

Summer 2015



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## 2015 Amendments to the Delaware General Corporation Law

On June 24, 2015, Delaware Governor Jack Markell signed Senate Bill 75 which will amend the Delaware General Corporate Law (the “DGCL”) effective August 1, 2015, as follows:

### Exclusive Forum Provisions

- A new Section 115 will be added to authorize the inclusion of a forum selection provision in the certificate of incorporation or bylaws of a corporation that designates the Delaware courts as the exclusive forum in which “internal corporate claims” may be brought.
- “Internal corporate claims” are defined as claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which the DGCL confers jurisdiction upon the Court of Chancery.
- Section 115 provides further that no provision in the certificate of incorporation or bylaws of a corporation may prohibit bringing internal corporate claims in the Delaware courts; however, Section 115 does not expressly prohibit a provision in the certificate of incorporation or bylaws of a corporation that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought.
- Section 115 is not intended to prevent the application of an exclusive forum provision pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.
- The Court of Chancery previously upheld a forum selection provision in *City of Providence v. First Citizens BancShares, Inc.*, discussed [here](#), which designated the courts of North Carolina as the exclusive forum for intra-corporate disputes. After Section 115 becomes effective such an exclusive forum provision would be impermissible; however, it remains to be seen whether a forum selection provision that selects a forum in addition to the Delaware courts may be valid.

### Fee-Shifting Provisions

- The revised Sections 102 and 109 will invalidate any provision in the certificate of incorporation or bylaws of a stock corporation that “would impose liability on a stockholder for the attorneys’ fees or expenses of the corporation or any other party in connection with an internal corporate claim.”
- The revised Sections 102 and 109 are not intended to prevent the application of a fee-shifting provision pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.
- The amendments to the DGCL do not disturb the validity of fee-shifting provisions in respect of nonstock corporations, and thus do not disturb the decision of the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund*, discussed [here](#).

### **Delaware Court of Chancery Holds that Compensation Awards to Directors Were Not Ratified by Stockholder Approval and Subject to Entire Fairness**

In *Calma v. Templeton*, the plaintiff alleged that a board of directors breached their fiduciary duties in awarding themselves restricted stock units (RSUs) pursuant to a stockholder-approved equity incentive compensation plan. The Court of Chancery held on a motion to dismiss that (i) the directors were interested in the award of the RSUs, and (ii) although the stockholders had approved the plan under which the RSUs were awarded, stockholder approval of the plan could not act as ratification because the plan did not include enough specificity as to the amount or form of compensation to be issued. The court, therefore, held that the awards were to be reviewed under the non-deferential entire fairness standard, rather than under the business judgment rule, and declined to dismiss the plaintiff’s breach of fiduciary duty claim. For more, click [here](#).

### **Delaware Supreme Court Clarifies that Plaintiffs Must Plead a Non-Exculpated Claim of Breach of Fiduciary Duty to Survive a Motion to Dismiss, Even Where Entire Fairness Applies**

Addressing appeals in *In re Cornerstone Therapeutics Inc.* and *In re Zhongpin Inc. S’holders Litig.*, discussed [here](#), the Delaware Supreme Court cleared up a confused area of the law and held that, in a stockholder suit challenging an acquisition by a controlling stockholder, a plaintiff seeking monetary damages from independent directors who negotiated and approved the merger must allege with specificity that each director protected by an exculpatory charter provision breached his or her duty of loyalty, even where Delaware’s stringent entire fairness standard of review applies to the court’s evaluation of the transaction. For more, click [here](#).

**Delaware Court of Chancery Again Sets Appraisal Value at Merger Price After a “Competitive and Fair Auction”**

In *Merlin Partners LP v. AutoInfo Inc.*, the Delaware Court of Chancery held in a statutory appraisal proceeding that the merger consideration represented the best estimate of fair value of AutoInfo Inc. Rejecting a discounted cash flow model based on optimistic projections created to market AutoInfo to potential acquirers and comparable companies analyses based on companies that were much larger than AutoInfo and employed a less risky business model, the court found that because the merger “was negotiated at arm’s length, without compulsion, and with adequate information” after “competition among many potential acquirers,” the merger consideration of \$1.05 per share was the best indication of fair value. For more, click [here](#).

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**M&A Markets**

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

➤ [April 2015](#)

➤ [May 2015](#)

➤ [June 2015](#)

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:



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