

Delaware Advance Notice Decisions Highlight Move Toward Enhanced Scrutiny of Board Actions, Even Where Conflicts Exist

April 14, 2022

Like US constitutional law, Delaware courts apply a tiered standard of judicial review to actions taken by the board of directors of corporations:

- Business judgment deference (rational basis).
- Enhanced scrutiny under *Unocal* and *Revlon* (intermediate scrutiny).
- The compelling justification standard articulated in *Blasius* (strict scrutiny).

In the constitutional arena, the failure to satisfy the strict scrutiny standard applied in First and Fourteenth Amendment cases led one constitutional scholar to remark that “strict scrutiny is strict in theory, but fatal in fact.” And so the same may be said of the compelling justification standard in corporate jurisprudence. In fact, the Delaware Court of Chancery’s then-Vice Chancellor (and later Chancellor and Chief Justice) Leo E. Strine articulated a view that Delaware courts should rely on the judiciary’s traditional equitable powers, articulated in cases such as *Schnell*, rather than strict scrutiny, to ensure that corporate machinery is not being manipulated by insiders for an improper purpose.

Recent Delaware cases addressing board use of advance notice bylaws to defeat proxy fights illustrate the growing recognition by the Delaware judiciary that the outcome-determinative nature of the compelling justification standard limits its applicability in legal analysis. Advance notice bylaws provide the procedural steps that need to be followed for directors to be nominated for election to a board. Even with relatively high stakes – after all, the enforcement of advance notice bylaws has the potential to cut off the opportunity for stockholders to decide elections, and there is the specter of directors acting in their own self-interest – Delaware courts have applied an intermediate level of review in favor of strict scrutiny. As long as stockholders had fair notice of the rules, and the rules were not enforced in a contrived manner to preclude a dissident from having a fair opportunity to launch a proxy fight, the board’s action would not be overturned.

Below, we discuss the legal background of these rulings, and outline practical tips for the drafting and enforcement of advance notice bylaws that would be expected to satisfy the immediate scrutiny test. While the applied level of review provides ample space for legal commentary, it certainly doesn’t grant boards permission to act without reason or care – under the intermediate standard of review, bylaws still need to be drafted clearly, contain reasonable procedures and be enforced equally.

Setting aside strict scrutiny: Background and recent Delaware rulings

A seminal Delaware case on the review of director actions in connection with stockholder voting is *Mercier v. Inter-Tel*, decided in 2007, which held that directors may “use the legal means at their disposal” to influence the stockholder voting process when working in the best interests of stockholders. In *Mercier*, the directors of Inter-Tel set a date for a special meeting at which stockholders would vote on the merger of Inter-Tel with another entity. After considering various factors in support of postponing the special meeting, including the possible defeat of the merger proposal, the special committee announced the meeting’s postponement. The plaintiff stockholder filed suit challenging the postponement, and argued that *Blasius* should apply in judging the conduct of the Inter-Tel board. The court rejected this argument and instead applied an enhanced standard of review, which required the directors to demonstrate that:

- Their motives in postponing were not improper.
- Their actions were “reasonable in relation to their legitimate objective.”
- The postponement did not prevent any of the stockholders from voting in an uncoerced manner.

In recent decisions, Delaware courts have reaffirmed the approach in *Mercier* and considered the use of advance notice bylaw provisions under an enhanced scrutiny standard, calling into question whether the courts would ever employ strict scrutiny in the case of the enforcement of an advance notice bylaw provision. First, in *Rosenbaum v. CytoDyn*, a Delaware court concluded that enforcement of a corporation’s advance notice bylaws does not implicate *Blasius* review where stockholders failed to meet the requirements set forth in the advance notice provisions. In *CytoDyn*, the board rejected director nominations put forward by a group of stockholders who did not provide all the information required by

the advance notice provisions. With their proxy fight thwarted, the stockholders asked the Court of Chancery to apply the *Blasius* standard in its review of the board's use of the advance notice provision. In exploring this question, the *CytoDyn* court articulated the principle that *Blasius* does not apply in all cases where board action interferes with the stockholder franchise, but rather is reserved for cases where the board engaged in manipulative conduct. Finding no manipulative conduct, the court applied an enhanced scrutiny-like analysis (without explicitly referencing *Unocal*) to the board's enforcement of the provisions. Under this standard, the court upheld the board's enforcement of the advance notice bylaws, because the bylaws:

- Had been adopted years before the stockholder proxy contest.
- Served a legitimate purpose, such as providing for an orderly election process that allowed enough time for stockholders to thoughtfully respond to director nominations.
- Were not unreasonable.

