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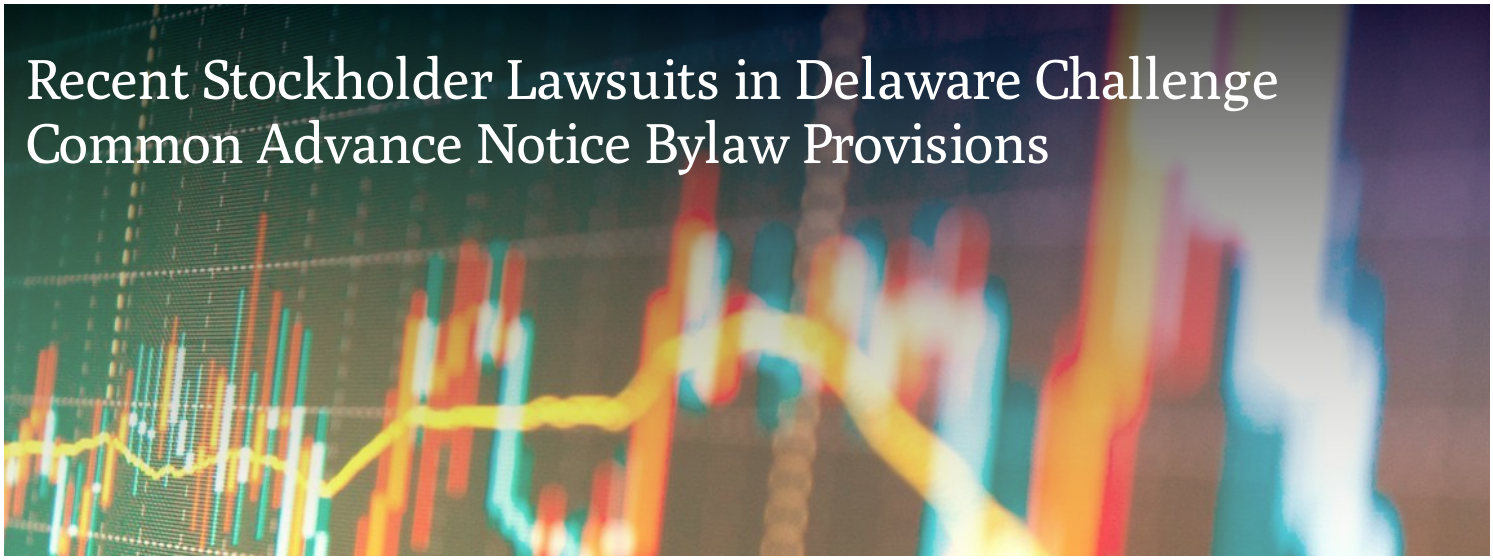
BLOG

Recent Stockholder Lawsuits in Delaware Challenge Common Advance Notice Bylaw Provisions



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A wave of substantially similar stockholders' complaints have recently been filed by plaintiffs' firms in the Delaware Court of Chancery challenging certain advance notice bylaw provisions commonly included in public companies' bylaws. In this post, we discuss the recent Delaware Court of Chancery decision driving the wave of stockholders' complaints and suggest proactive steps for public companies to take in light of such complaints.

Plaintiffs' firms have recently filed substantially similar complaints on behalf of stockholders in the Delaware Court of Chancery challenging the facial validity of certain advance notice bylaw provisions commonly included in public companies' bylaws. The complaints appear to have been filed even when a company is not actively engaged in any director nomination process, suggesting that these complaints may be motivated by plaintiffs' attorneys' seeking to be awarded fees under the corporate benefit doctrine, which allows judges to award attorneys' fees to litigants who benefit a Delaware corporation or its stockholders. In these lawsuits, the corporate benefit purportedly conferred by plaintiffs is pointing out provisions in a corporation's bylaws of a type that has been invalidated by the Delaware Court of Chancery's December 28, 2023 decision in *Kellner v. AIM ImmunoTech, Inc.*[1].

THE *KELLNER* DECISION

The *Kellner* decision declared four common advance notice bylaw provisions invalid for failing to satisfy the second prong of the two-prong enhanced scrutiny test of reasonableness and proportionality that has been established by the Delaware Supreme Court. The enhanced scrutiny test requires that, when reviewing defensive measures taken by a board, Delaware courts must evaluate (i) whether the board faced a threat to an important corporate interest or to the achievement of a significant corporate benefit and (ii) whether the defensive measures were reasonable in relation to the threat posed.

The first provision struck down required a nominating stockholder to disclose all arrangements, agreements, or understandings (AAUs) relating to a board nomination with persons acting in concert with the stockholder and any Stockholder Associated Person (SAP). The second provision required disclosure of AAUs regarding consulting, investment advice, or a previous nomination for a publicly traded company within the last ten years. The third provision required the nominator and nominees to list "all known supporters" of the nomination, including the support of other stockholders known by SAPs to support the nomination. The fourth provision required a nominating stockholder to disclose ownership in the company's stock held by the nominating stockholder and each

beneficial holder on whose behalf the nomination is made, SAPs, immediate family members, and persons acting in concert with a nominee.

The Delaware Court of Chancery did uphold one common provision which required a nominee to complete a form of questionnaire, but noted that it may be unreasonable for a company to allow fewer than five business days for the company to send the form of questionnaire to a stockholder.

KEY ACTION ITEMS FOR DELAWARE PUBLIC COMPANIES

While the parties in *Kellner* have appealed and cross-appealed various aspects of the Delaware Court of Chancery's decision and a ruling by the Delaware Supreme Court is currently pending, public companies incorporated in Delaware should nonetheless proactively review their bylaws and explicitly document in their written records that they are engaging in such a review in light of *Kellner*. If a company receives a demand or complaint to amend its bylaws, it can point to its own review process documented in its written records to argue that this review was the reason for any amendments, undermining any claim for attorneys' fees under the corporate benefit doctrine. To the extent any amendments to a company's bylaws are required, companies should work with counsel to best ensure that the amended provisions will incorporate valid protective language while maintaining enforceability should such provisions be subsequently challenged.

Regan Roberts, Summer Associate, co-authored this blog.

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[1] *See Kellner v. AIM ImmunoTech, Inc.*, 307 A.3d 998, 999 (Del. Ch. Dec. 28, 2023).

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