

A Legal Challenge to a Bylaw Requiring Minimum Number of Shareholders Before Lawsuits Can Be Brought

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Imperial Holdings' shareholders have sued the company and its board over a bylaw that the board adopted last November. The bylaw requires that a current or prior shareholder may not initiate a claim in a court of law against the company, its directors or officers, unless the shareholder obtains the written consents of at least 3% of the outstanding shares.

The plaintiffs allege that the purpose of the bylaw is to reduce the risk of defendants being held liable to the company or its shareholders for violations of law, and that the bylaw creates an onerous obstacle designed to prevent shareholders from exercising their statutory rights. In addition, the bylaw falls outside the scope of authority granted under Florida law since it does not relate to the business or affairs of the corporation.

The complaint also notes that insiders and related entities control over 21% of the company's shares. Plaintiffs seek a declaratory judgment that the bylaw was adopted in breach of the directors' fiduciary duties, is irreconcilable with Florida and federal law and public policy and is invalid and unenforceable. Plaintiffs also seek an injunction barring defendants from enforcing the bylaw and from holding a shareholder vote on the bylaw without full disclosure of the company's previous investigations by the FBI, the SEC and the IRS.

Reuters [reports](#) that the company's chairman stated that the bylaw was "intended to stop shareholders without a real financial interest in the outcome of their own case from hijacking deals and forcing the company to defend meritless litigation."

The company also consulted with ISS before the board agreed to adopt the measure, according to the same article, and decided to provide shareholders with the ability to vote to approve the bylaw at its upcoming annual meeting. Although the bylaw is currently effective, if shareholders do not approve the bylaw, the board intends to rescind it.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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