



Forum-Selection Bylaws—Another Attack Rebuffed

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Editor's note: [Eric M. Roth](#) and [Eric S. Robinson](#) are of counsel at Wachtell, Lipton, Rosen & Katz. This post is based on a Wachtell Lipton publication by Mr. Roth, Mr. Robinson, and [Aneil Kovvali](#). The memorandum discusses the continued judicial acceptance of exclusive forum bylaws, which were put forward by Wachtell Lipton partner Theodore N. Mirvis and discussed by him on the Forum [here](#), [here](#), and [here](#). This post is part of the [Delaware law series](#); links to other posts in the series are available [here](#).

In previous posts (available [here](#) and [here](#)), we have tracked the increasing judicial acceptance of forum selection bylaws adopted by Delaware corporations in the wake of the 2013 Court of Chancery decision in *Chevron* and the 2015 enactment of Section 115 of the Delaware General Corporation Law. Some plaintiff's law firms nevertheless continue to file breach of fiduciary duty claims in other states against Delaware companies that have adopted forum selection bylaws, in apparent response to the Court of Chancery's recent crackdown on [disclosure-only settlements](#). [On December 12, 2016], a Missouri state court rejected the most recent attempt to circumvent a Delaware forum bylaw, amplifying the trend toward enforcement of such bylaws adopted in anticipation of, or in connection with, a potential corporate transaction.

Monsanto Company is a Delaware corporation headquartered in Missouri. In the weeks leading up to its approval of a \$66 billion merger agreement with Bayer AG, the Monsanto board adopted a bylaw requiring that any fiduciary duty litigation against the company or its directors be brought in the Delaware courts.

After Monsanto mailed its proxy statement for the merger, a shareholder plaintiff sued Monsanto, Monsanto's board and financial advisors, and Bayer in Missouri state court, alleging that Monsanto's directors breached their fiduciary duties in negotiating the merger and issuing a misleading proxy statement, and that the financial advisors and Bayer aided and abetted that purported breach. In response to the defendants' motions to dismiss the action, plaintiff argued that enforcement of Monsanto's forum selection bylaw would infringe his federal and state constitutional rights because jury trials are unavailable in the Delaware Court of Chancery. The Missouri court rejected plaintiff's arguments and dismissed the action.

This result is consistent with federal appellate precedents that have enforced forum selection clauses in bilateral contracts even when the designated forum would not provide a jury trial. In light of this decision and other recent precedents confirming the validity and enforceability of forum selection bylaws, Delaware companies should continue to consider the adoption of state-of-the-art bylaws to manage opportunistic shareholder litigation brought in forums other than Delaware.