

No Class Voting Right Available to Nonvoting Class for Adoption of Officer Exculpation Provision

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In a closely watched case, the Delaware Court of Chancery recently held in a bench ruling in *Electrical Workers Pension Fund, Local 103, I.B.E.W. v. Fox Corporation* that Fox Corporation's (Fox) nonvoting stock was not entitled to a class vote under Section 242(b)(2) of the Delaware General Corporation Law (DGCL) in connection with Fox's proposed amendment to its charter that would insulate Fox officers from monetary liability in certain situations for breaches of the fiduciary duty of care. DGCL Section 242(b)(2) provides the holders of the outstanding shares of a class with a vote upon a proposed charter amendment, whether or not entitled to vote thereon by the charter, if the amendment would, among other things, "alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely."

According to the court, no vote was available to this class of stock because the amendment did not affect a power, preference, or special right that appears expressly in Fox's charter. The court's analysis and the parties' arguments focused upon whether the adversely affected power — namely, the power to sue — needed to be expressly set forth in the charter or the DGCL to trigger a class vote requirement under Section 242(b)(2). While the court's decision is consistent with Delaware practitioners' expectations, the court also made it clear that it expected the decision to be appealed to the Delaware Supreme Court. Thus, public companies with multiclass capitalization will need to wait for the Delaware Supreme Court to provide the final word.

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