Similarly, in *Strategic Investment Opportunities LLC v. Lee Enterprises*, the Delaware court affirmed that the correct standard of review to apply when considering the enforcement of advance notice bylaws is enhanced scrutiny, when there is no evidence that a board acted unscrupulously. The facts in *Lee* are somewhat similar to *CytoDyn*: A spurned bidder (Alden Global Capital) attempted to launch a proxy fight close to the nomination deadline, but Lee's board of directors rejected Alden's nominations for failing to comply with the plain terms of Lee's advance notice bylaw requirements. Lee's board of directors rejected Alden's attempt to nominate a competing slate on the basis that Alden was a beneficial holder of shares and not a record holder as required under its advance notice bylaw. Building upon *Mercier* and *CytoDyn*, the court concluded that the *Blasius* standard would be too stringent of a standard to apply when the only evidence is a conflict of interest: "hether labeled as *Unocal* or *Blasius*, enhanced scrutiny review 'recognize the inherent conflicts of interest that arise when a board of directors acts to prevent shareholders from effectively exercising their right to vote either contrary to the will of the incumbent board members generally or to replace the incumbent board members in a contested election.' That is so here, even though a minority of the Board members were at risk of losing his or her board seat." The court acknowledged that, given the imminent threat of a potential hostile takeover, the Lee directors may have operated with a defensive mindset when they rejected the nominations. Even if their actions yielded a "selfish" benefit, the directors' conduct was not unscrupulous – the directors and counsel met to discuss the stockholder nominations and, after considering the noncompliance with the advance notice bylaw, rejected the nominations for failing to comply with the clear terms of the bylaw. Considering this process, the court concluded that the board was justified in rejecting the nominations that "could readily have been satisfied by any stockholder."

Looking ahead: Enhanced scrutiny won't let a board off easy

Boards can take some solace in these recent rulings – it seems that Delaware courts have limited the *Blasius* standard of review to instances where board actions are manipulative and unscrupulous, and even the enforcement of rules that operate to protect the board members do not meet such standards if applied consistently. Further, in *Lee*, the court somewhat conflates *Unocal* and *Blasius* under one "enhanced scrutiny" umbrella, which calls into question the relevancy of *Blasius*. Even under a lower standard of review, however, boards must be careful to craft and adhere to clear guidelines. As these rulings demonstrate, courts are willing to consider motive, procedure and interests when evaluating directors' actions in connection with director nominations. In light of this focus, we offer some key takeaways and practice points below.

Key takeaways and practice points

Advance notice bylaws should be drafted clearly, reasonably and in advance

To be enforceable, advance notice bylaws should be:

- Unambiguous, clear and explicit (i.e., list the exact information needed in a director nominee questionnaire form and clearly state that any nomination not made in accordance with the bylaw will be disregarded).
- Applicable to all stockholders.
- Reasonable "with a legitimate corporate purpose" and not unnecessarily difficult for stockholders to comply with.
- Adopted on a "clear day" – not as a response to an unwanted nominee – and in advance of the annual stockholder meeting or planned special meeting, so there is no appearance of manipulative behavior by directors to "move the goal posts."

Advance notice bylaws should be enforced by boards with contractual and equitable principles in mind

Courts will examine advance notice bylaws through the lens of both contract law and equity. Bylaws are a "flexible

contract between corporations and stockholders,” and courts will look to see whether the bylaws are unambiguous, the stockholder complied with the bylaws or the corporation interfered with the stockholder’s attempt to comply with the bylaws. Courts will interpret the language within the bylaws in “their commonly accepted meaning” and, if there is any ambiguity in the language of the bylaws, courts will resolve such ambiguities “in favor of the stockholder’s electoral rights.”

Directors are required to act reasonably in enforcing advance notice bylaws and cannot behave in a manipulative manner by making stockholder compliance harder (for example, by intentionally waiting until the nomination deadline to address a noncompliant director nomination submitted by a stockholder). Additionally, in *CytoDyn*, the court signaled that directors should review nominations “with an open mind,” not trying to “nitpick” the shareholder nomination, but rather legitimately review for material noncompliance with corporation bylaws. The court also suggested that directors should not reject an entire nomination notice if the notice was noncompliant with respect to just one nominee.

One final word of caution

We have reviewed the bylaws of a number of corporations that have gone public through a deSPAC or traditional IPO process. Many of the advance notice bylaws of these corporations do not address the nomination deadline for the **first** annual meeting. This is a result of using advance notice bylaw language that keys the nomination deadline off a prior year’s meeting (which may not have been held or has not been disclosed). We suggest that companies going public through a traditional IPO or deSPAC transaction draft the advance notice bylaws to account for the first annual meeting. Most companies that have gone public without addressing the issue can adopt an amendment to a bylaw to fix the issue. But, doing so may be of limited value if not done on a “clear day.”

Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Mercier v. Inter-Tel (Del. Ch. August 14, 2007).

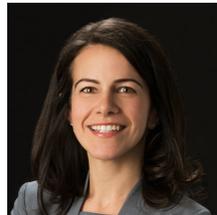
Rosenbaum v. CytoDyn Inc. (Del. Ch. Oct. 13, 2021).

Strategic Investment Opportunities LLC v. Lee Enterprises (Del. Ch, Feb. 14, 2022), at 38.

Contributors



Barbara Borden
[Bio](#)



Sarah Lightdale
[Bio](#)



Cristina Lombardi
[Bio](#)

Yoana Setzer
[Bio](#)

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as “Cooley”). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our [AI Principles](#), may be considered Attorney Advertising and is subject to our [legal notices](#). Copyright © 2026