DELAWARE
A “Go To” Forum for Global Business

Today’s Discussion
- Overview
- Delaware General Corporate Law (“GCL”)
- Delaware Alternative Entities
- Delaware Courts
- Recent Developments in Delaware Law
Richards, Layton & Finger P.A. – Your Delaware Connection

Our goal: To be your “go to” Delaware resource

Support, Serve and . . . Repeat!
TOTAL DOMESTIC ENTITIES AS OF DECEMBER 31*
(CORPORATIONS, LLC, LP, & STATUTORY TRUSTS)

The Delaware General Corporation Law

C. Malcolm Cochran
Why Delaware? Historical Factors:

- Federalism: In the U.S., state law controls matters of internal structure and governance of business organizations.
  - Late 1800s: Delaware v. New Jersey. A race to the bottom?
  - Delaware’s new “general corporation law” (“GCL”) allowed anyone to incorporate. “Special act” of legislature not required.

- Small legislature and Bar: Really only a handful of elected officials and lawyers who decide.
  - And I am number 2377, since the beginning of time.

- Good courts, good location.

- Good Luck!
Some Delaware Advantages

A premier state for U.S. corporate formation since the early 1900s

- Today, over 1 million business entities chartered in Delaware.

- 64% of the Fortune 500

- 50% of all publicly traded companies in the U.S.

Delaware is a preferred U.S. domicile for multinational enterprises engaged domestic (U.S.) operations and in “M & A” activity

International interest is high, particularly in the area of “alternative entities” (Limited Liability Companies, Statutory Partnerships, Trusts, and others)
Some Delaware Advantages

- Leading Statutes
  - Delaware General Corporation Law
  - Delaware Limited Liability Company Act
  - Others.

- Experienced Courts
  - Highly specialized courts with substantial experience handling business disputes, including corporate governance and fiduciary; “M & A”; complex commercial; patent and intellectual property; bankruptcy.

- Extensive Case Law
  - Offers certainty in structuring transactions and predictability for management
Delaware Corporate Law

- **Delaware General Corporation Law ("GCL")**

  - Specialized and highly specific statutes governing duties and relationships of those who manage and own Delaware corporations.

  - Provides specific direction regarding organizational documents, stockholders’ rights and directors’ duties.

  - Concerned largely with matters of formation, ownership, governance, distributions and structure. The GCL does not address various other areas, such as antitrust, labor or securities.
Delaware Corporate Law

- How does the GCL apply?

  - Companies must elect to incorporate in Delaware, a process that typically includes the filing of incorporation documents with the Delaware Secretary of State.

  - “Internal Affairs” Doctrine: A choice of law rule that provides that the "internal affairs" of a corporation will be governed by the corporate statutes and case law of the state in which the entity is incorporated.
Delaware Corporate Law

- **GCL Advantages**
  - Provides stockholders and corporations with substantial flexibility in ordering their affairs.
  
  - Unlike some civil-law jurisdictions, the GCL is designed as an enabling statute that permits and facilitates company-specific procedures.
  
  - Mandatory provisions of the GCL are kept to a minimum to address primarily issues of importance to the protection of investors, such as the right to elect directors and to vote on certain major transactions.
  
  - Many other provisions are “default” provisions that will apply in the absence of bylaws or agreement to the contrary.
Delaware Corporate Law

- GCL Advantages

  - Stability and Innovation
    - Delaware's constitution requires a super-majority vote by the legislature to amend the corporation law, protecting the GCL from one-time amendments proposed by special-interest groups.
    - Experienced Delaware corporate lawyers advise the legislature and recommend annual amendments.
    - This process keeps the GCL current and responsive to the needs of the managers and owners of Delaware's corporations.
Delaware Corporate Law

- GCL Advantages

  - For companies incorporated in Delaware:
    - GCL applies regardless of the corporation’s physical headquarters or where it does business
    - Delaware courts are available to resolve disputes
      * Forum selection bylaws – upheld (internal affairs)
      * Fee shifting bylaws – upheld for non-stock. Others?

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Delaware Corporate Law

- Some Key GCL Provisions
  - Shareholder Voting Rights:
    - A “fundamental right” that the Delaware courts will aggressively protect
    - “The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.” *Blasius Indus. Inc. v. Atlas Corp.* 564 A.2d 651 (Del. Ch. 1988)
    - Carefully defined in the GCL: *e.g. 8 Del. C. § 212*
Delaware Corporate Law

- Directors’ duties:
  - **GCL’s central mandate**: Section 141(a)(“The business and affairs of every corporation . . . Shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter [or in the charter] . . .”)
  - **Business judgment rule**: Disinterested directors business judgment is granted deference
  - **Duty of loyalty**: Undivided duty of loyalty to the company and its stockholders.
  - **Duty of care**: To act on an informed basis, in good faith.
Delaware Corporate Law

-Some of the Safe Harbors:

