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NAVIGATING DERIVATIVE LITIGATION IN DELAWARE AND PENNSYLVANIA: A COMPARATIVE ANALYSIS

Delaware and Pennsylvania take different approaches to derivative litigation. While both states require stockholders to make a demand upon the corporation, Delaware allows demand to be excused if the stockholder can show that a majority of the board is incapable of making an impartial decision regarding the litigation. In contrast, Pennsylvania does not recognize the concept of demand futility and provides that a corporation can establish a Special Litigation Committee to determine whether pursuing litigation is in the best interests of the corporation. Understanding these differences is essential for effectively navigating derivative litigation in these jurisdictions.

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DERIVATIVE LITIGATION IN DELAWARE

Under Delaware law, a derivative action is defined as "an action on behalf of an entity to enforce a claim that the entity could assert."[1] Deemed a "cardinal precept of Delaware law," directors, as opposed to shareholders, are given the responsibility of managing the business and affairs of the corporation.[2] Given this board-centric model, Delaware places a demand requirement on stockholders seeking to act as a corporation for litigation purposes.[3] A demand requirement "(1) ensures that a stockholder exhausts his intracorporate remedies, (2) provides a safeguard against strike suits, and (3) assures that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation and to control any litigation which does occur."[4]

DEMAND FOR DELAWARE CORPORATIONS

To pursue a derivative action in Delaware, a plaintiff must first establish standing. This requires the plaintiff to have been a stockholder at the time of the alleged misconduct and to continue to hold the shares

[1] Del. Ch. Ct. R. 23.1(f)(1).

[2] *In re Fox Corp. Deriv. Litig.*, No. 2023-0418, 2024 WL 5233229, at *7 (Del. Ch. Dec. 27, 2024).

[3] *Crispo v. Musk*, 304 A.3d 567, 576 (Del. Ch. 2023).

[4] *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1047 (Del. 2021) (cleaned up).

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