

Was This Director Duly Elected Or Appointed?

Article By:

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Suppose that a corporation's bylaws includes the following two provisions:

1. The Board of Directors shall consist of one or more members, the number thereof to be determined from time to time by the Board.
2. Unless otherwise provided in the Articles of Incorporation or in these bylaws, vacancies and newly-created directorship [sic] resulting from any increase in the authorized number of directors may be filled by a majority of the directors then in office, although less than quorum, or by the sole remaining director.

Suppose further that the minutes of a meeting provide the following:

Mr. X left the room, and after further discussion, upon motion duly made and seconded, the Board approved . . . appointing Mr. X to the Board if the ABC transaction was completed.

Has Mr. X been duly elected or appointed? The Bylaws clearly authorize the Board to determine the number of directors and to fill vacancies, including those resulting from an increase in the authorized number of directors. However, a step seems to be missing. The minutes don't reflect a vote to increase the size of the Board. But the Bylaws don't explicitly require a separate vote. However, the conclusion that a single vote suffices would render superfluous the reference to vacancies and newly-created in Bylaw 2. Interpretations that render language meaningless or superfluous should be avoided.

This was the conundrum that U.S. District Court Judge [Arthur D. Spatt](#) faced in *Intelligent Digital Systems, LLC v. Beazley Ins. Co., Inc.*, 2015 U.S. Dis. LEXIS 82742 (June 23, 2015). Unfortunately, we'll have to wait for an answer because Judge Spatt was ruling on motions for summary judgment. Applying Nevada law, Judge Spatt found that both interpretations of the plain language of Bylaw 2 above to be plausible. This meant that the Bylaw was ambiguous and summary judgment for either

party was improper.

Why are the parties even fighting over the question? The defendant in the action is an insurance company invoking an insured versus insured exclusion from its policy. If the plaintiff was duly elected or appointed, he is an insured under the policy and the exclusion would be triggered. If not, the exclusion does not apply.

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