

## Crisis-Driven Derivative Litigation: The Importance and Role of the Special Litigation Committee

Litigation Alert

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History teaches us that the actions of boards of directors and executive officers come under intense scrutiny during and after times of crisis. As with other modern crises, it is likely there will be a surge of allegations of officer or director misconduct in the preparation for and handling of issues related to the COVID-19 pandemic. Such allegations frequently manifest in shareholder derivative suits rooted in Delaware law. Thus, at a time when so much is beyond our control, it would be wise for companies to revisit the fundamentals of navigating a derivative action, including one important tool: the special litigation committee.

Shareholder plaintiffs in a derivative suit plead a variety of causes of action, including breach of fiduciary duties, corporate waste, usurpation of corporate opportunity, self-dealing, and fraud. Although a derivative suit is brought by one or more shareholders, the claims belong to the corporation. Because the corporation is the true party in interest, the law provides built-in opportunities for the corporation to take control of the claims, manage an investigation, and make decisions regarding what further actions to take, if any. One such opportunity is the ability of a board of directors to appoint a special litigation committee (SLC).

When successfully undertaken, an SLC wrests control of a suit away from the shareholder plaintiffs. The catch is that an SLC must first convince the court that it is independent, disinterested, and has conducted a reasonable investigation in good faith. Thus, the manner and method by which the SLC is composed, conducts its investigation, and presents its findings is crucial to its success.

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