

Where's the Beef? Delaware Courts Nix Unripe Challenges to Advance Notice Bylaws and Uphold Bylaws Adopted 'on a Clear Day'

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Advance notice bylaws are commonplace among public companies, with nearly all S&P 500 companies having some form of these requirements. Traditionally, stockholder challenges to these bylaws arose where the investor had a real gripe: having their efforts to nominate a director slate blocked by an incumbent board. More recently, after the Securities and Exchange Commission's (SEC's) began requiring a universal proxy, many companies refreshed their advance notice bylaws, leading to a flurry of books and records demands and stockholder challenges.

The Delaware Supreme Court weighted in on one such challenge in *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239 (Del. 2024) (*Kellner II*), holding that “[i]n a challenge to the adoption, amendment, or enforcement of a Delaware corporation’s advance notice bylaws that is ripe for judicial review, the court” will first evaluate the bylaws legal validity, and then look to whether the bylaw was equitably applied. *Kellner II*, 320 A.3d at 259.

In the year since *Kellner II* was decided, four advance notice bylaw cases have come before the Delaware Court of Chancery. In two of those cases, the court dismissed the complaints as unripe pursuant to *Kellner II*'s direction that the *threshold* question is whether an “genuine and extant controversy” exists — meaning the stockholder has suffered an identified harm, not merely a hypothetical one. In two other cases, the controversy was ripe and, pursuant to *Kellner II*, the court applied enhanced scrutiny, but ultimately enforced the advance notice bylaws because they were adopted on a “clear day” (*i.e.*, not in response to any threat) and were not inequitable.

Advance Notice Bylaw Challenges Must Be Ripe

In both *Siegel v. Morse* and *Assad v. Chambers*, Vice Chancellor Nathan Cook dismissed stockholder challenges to amended advance notice bylaws as unripe, underscoring Delaware’s insistence on a “genuine, extant controversy.” In both cases, the company amended its advance notice bylaws in response to the SEC’s universal proxy rule, and the plaintiffs subsequently challenged them as preclusive.

Initially, in both cases the stockholders alleged that the challenged bylaw provisions were “facially invalid,” but following *Kellner II*, both plaintiffs — who were represented by the same law firm — abandoned facial validity challenges and asked the court to undertake an equitable review, arguing the bylaws were “unenforceable.” The court noted in both cases that, pursuant to *Kellner II*, to undertake an equitable review “it must be presented with a ripe dispute.” The court held that hypothetical concerns that the advance notice bylaws “chill” or “impermissibly burden the free exercise of the stockholder franchise” were insufficient because neither stockholder alleged an intent to run a proxy contest, nor did they identify any stockholder that was “chilled” from making a nomination. Ultimately, the court held that the plaintiffs’ “interests in seeking immediate equitable review are outweighed by this Court’s concern in postponing review until the question arises in some more concrete and final form” and dismissed the actions as unripe.

Advance Notice Bylaws Withstand Enhanced Scrutiny

Two other recent decisions reflect that Delaware courts will not hesitate to apply advance notice bylaws as written if they are reasonable and equitable.

In *Vejseli v. Duffy*, three stockholders ran a proxy contest. In response, the board adopted a resolution that reduced the size of the board so that only one director (rather than two) would be up for election (the “Board Reduction Resolution”), but the company delayed disclosing the change. Before the change was revealed, the stockholders submitted a nomination notice for two seats. The board rejected it for failing to disclose and attach all agreements required by the advance notice bylaw.

Applying enhanced scrutiny following an expedited trial, Vice Chancellor Bonnie David held that “Ionic’s directors breached their fiduciary duties by reducing the size of the Board, not for a valid corporate purpose, but as an inequitable defensive measure.” However, the court found that the board’s rejection of the nomination notice was equitable because the advance notice bylaw served “to advance important corporate interests” and ensure that stockholders receive

full disclosures. The court also held that the board’s rejection of the nomination was not pretextual or preclusive, and the stockholders could have complied with the bylaw but did not.

To remedy the board’s breach of fiduciary duty in adopting the Board Reduction Resolution, the court ordered the board to “reopen the ten-day nomination window under the advance notice bylaw.” But the ruling upheld the validity of the advance notice bylaw.

In *Barnwell Industries, Inc. v. Sherwood*, the court upheld a board’s rejection of a stockholder’s nomination notice for failing to comply with the company’s advance notice bylaw. The bylaw, adopted on a “clear day,” required stockholders to provide information in accordance with Section 14(a) of the Securities Exchange Act of 1934. Vice Chancellor Paul Fioravanti credited the board’s reasons — holding an orderly election, avoiding confusion and enforcing the company’s governing documents — as legitimate and supported by the record. The court reiterated that, “[w]hen a stockholder submits a materially deficient nomination notice in violation of the plain terms of the advance notice bylaw adopted on a ‘clear day,’ the Company’s overall burden, in my view, is not high.”

Key Points

- Delaware courts will not entertain challenges to advance notice bylaws based on hypothetical or speculative harms. A stockholder challenging a bylaw must identify a real, concrete dispute.
- When a genuine dispute arises, Delaware courts apply enhanced scrutiny to board actions, but they will not rescue stockholders who fail to comply with clear, reasonable bylaw requirements.
- When evaluating whether a nomination notice complies with an advance notice bylaw provisions, the board should contemporaneously articulate a specific corporate purpose if it rejects the notice.
- Governance changes made on a “clear day” tend to fare better in court.

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