-Special Committees of Disinterested Directors

-Reliance on experts, officers and employees (141(e))

-Indemnification (145)

-102(b)(7): Charter provision eliminating personal liability for breach of the duty of care

-144: Transactions with interested directors and officers
Delaware Corporate Law: The Courts

- The Court of Chancery
- The Complex Commercial Litigation Division
- The Delaware Supreme Court
- Specialized Federal Courts (Intellectual Property and Bankruptcy)
Delaware Alternative Entities

Elisa Erlenbach Maas
Delaware Alternative Entities

- Flexible legal entities through which to conduct business
- Delaware Limited Liability Company Act, Delaware Revised Uniform Partnership Act, Delaware Revised Uniform Partnership Act and Delaware Statutory Trust Act (the “Acts”)
- Delaware LLCs:
  - As of July 2014, 700,000
  - Compare with corporations
- Policy is to give maximum effect to the principle of freedom of contract and to the enforceability of the operating agreement.

Delaware Alternative Entities

- The alternative entity statutes are default-rule statutes.

- Parties are permitted flexibility in structuring:
  - Management
  - Voting rights
  - Equity
  - Indemnification and advancement
  - Duties (including elimination of fiduciary duties)
  - Liabilities
  - Penalties for breach

- Used in the most complex to the simplest transactions, in all business sectors.
Delaware Advantages

- Responsive Delaware Secretary of State.
  - Expedited filings.
  - Preclearance.

- Simple LLC formation process.
  - Certificate of Formation (notice filing).
  - Limited Liability Company Agreement (at least one member).
  - “Member” is broadly-defined.

- Business-savvy courts.
Delaware Advantages

- Acts permit parties to consent to jurisdiction:
  - Non-exclusive - anywhere.
  - Exclusive - Delaware.
  - Exclusive arbitration - anywhere.

- Non-manager member cannot waive its right to maintain action in the courts of Delaware with respect to organizational or internal affairs matters.

- Delaware courts enforce compliant choice of forum clauses.
Delaware Advantages

- Up-to-date statutes.
  - Annual amendments.
  - Drafting Committee of the Bar meets weekly to consider issues and work on amendments.
  - Amendments reflect Delaware's continuing commitment to maintaining statutes governing Delaware LLCs, Delaware LPs, Delaware GPs and Delaware Statutory Trusts that effectively serve the business needs of the national and international business communities.
Statutory Advantages

- Examples reflect Delaware’s responsiveness.
  - 2014 - “pre-position” amendments.
  - Deals with real-world closing mechanics.
  - 2013 - LLC default fiduciary duties.
Statutory Advantages - LLC Default Fiduciary Duties

- Whether fiduciary duties applied by default in the LLC context had been the subject of debate:
  - Delaware Supreme Court - Court of Chancery statements are “dictum without any precedential value”; but it did not take its own definitive position (59 A.3d 1206 (Del. Nov. 7, 2012)).

- The Delaware legislature took action to clarify the statute.
Statutory Advantages - LLC Default Fiduciary Duties

- **Section 18-1104 of the LLC Act:**
  - In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern.

- **Synopsis**
  - The amendment to Section 18-1104 confirms that in some circumstances fiduciary duties not explicitly provided for in a limited liability company agreement apply. For example, a manager of a manager-managed limited liability company would ordinarily have fiduciary duties even in the absence of a provision in the limited liability company agreement establishing such duties. **Section 18-1101(c) continues to provide that such duties may be expanded, restricted or eliminated by the limited liability company agreement.**
Delaware General Partnership - Non-Uniform Provisions For Global Business

- By default, a General Partnership is a separate, legal entity.

- Under the Delaware Revised Uniform Partnership Act, partners may “opt out” of entity status.

- May also “opt out” of application of entity property-ownership, permitting partners to be co-owners of partnership property.

- Provisions were included so that parties engaging in deals would not lose favorable treatment that they achieved under prior Delaware Uniform Partnership Law.

- Used in certain cross-border transactions, including by those using Delaware limited liability partnerships.
The Delaware Courts: A “First” Advantage

Chad M. Shandler
Delaware – A Preeminent Venue to Litigate Business Disputes

- Ranked #1 court system by U.S. Chamber of Commerce for last 11 years (2002-2013)
  - Impartial and competent judiciary
  - Prompt decisions
  - Favorable discovery rules
  - Predictability
Delaware – A Preeminent Venue to Litigate Business Disputes

- Excellent forum to litigate intellectual property disputes
  - No. 2 in U.S. for new patent case filings in 2013
  - 1,527 IP cases commenced in 12 month period ending September 30, 2013
  - Specialized practices and procedures for litigating IP matters
  - Nationally recognized judiciary for handling IP litigation

- Delaware Bankruptcy Court remains one of the busiest and most respected bankruptcy courts in the U.S.

