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Court of Chancery Reaffirms Validity of Forum Selection Charter Provision

Posted by Theodore Mirvis, Wachtell, Lipton, Rosen & Katz, on Friday November 15, 2013

Editor's Note: Theodore N. Mirvis is a partner in the Litigation Department at Wachtell, Lipton, Rosen & Katz. The following post is based on a Wachtell Lipton memorandum by Mr. Mirvis, David A. Katz, William Savitt, and Ryan A. McLeod. This post is part of the Delaware law series, which is cosponsored by the Forum and Corporation Service Company; links to other posts in the series are available here.

The Delaware Court of Chancery recently determined that forum selection provisions in corporate charters—much like forum selection bylaws—are presumptively valid, and provided guidance on the appropriate procedure to enforce such provisions against a stockholder who files suit in violation of them. *Edgen Grp. Inc. v. Genoud*, C.A. No. 9055-VCL (Del. Ch. Nov. 5, 2013) (Trans.).

The dispute arose after the Edgen Group announced that it had agreed to sell itself in a premium, all-cash, sales transaction to an unrelated third party. Edgen's certificate of incorporation includes a provision that provides that any claim of breach of fiduciary duty by an Edgen stockholder must be filed in Delaware. Nevertheless, a putative class action challenging the merger was filed in Louisiana state court. In response, Edgen filed suit against the stockholder in Delaware, asking the Court of Chancery to enjoin him from proceeding in Louisiana.

The Court of Chancery denied Edgen's motion for a temporary restraining order to stop the plaintiff from proceeding in Louisiana. The Court noted that "the ability of plaintiff's counsel to sue in multiple forums is a factor that imposes materially increased costs on deals and effectively disadvantages stockholders as a whole," and recognized that corporations have properly adopted forum selection provisions in charters and bylaws in response "in an effort to reduce the ability of plaintiff's counsel to extract rents." The Vice Chancellor went on to hold that "[t]he forum selection provision in the charter is valid as a matter of Delaware corporate law," and that "the [stockholder] here has facially breached the exclusive forum clause" by suing for alleged breaches of fiduciary duty outside of Delaware. Nevertheless, the Court observed that Edgen's pursuit of an anti-suit injunction was "the most aggressive" path it could take and expressed concern that such a

remedy “creates potential issues of interforum comity.” Citing Chancellor Strine’s foundational *Chevron* decision, the Vice Chancellor expressed a preference “that the forum selection provision would be considered in the first instance by . . . the court where the breaching party filed its litigation, not through an anti-suit injunction in the contractually specified court.” The Court did note, however, that “in the right case an anti-suit injunction [may be] appropriate.”

The *Edgen* case adds to the growing body of law supporting the validity of forum selection bylaws and charter provisions. The decision indicates that the first line of enforcement is in the court where suit is improperly filed, and that anti-suit injunctions to support forum provisions will not be freely granted in Delaware. The decision counsels that corporations first move to dismiss suits filed in breach of these forum selection bylaws and charter provisions, which, as we previously noted, should be respected and enforced by other courts in deference to Delaware law.