Section 2115, The Internal Affairs Doctrine And Mandatory Indemnification Of Successful Agents

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Last Friday, I wrote in this post about mandatory indemnification of agents pursuant to California Corporations Code § 317(d). California's neighbor to the East, Nevada, also requires indemnification of agents in much the same terms as California. NRS 78.7502(3). Delaware, however has not mandated by statute the indemnification of agents or employees who are not directors or officers since 1997.

While the differences among California, Delaware and Nevada with respect to mandatory, statutory indemnification might be viewed as another bit of corporate arcana, the reason for Delaware's amendment of Delaware General Corporation Law § 145(c) has an important implication for the application of the internal affairs doctrine.

As California corporate practitioners are aware, Corporations Code § 2115 purports to apply a laundry list of California statutes to out-of-state corporations to the exclusion of the law of their state of incorporation. Unless exempt, an out-of-state corporation is subject to § 2115 when specified shareholder and business tests are met. Corporations Code § 317 is one of the statutes that California imposes on these "pseudo-foreign" corporations.

Delaware corporate practitioners are undoubtedly familiar with decision in *VantagePoint v. Examen, Inc.,* 871 A. 2d 1108 (Del. 2005). In that case, the Delaware Supreme Court upheld the Chancery Court's decision not to apply California's § 2115 based on the internal affairs doctrine. To some, the decision was the death knell for § 2115. I've cautioned, however, that one should not assume that every California statute listed in § 2115 necessarily involves a corporation's internal affairs. *See* my articles, "The War Between the States – Delaware's Supreme Court Ignores California's Corporate 'Outreach' Statute", 19 *Insights* 19 (July 2005) and "California Appellate Court Holds that the Internal Affairs Doctrine Does Not Trump California's Insider Trading Law", 20 *Insights* 15 (Jan. 2006).

Professor Lawrence Hamermesh made the scope of the internal affairs doctrine clear in the context of DGCL § 145(c). In a memorandum explaining the amendment, Professor Hamermesh wrote:

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Certainly, state corporation law properly defines the extent of corporate powers (to indemnify employees and agents, for example) and the rights and responsibilities inter se of the corporation and its officers and directors. It seems just as clear, however, that rights and responsibilities as between the corporation and its agents and employees generally are not within the purview of the law of the state of incorporation. For a jurisdiction which attaches great significance to observing the line between the internal and external affairs of the corporation, it seems incongruous for Delaware to attempt, as Section 145(c) has historically done, to impose a corporate law rule to determine rights between the corporation and agents or employees which would otherwise be defined by the agency, contract or labor law of the jurisdiction in which the agency or employment relationship is created, as opposed to the state of incorporation.

Quoted in *Cochran v. Stifel Fin. Corp.,* 2000 Del. Ch. 58, 69-70. Accordingly, the internal affairs doctrine would not be implicated insofar as § 2115 imposes California's statute requiring the indemnification of agents (§ 317(d)). Further, no conflict of laws problem is engendered because, as Vice Chancellor Strine noted the legislative history of the 1997 amendment to DGCL § 145(c) "supports the proposition that no public policy interests contractual indemnification of a person who satisfies that subsection's success criteria."

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