

MEDIA MENTIONS

Corporate Dissolutions: Indiana Law Is Preferable To Delaware Law

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The Indiana Business Corporation Law provides a corporation desiring to wind up its affairs and dissolve as a legal entity with significant benefits and legal protections not available under Delaware's General Corporation Law.

Practitioners would be well served to look beyond Delaware law when contemplating the dissolution of a Delaware corporation and should consider re-domesticating to Indiana via a related party merger prior to dissolution.

While this article focuses on the advantages of Indiana law as compared to Delaware law, the benefits of Indiana law are available to corporations formed in any U.S. jurisdiction.

Even though many states have established corporate laws and precedent that are more favorable to corporations than Delaware law, the sophistication of Delaware courts and legal precedent in corporate governance matters typically provide a compelling justification for incorporation in Delaware over other states.

However, many benefits provided by Delaware law for the nuanced and efficient resolution of corporate governance matters are absent when it comes to corporate dissolution.

A corporation seeking to dissolve as a legal entity is concerned mainly with efficiently resolving its affairs and gaining certainty regarding its liabilities and the distribution of its remaining assets. Indiana law provides significant benefits in both areas when compared to Delaware law.

Perhaps most important, Indiana law provides a mechanism through which corporations can limit post-dissolution liabilities with respect to known and unknown creditors.

This aspect of Indiana law is particularly relevant to corporations that have concerns regarding future unknown liabilities at the time of dissolution.

Indiana law permits a corporation with contingent liability exposure to avoid such exposure in a manner that statutorily bars claims by unknown creditors two years after dissolution.

Additionally, Indiana law limits the time during which a corporation must evaluate its post-dissolution liabilities.

This limitation provides corporations with increased certainty regarding the amount of money they should retain post-dissolution and the timing for the eventual release of such funds.

Finally, Indiana law provides a process by which corporate dissolutions

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can be completed in a matter of days, significantly reducing legal fees and the amount of time required to execute the process.

DISSOLUTION UNDER DELAWARE LAW

Under Delaware law, a corporate dissolution becomes effective when a certificate of dissolution is filed with the Delaware secretary of state or on the date specified in the certificate.

A dissolved Delaware corporation generally continues to exist for three years after dissolution to allow it to wind up its business. A court can order the corporation's continued existence beyond that time so the firm can prosecute or defend claims or proceedings brought during the three-year period.

A Delaware corporation may follow one of two methods of winding down its business and dissolving as a legal entity. In either case, it must pay or make reasonable provisions to pay all claims and obligations against it.

The first method is a court-supervised process by which a Delaware Chancery Court reviews the terms and conditions of a corporation's dissolution. This process requires the provision of dissolution notices to all known creditors and a review of the corporation's determinations concerning its remaining assets and liabilities.

The second method does not require court supervision. Instead, the corporation must only establish and comply with a plan of distribution that it adopts.

The plan of distribution must provide, or make reasonable provisions, for the payment of claims or potential claims against the corporation, including all contingent, conditional or unmatured contractual claims; all claims that are the subject of pending actions, suits or proceedings; and all currently unknown claims that are likely to arise or become known to the corporation within 10 years after the date of dissolution based on facts known to the corporation at that time.

Any assets that remain after the payments (or provisions for unknown future payments) have been made are to be distributed to the corporation's shareholders.

The court-supervised method provides greater certainty about the reasonableness of the provisions made for further payments. It also provides corporations and their directors and shareholders with greater overall protection, since a Delaware Chancery Court reviews those determinations. However, this method involves a complex procedure that places additional burdens on the dissolution process.

Notably, the court-supervised process increases both the costs and time required to dissolve a Delaware corporation. Complying with the process and dealing with issues that may arise require payment of potentially significant legal fees. Additionally, the process takes relatively long to complete and will delay any final distribution of corporate assets.

While the second method avoids the increased costs and time that are part of the court-supervised process, forgoing the court-supervised process comes with its own unique risks. Most important, a corporation will not be able to rely on an independent court review.

TA court-supervised review may significantly reduce uncertainty about the

reasonableness of a corporation's determinations with respect to provisions for future liabilities.

Unlike in the court-supervised method in which a Delaware Chancery Court determines the adequacy of assets set aside by the corporation for pending and contingent claims, under the second method a corporation's board of directors must make that determination themselves and without the imprimatur of a Delaware court.

This concern is exacerbated by the fact that Delaware law requires corporations to make reasonable provisions for unknown and contingent claims covering a 10-year lookforward period.

Corporations may have difficulty accurately evaluating such contingent risks for such a long period. Therefore, while forgoing the court-supervised process is less complex and demanding in some ways, it increases the risk of liability in the event that distributions are not evaluated correctly.

DISSOLUTION UNDER INDIANA LAW

Under Indiana law, a corporate dissolution is effective upon the filing of articles of dissolution with the Indiana secretary of state or upon an effective date specified in the articles of dissolution.⁶

Besides filing the article of dissolution, the corporation must provide notices to three other state agencies: the Department of Revenue, the Department of Workforce Development and the attorney general's office.

