

June 25, 2013

Delaware Court of Chancery Upholds Forum Selection Bylaws

The Court of Chancery today held that directors of Delaware corporations may validly adopt bylaws limiting the courts in which certain types of internal-affairs shareholder litigation can be brought. [Boilermakers Local 154 Ret. Fund v. Chevron Corp., C.A. No. 7220-CS \(Del. Ch. June 25, 2013\)](#). This important decision thus authorizes board-adopted forum selection bylaws—an [innovation](#) of this Firm—as a potential solution to the duplicative shareholder litigation epidemic about which we have [written previously](#).

As Chancellor Strine explained, “a forum selection bylaw is a provision in a corporation’s bylaws that designates a forum as the exclusive venue for certain stockholder suits against the corporation, either as an actual or nominal defendant, and its directors and employees.” Such bylaws aim to regulate shareholder class actions alleging breaches of fiduciary duty (such as merger litigation), derivative suits, and other corporate-governance or internal-affairs cases. In February 2012, a shareholder plaintiffs’ law firm began a coordinated attack on the boards of twelve different companies that had unilaterally adopted forum selection bylaws without shareholder approval. Two of those companies, Chevron and FedEx, chose to defend their bylaws, and they sought a prompt ruling from the Court as to their statutory validity.

Emphasizing the broad powers of Delaware boards to enact bylaws, Chancellor Strine concluded that the forum selection bylaws easily fit within the scope permitted by the statute. Drawing an analogy to the shareholder rights plan—which, like the forum selection bylaw, was attacked as an excessive exercise of director authority—the Chancellor rejected plaintiffs’ “position that board action should be invalidated or enjoined simply because it involved a novel use of statutory authority.” Thus, the Court held, “[j]ust as the board of Household was permitted to adopt the pill to address a future tender offer that might threaten the corporation’s best interests, so too do the boards of Chevron and FedEx have the statutory authority to adopt a bylaw to protect against what they claim is a threat to their corporations and stockholders, the potential for duplicative law suits in multiple jurisdictions over single events.”

Nor was the Court troubled by the fact that the bylaws were adopted by directors without shareholder approval, because “the overarching statutory and contractual regime the stockholders buy into explicitly allows the board” to unilaterally adopt and amend bylaws where permitted by the corporation’s charter. Finally, the Chancellor declined to credit plaintiffs’ “parade of horrors”—“an array of purely hypothetical situations in which they say that the bylaws of Chevron and FedEx might operate unreasonably”—because the bylaws will be subject to a situational reasonableness review whenever they are enforced and directors are always subject to fiduciary obligations.

Today’s decision endorses the creative power of directors to adopt bylaws designed to promote the best interests of corporations and their stockholders when made on the basis of informed deliberation. We recommend that all Delaware boards carefully consider whether to adopt a forum selection bylaw.

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