August 22, 2014

Progress and Challenges in the Battle against Multiforum Stockholder Litigation

Just over a year ago, the Delaware Court of Chancery upheld the facial validity of exclusive forum bylaws adopted by corporate boards as a means of rationalizing stockholder litigation. In the time since Chancery's landmark *Chevron* opinion, numerous corporations have adopted exclusive forum bylaws, and courts in New York, Texas, Illinois, Louisiana, and California have enforced such bylaws against stockholders bringing duplicative lawsuits in violation of their terms. The result, as one commentator recently noted, has been to disincentivize duplicative filings and reduce the concomitant litigation "deal tax" on merging parties. Yet, despite this progress, pernicious multijurisdictional litigation persists. A recent decision from a court in Oregon illustrates the potential harm from such litigation and the importance of continued authoritative articulation of the law to ensure the efficacy of exclusive forum bylaws. *Roberts* v. *TriQuint SemiConductor, Inc.*, No. 1402-02441 (Or. Cir. Ct. Aug. 14, 2014).

The *TriQuint* case involved a challenge to the stock-for-stock merger between TriQuint Semiconductor and RF Micro Devices. Cognizant of the heightened risk of wasteful, duplicative litigation attendant to merger transactions, TriQuint's board adopted a bylaw in connection with its approval of the transaction designating Delaware courts as the exclusive forum for intracorporate stockholder litigation. Following the announcement of the deal, and as the board had feared, TriQuint stockholders filed duplicative lawsuits in Delaware and Oregon courts challenging the transaction and alleging that TriQuint's directors entered into the merger only to fend off an activist stockholder's proxy contest threat. In a June opinion, Vice Chancellor Noble of the Delaware Court of Chancery denied expedition, holding that the stock-for-stock transaction was due business judgment deference under longstanding precedent from the Delaware Supreme Court and that the plaintiffs failed to articulate even a colorable claim against the directors.

Defendants then moved to dismiss the Oregon suits as barred by the exclusive forum bylaw and for failure to state a claim. The Oregon court denied the motions. While the court acknowledged *Chevron*'s teaching that "bylaws are not contractually invalid simply because they were adopted unilaterally," it nevertheless relied on non-Delaware authority, expressly disapproved in *Chevron*, to conclude that the board acted "inequitably" because it "enacted the bylaw in anticipation of this exact lawsuit" and without some undefined "ample time" the court believed was needed "for the shareholders to accept or reject the change." Then, even though it conceded that the stock-for-stock merger was entitled to business judgment review, the Oregon court declined to dismiss the lawsuit, apparently finding potential merit in the same Delaware law claims the Delaware Court of Chancery had already ruled were not even colorable.

The Oregon rulings, which stray far from settled and binding Delaware authority, highlight the indefensible cost and procedural unfairness of duplicative multiforum corporate litigation. We continue to believe exclusive forum provisions remain a viable deterrent against such wasteful duplicative litigation. In light of the *TriQuint* case and pending further elaboration and acceptance of the legal principles governing forum bylaws, however, boards should consider adopting such provisions on a "clear day" in advance of any particular anticipated litigation.

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