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Delaware Court of Chancery Enforces Unambiguous Terms of Advance Notice Bylaw

In *Strategic Investment Opportunities LLC* v. *Lee Enterprises, Inc.*, the Delaware Court of Chancery upheld a board's rejection of a stockholder nomination notice due to noncompliance with the unambiguous terms of the corporation's advance notice bylaw relating to stockholder nomination of directors – namely, that the notice must be submitted by a record holder and that information regarding the nominees must be submitted on a form provided by the company. This recent opinion by Vice Chancellor Will, viewed alongside *Rosenbaum* v. *CytoDyn, Inc.* (another recent decision upholding the rejection of stockholder nominees due to deficiencies in the stockholder notice required by a company's advance notice bylaws),[1] indicates that the Delaware courts can be expected to continue to enforce the terms of advance notice bylaws that are adopted on a "clear day" and where there is no evidence of manipulation or other inequitable conduct by the board.

Background

On the date of the deadline for nominations under Lee Enterprises' advance notice bylaw, Strategic Investment Opportunities ("Opportunities"), a beneficial owner of Lee stock and the vehicle of a hedge fund that was concurrently making a bid for Lee, submitted a notice nominating directors for Lee's upcoming annual stockholder meeting. Recognizing that it was not a record holder of Lee shares as required under the bylaws for submission of a valid nomination notice, Opportunities had attempted, but failed, to move some of its shares to record holder status before the nomination deadline. To bridge this shortcoming, Opportunities included a "cover letter" from the record holder of its shares, Cede & Co., alongside its notice, but the Cede letter did not include any information about the Opportunities nominees and referred to the nomination as one by Opportunities, not Cede.

In addition, Opportunities' own notice did not use Lee's form of nominee questionnaire, again, as required under the bylaws. Opportunities had requested the form from Lee a few days before the submission of its nomination notice, but Lee denied the request, noting that it was only required to provide the form to stockholders of record. In lieu of Lee's form, Opportunities submitted questionnaires for its nominees that were "substantially similar in scope to the forms of written questionnaires provided by a company's secretary in like situations" alongside its nomination notice.

Six days after the nomination deadline, Lee rejected Opportunities' nomination notice. Opportunities filed suit in the Court of Chancery alleging breach of contract and breach of fiduciary duty by Lee's board of directors and seeking a declaration that Opportunities nominees were permitted to stand for election at the 2022 Lee annual meeting of stockholders, among other relief.

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1 For more information on *Rosenbaum* v. *CytoDyn, Inc.*, see our alert here.

Takeaways

The court concluded that the Lee board did not improperly reject the nomination notice and denied Opportunities' requested relief. The key takeaway from this and the *Rosenbaum* decisions is that Delaware courts will enforce the unambiguous terms of a reasonable advance notice bylaw, adopted on a "clear day" and absent evidence that the board's actions were unreasonable or inequitable. Applying enhanced scrutiny to the board's rejection of the Opportunities' nomination notice (which requires the directors to identify the proper corporate objectives served by their actions and justify their actions as reasonable in relation to those objectives), the court looked to three key questions in its inquiry: whether the bylaws were clear and unambiguous (with any ambiguity to be resolved in favor of stockholders' electoral rights), whether the stockholder's nominations complied with the bylaws and whether the company interfered with the plaintiff's attempt to comply. Finding that the answer to each was no, the court denied plaintiff's relief. While equity would prevent the use of advance notice bylaws to obstruct "legitimate efforts of dissident stockholders to undertake a proxy fight," the court also noted that these bylaws help ensure orderly meetings and election contests. With respect to the situation at hand, the court stated that the record holder requirement in Lee's bylaws was "not an empty formalism" and provided the nominating party with "skin in the game"; and that the board's enforcement of Lee's advance notice bylaws was "reasonable and appropriate." Importantly, the court noted that it was actually Opportunities' delay that prevented it from satisfying Lee's advance notice requirements. Based on these decisions, companies should consider reviewing their advance notice bylaws on such a "clear day" to ensure that they conform to modern market practices.

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Scott A. Barshay +1-212-373-3040 sbarshay@paulweiss.com	**Andre G. Bouchard** +1-302-655-4413 abouchard@paulweiss.com	**Jaren Janghorbani** +1-212-373-3211 jjanghorbani@paulweiss.com
Kyle T. Seifried +1-212-373-3220 kseifried@paulweiss.com	**Laura C. Turano** +1-212-373-3659 lturano@paulweiss.com	**Krishna Veeraraghavan** +1-212-373-3661 kveeraraghavan@paulweiss.com

Counsel Frances F. Mi and Jason S. Tyler and legal consultant Cara G. Fay contributed to this memorandum.

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