



## Delaware Supreme Court Clarifies Standards Applicable To Advance Notice Bylaws

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**Editor’s note:** Arthur R. Bookout, Joseph O. Larkin and Jenness E. Parker are Partners at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on a Skadden memorandum by Mr. Bookout, Mr. Larkin, Ms. Parker, and Gregory P. Ranzini and is part of the Delaware law series; links to other posts in the series are available [here](#).

On July 11, 2024, the Supreme Court of Delaware, en banc, issued an important decision in *Kellner v. AIM Immunotech Inc.*,<sup>1</sup> which arose from a challenge in the Delaware Court of Chancery involving advance notice bylaws that were adopted in the wake of the recent universal proxy rules.

The Supreme Court engaged in a detailed analysis of the post-trial rulings below and clarified the standards of review for determining the validity and enforceability of such bylaws. Ultimately, the court affirmed in part, and reversed in part, the rulings below.

The decision provides important guidance to companies and boards in a developing area of law, and may spur challenges against similar bylaws.

### The Case Before the Court of Chancery

The decision below stemmed from renewed efforts by a group of dissident stockholders to nominate a slate of directors to the board of AIM Immunotech, a publicly traded, developmental-stage biopharmaceutical company. After the stockholders’ prior proxy contest, the AIM board enacted a suite of additional bylaw amendments.

When the stockholders failed to provide all of the required additional information, the board rejected their slate of nominees. In December 2023, the Court of Chancery held that several of the provisions in the amended bylaws were “invalid,” but that the AIM board’s rejection of the nominations was nevertheless equitable. The parties cross-appealed.

### The Supreme Court’s Ruling

The Supreme Court held that the facial validity of a bylaw turns on “whether the bylaw is contrary to law or the certificate of incorporation and addresses a proper subject matter,” with “the burden ... on the party asserting invalidity to demonstrate that the bylaw cannot be valid under any circumstance.”

The Court of Chancery had found, and the Supreme Court agreed, that the amended bylaws were not “adopted on a clear day,” but it nevertheless had “no trouble” in finding five of the six amended bylaws on appeal to be valid. The lone exception was the 1,099-word “nonsensical” “Ownership Provision” bylaw, which required sweeping disclosure relating to any ownership interest in AIM or any principal competitors.

The Supreme Court also made clear that bylaws must also be “twice tested” and applied equitably. Referring to its recent decision in *Coster v. UIP Companies, Inc.*, the Supreme Court explained that bylaws should be assessed as follows:

- **First**, “whether the board faced a threat “to an important corporate interest”” that was “real and not pretextual,” and whether the board acted with proper, unselfish and loyal motivations.
- **Second**, “whether the board’s response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise.”

Relying on the Court of Chancery’s findings and the record below, the Supreme Court agreed that four of the amended bylaws (the Ownership Provision, AAU provision, Consulting/Nomination Provision and Known Supporter Provision) were ““designed to thwart an approaching proxy contest, entrench incumbents, and remove any possibility of a contested election,”” and were unreasonably broad, thus failing the first prong of the *Coster* test.

The Supreme Court also held, based on the Court of Chancery’s assessment below, that this amounted to a breach of the duty of loyalty rendering all of the challenged bylaws (including the two bylaws that the Court of Chancery had upheld) inequitable and unenforceable.

The Supreme Court also declined to provide the plaintiff any relief, crediting the Court of Chancery’s findings that the plaintiff had “submitted false and misleading responses to some of the requests,” and declared that “[t]he case is closed.”