

# Validity of Stockholder Agreements with Delaware Corporations

## Publications

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By: Bill Erlain

Effective August 1, 2024, the Delaware General Corporation Law (“DGCL”) was amended to include a new Section 122(18), pursuant to which corporations are expressly permitted to enter into contracts that:

1. restrict or prohibit the corporation from taking actions specified in the contract;
2. require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract; and
3. covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract.

The new Section 122(18) was enacted less than six months after the Delaware Court of Chancery invalidated numerous affirmative and restrictive covenants contained in a stockholder agreement between the corporation and a particular stockholder. In *West Palm Beach Firefighters’ Pension Fund v. Moelis & Company*, the Court declared that such affirmative and restrictive covenants violated Section 141(a) (and in one instance, Section 141(c)) of the DGCL by improperly taking power away from the board of directors to manage the business and affairs of the corporation. This ruling caused many Delaware corporations and their stockholders to question the validity of their own stockholder agreements, which have become a common tool to implement corporate governance arrangements. In response, the Delaware legislature quickly moved to amend the DGCL to expressly permit corporations to enter into stockholder agreements (and other contracts) that grant stockholders (and other stakeholders) rights concerning the internal management of the corporation.

While Section 122(18) provides clarity about whether certain stockholder agreements are facially valid, it remains true that actions taken in accordance with a stockholder agreement can be challenged on other grounds, including for breach of fiduciary duties. Therefore, directors, stockholders, and other stakeholders should continue to be mindful of what types of corporate governance rights and obligations are set forth in a stockholder agreement (or other contract).

Moreover, it should be noted that a stockholder agreement (or other contract) is within the scope of Section 122(18) only if the corporation enters into it “for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, one or more actions).” It remains to be seen how courts will apply this requirement in the future cases. In the meantime, parties should ensure that a corporation receives an identifiable form of consideration in exchange for entering into a stockholder agreement (or other contract).

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### **Bill Erlain**

Associate

werlain@jenner.com

+1 312 840 7388

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