No court-supervised dissolution process exists in Indiana, and no independent review by any state agency is required.

Furthermore, Indiana law allows a corporation to proactively dispose of both known and unknown claims and liabilities. Disposal procedures vary; they depend on whether the claimant is known to the corporation at the time of dissolution.

Under Indiana law, any time after the effective date of a corporation's dissolution, the corporation may notify known claimants in writing of the dissolution and specify an amount the corporation believes will satisfy the claim.

If the amount of the claim is not disputed by the known claimant within 60 days after such notice, the amount is fixed.

If the claimant disputes the claim amount and the dissolved corporation rejects the claimant's assertion, the claim amount becomes fixed unless the claimant commences a legal proceeding to enforce the claim within 90 days after the effective date of the rejection notice.

In addition to timely resolving known claims against the corporation, a corporation may bar future unknown claims by claimants brought more than two years from the date of dissolution.

At any time after the effective date of a corporation's dissolution, it may publish a legal notice of its dissolution in an Indiana newspaper and request that claimants provide notice of any unknown claims against it.

Unknown claims are statutorily barred unless the claimant commences a proceeding to enforce the claim against the corporation within two years of the publication of the newspaper notice.

By taking advantage of this notice procedure, Indiana corporations need only consider potential claims covering a two-year look-forward time period.

While a corporation is still required to consider the risk of unknown claims in the future, the two-year time limitation makes this analysis considerably less complicated.

Moreover, the two-year limitation provides far greater certainty regarding the timing of future distributions and does not require the corporation to continually reassess those calculations.

If an unknown claim is properly brought against the corporation within two years of the corporation's newspaper notice, it may be enforced against the corporation to the extent of the corporation's undistributed assets or, if the corporate assets have been distributed in liquidation, against individual shareholders for the lesser of the shareholder's pro rata share of the claim or the corporate assets distributed to the shareholder in liquidation.

However, a shareholder's total liability for all unknown claims may not exceed the total amount of assets distributed to the shareholder.

ALTERNATIVE MERGER AND DISSOLUTION UNDER INDIANA LAW

Instead of dissolving a Delaware corporation under Delaware law, a corporation can take advantage of the numerous benefits provided by Indiana law by conducting a related-party merger.

A Delaware corporation can achieve this by forming a wholly owned subsidiary in Indiana and then merging into the subsidiary, with the Indiana subsidiary serving as the surviving entity in the merger.

The formation of the Indiana subsidiary and the subsequent related-party merger can be completed within a few days of the approval by the corporation's board of directors and shareholders.

After the merger is complete, the Indiana corporation, as the sole remaining entity after the merger, can immediately dissolve in accordance with Indiana law.

By dissolving as an Indiana corporation, the surviving entity will dissolve under Indiana law and be afforded all the benefits of Indiana law.

Most significantly, the corporation can bar claims by unknown creditors by providing notice in an Indiana newspaper of general circulation in the county where the corporation's principal or registered office is located.

Unless the corporation has an existing office in Indiana, the notice would be given by placing a notice in the Indianapolis Star, the main newspaper for the Indianapolis region.

ADVANTAGES OF CORPORATE DISSOLUTION UNDER INDIANA LAW

Despite the significant benefits provided by Delaware law during a corporation's lifetime, Delaware law imposes numerous procedural and practical hurdles to corporate dissolution that can significantly increase the cost and time required to dissolve a corporation.

Moreover, Delaware law provides significantly less certainty regarding the

potential post-dissolution liability of a corporation's shareholders and the timing of future distributions.

Finally, while Delaware's court-supervised dissolution procedure increases such certainty, it adds both time and cost.

Conversely, Indiana law provides a streamlined corporate dissolution process that permits the timely dissolution of an Indiana corporation. Indiana corporations can be quickly and efficiently dissolved via a corporate filing with the Indiana secretary of state and three notices to state agencies.

Indiana law does not provide for a court-supervised process that imposes additional burdens on the dissolution process. Since no court-supervised process exists, corporations are not required to weigh the tradeoffs between the benefits and burdens of such a process.

Indiana law provides protections to corporations and their directors and shareholders without the need to endure a court-supervised process.

Moreover, Indiana law significantly reduces uncertainty with respect to post-dissolution liabilities and the treatment of corporate assets. By taking advantage of the procedures established by Indiana law to extinguish both known and unknown creditors, corporations can proactively reduce exposure and uncertainty.

Such uncertainty is further reduced by the limited two-year post-dissolution period. On the other hand, Delaware law requires corporations to consider potential exposure for 10 years.

BENEFITS AND SUMMARY

The significantly shorter post-dissolution time period during which a corporation is subject to unknown and contingent claims under Indiana law is a significant and important distinction between Indiana and Delaware law.

The dissolution procedures available under Indiana law have numerous additional advantages as compared to the procedures imposed by Delaware law, including reduced costs and greater certainty for corporations and their directors and shareholders.

When looking to dissolve a corporation, practitioners should consider all options available before simply deciding to dissolve a corporation under the laws of its current jurisdiction.

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