

## Delaware Case Law Update:

# New Statutory Provision for Appointing the Shareholder Representative in M&A Transactions

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M&A deal parties have a new section of the Delaware General Corporation Law (DGCL) to rely upon when appointing a shareholder representative. Previously, M&A deal parties relied on statutory language around “facts ascertainable outside of the agreement” for the binding appointment of a shareholder representative. Effective August 1, 2024, section 261(a)(2) of the DGCL broadly addresses shareholder representatives, including irrevocable appointment, binding authority to act and enforce the rights of shareholders, and related mechanics.

### The Bottom Line

As of August 1, 2024, the new section 261(a)(2) of the DGCL expressly allows the appointment of a shareholder representative in M&A transactions, which operates in conjunction with the “facts ascertainable” doctrine. While the revised statute does not require any “magic words” and standard-appointment language commonly used before will likely continue to suffice, M&A counsel should review their form provisions regarding the appointment of a shareholder representative to ensure compliance with the new legislation.

### Background

DGCL section 261(a)(2) addresses questions raised by the Delaware Court of Chancery in *Crispo v. Musk*, which specifically addressed who might be able to bring lost merger premium claims on behalf of shareholders. In *Crispo*, the court rejected the idea that the target entity could unilaterally appoint itself as agent of the shareholders for the purposes of pursuing a lost merger premium claim.

## Statutory Provision Details & Drafting Considerations

The new section goes beyond the specific scenario in *Crispo*, allowing for the appointment of a shareholder representative with respect to any and all “rights of shareholders” in accordance with the merger agreement.

Previously, the appointment of a shareholder representative with such broad authority relied on the “fact ascertainable” doctrine, a legal theory that a merger agreement can be dependent upon clear and unambiguous facts ascertainable outside of the provision of the agreement so long as they are not “impermissibly vague, constitute an improper abdication, or otherwise give rise to a breach of fiduciary duty.” The Delaware Court of Chancery directly addressed this in *Aveta, Inc. v. Cavallieri*, shareholders’ rights.

### Drafting Considerations:

Section 261(a)(2) does not require any specific drafting formulation when appointing a shareholder representative but does use the language “through express provision in the agreement.” Consider including a broad appointment provision, such as:

*By the adoption of the Merger, and by receiving the benefits thereof, including any consideration payable hereunder, each Shareholder shall be deemed to have approved in Shareholder Representative Services LLC as the Shareholder Representative as of the Closing for all purposes in connection with this Agreement and any related agreements.*

Case law informs us that provisions need to be clear and unambiguous. Where applicable and appropriate, the merger agreement should expressly refer to the shareholder representative on those matters for which the representative has any responsibilities or authority to act, such as purchase price adjustments, earnouts, post-closing indemnification claims, tax return reviews, notice provisions, and attorney-client privilege matters.

While most appointment and authority language currently used for M&A shareholder representatives is likely still sufficient under the new DGCL 261(a)(2), the new statutory language is a good reminder to use clear, unambiguous language. An approach that couples a broad appointment provision with specific language for known matters should allow for the shareholder representative to adequately and effectively protect the selling shareholders’ rights.

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