the foundations of corporate law and enable lawyers to give good advice to their corporate clients."

--Editing by Jeremy Barker and Philip Shea.

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