- Convenient forum to obtain jurisdiction over defendants
  - Most U.S companies incorporated in Delaware
  - Court strictly enforce forum selection clauses
Overview of State Court System

- Consists of Supreme Court, Court of Chancery, Superior Court, Family Court, Court of Common Pleas and Justice of the Peace Court
- Supreme Court is highest appellate court in Delaware and has final appellate jurisdiction in civil appeals
- Court of Chancery and Superior Court are trial level courts of general jurisdiction
- Family Court has jurisdiction over domestic relations matters and most offenses involving juveniles
- The remaining courts are courts of limited jurisdiction
- Delaware maintains division between law and equity
  - Court of Chancery has jurisdiction to hear and determine all causes and matters in equity
  - Superior Court is the state’s trial level court of general jurisdiction hearing matters of law
Delaware Supreme Court

- Highest appellate court in Delaware
  - No intermediate appellate courts
  - Hears direct appeals from Court of Chancery and Superior Court
- Consists of five justices (one of whom is the Chief Justice)
  - Justices are appointed by governor; confirmed by State Senate
  - Serve 12 year terms
  - Must be citizens of Delaware
Delaware Supreme Court (cont.)

- Recognized nationally and internationally as expert in issues of corporate law (M&A, shareholder rights, fiduciary relations, director liability)
- Appeals typically resolved within 180 days
- Supreme Court accustomed to hearing expedited appeals
- Discretionary jurisdiction to hear interlocutory appeals and questions of law certified to it by other Delaware courts, the Supreme Court of the United States, highest appellate courts of any other state
Delaware Court of Chancery

- Court of equitable jurisdiction
  - Hears matters in equity
  - Jurisdiction to grant traditional equitable remedies (injunctions, reformation, rescission, specific performance, accountings)
  - Jurisdiction to hear disputes involving GCL, corporate governance issues, M&As, shareholder rights
  - Also has jurisdiction to hear disputes involving trust and estates, wills, and other matters for which it has been granted jurisdiction by statute (certain technology disputes, disputes involving business entities such as LLCs)
  - Clean-up doctrine - will hear all claims (including claims at law) as long as it has jurisdiction over at least one claim or request for relief
  - Limited appellate jurisdiction (appeals from state agencies such as securities commissioner)
Delaware Court of Chancery (cont.)

- Recognized nationally and internationally as the preeminent business court for resolving corporate and partnership disputes
  - Sophisticated judiciary
  - Flexible procedural rules
  - Prompt resolution of disputes - expedited proceedings are routine

- Consists of one chancellor and four vice-chancellors
  - Appointed by governor; confirmed by Senate
  - 12 year terms
  - History of appointing experienced practitioners to bench

- No jury trials in Court of Chancery

- No punitive damages unless authorized by statute
Delaware Superior Court

- State’s trial level court of general jurisdiction on matters of law
- Statewide jurisdiction over civil and criminal matters (personal injury, libel and slander, products liability)
- Jury trials and punitive damages available
- Limited appellate jurisdiction (appeals from Court of Common Pleas, Family Court and certain administrative agencies)
- Consists of 18 judges (one of whom is the President Judge)
  - Appointed by governor; confirmed by Senate
  - 12 year terms
Delaware Superior Court (cont.)

- Created a specialized division (CCLD) within court to hear business disputes
  - Appropriate for business disputes when there are no claims in equity and no request for an equitable remedy
  - Chancery-like approach to cases (flexible rules and schedule, prompt resolution of disputes, case specific approach to electronic discovery issues)
  - Amount in controversy must be at least $1 million to qualify or matter involves an exclusive choice of court agreement for CCLD to resolve dispute
  - Becoming an increasingly popular venue to litigate business disputes
U.S. District Court for the District of Delaware

- Currently consists of four judges
  - Also has three full time magistrate judges (handle mediations and discovery disputes)
- Limited original jurisdiction and broad appellate jurisdiction over appeals from Delaware Bankruptcy Court
- Appeals taken directly to Third Circuit or in some cases the Federal Circuit
- Preferred venue for intellectual property disputes
  - No. 2 in U.S. in 2013 for new patent filings
  - Demanding caseload but cases still move quickly and proceed to trial within 18-24 months
  - Default rules for electronic discovery - minimizes disputes
Delaware Courts – Firm Commitment to ADR

- All state and federal courts encourage and promote ADR early in cases

- In U.S. District Court, judges require parties to mediate cases before trial
  - Mediation responsibility assigned to U.S. magistrate judges
  - No cost to parties
  - Magistrate judges nationally recognized for ability to resolve complex disputes
Delaware Courts – Firm Commitment to ADR

- Court of Chancery allows parties to mediate cases before a vice chancellor not hearing the dispute
  - Program has been used frequently to resolve business disputes
  - Modest cost to parties
  - Perspective of a current judicial officer - persuasive to clients

- Superior Court judges strongly encourage ADR
  - Built in to scheduling orders
  - Mediation is preferred form of ADR
  - Rules allows for non-binding arbitration
Recent Developments in Delaware Law
For More Information

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