



Delaware Court Curtails Books & Records, Validates Board-Adopted Forum Selection Bylaws

Posted by William Savitt, Wachtell, Lipton, Rosen & Katz, on Monday January 12, 2015

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A unanimous Delaware Supreme Court yesterday reaffirmed the ability of Delaware companies to organize corporate litigation in the Delaware courts. [United Technologies Corp. v. Treppel, No. 127, 2014 \(Del. Dec. 23, 2014\) \(en banc\)](#).

The case involved an action to produce corporate books and records under Section 220 of the Delaware General Corporation Law, an increasingly frequent preliminary battleground in derivative litigation. Following a familiar pattern, stockholder plaintiffs demanded access to certain books and records of United Technologies Corporation, allegedly to assist in their consideration of potential derivative litigation. UTC asked that all demanding stockholders agree to restrict use of the materials obtained in the inspection to cases filed only in Delaware, pointing out that litigation had already been filed relating to the same matters in the Delaware courts and that any derivative lawsuit would be governed by Delaware law. Then, further evincing its concern to organize corporate governance litigation in the courts of Delaware, UTC's board adopted a forum selection bylaw during the pendency of the Section 220 lawsuit.

The stockholder plaintiff nevertheless refused to agree to the Delaware forum condition, insisting on his right to use UTC's books and records to bring litigation in any court. The parties tried the case to the Court of Chancery, which concluded that it lacked the statutory power to enter the order and thus ruled for the plaintiff.

The Supreme Court reversed. Emphasizing that "the stockholder's inspection right is a 'qualified' one," Chief Justice Strine's decision held that "the Court of Chancery has wide discretion to shape the breadth and use of inspections under § 220 to protect the legitimate interests of

Delaware corporations,” including through use restrictions related to forum. In remanding to the Court of Chancery to exercise this discretion, the Supreme Court instructed that the Vice Chancellor should consider that a corporation has a “legitimate interest in having consistent rulings on related issues of Delaware law, and having those rulings made by the courts of this state,” and a similarly legitimate interest in avoiding undue expense in defending against duplicative derivative lawsuits. The Supreme Court also [reaffirmed](#) the power of boards to adopt [forum selection bylaws](#), noting that such bylaws demonstrate a corporation’s interest in rationalizing stockholder litigation, and once more endorsed board-adopted bylaws as valid and enforceable against stockholders who purchased shares before adoption.

The *Treppel* decision demonstrates again the tools available to Delaware companies to manage litigation relating to the duties of directors. The multijurisdictional stockholder litigation problem extends to derivative as well as merger suits. Forum selection bylaws and the courts’ statutory powers, as invoked and clarified here, are complementary parts of the solution.