

## Delaware Chancery Court Upholds Forum Selection Bylaws

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The Delaware Chancery Court held on June 25 that forum selection bylaw provisions, which purport to control the forum in which certain litigation relating to a corporation must be brought, are statutorily and contractually valid and binding on the stockholders of Delaware corporations. Chancellor Strine's decision may relieve Delaware corporations of some of the burdens of time and cost associated with multi-forum litigation.

### Background

Delaware corporations have begun adopting bylaws that set Delaware as the exclusive forum for certain types of litigation:

- derivative actions or proceedings brought on behalf of the corporation;
- actions asserting claims of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to either the corporation or its stockholders;
- actions asserting claims arising pursuant to any provision of the Delaware General Corporation Law (DGCL); and
- actions asserting claims governed by the internal affairs doctrine.

Adoption of these provisions was a reaction to ever-increasing numbers of claims by stockholders, particularly in the context of corporate mergers.

Over the course of three weeks in February 2012, multiple plaintiffs filed 12 complaints in the Delaware Chancery Court against corporations that had adopted such bylaws by action of the board. In response, 10 of the 12 defendant corporations settled the suits by repealing their forum selection bylaw provisions and paying substantial amounts to plaintiffs' counsel. Two defendants, Chevron Corporation and FedEx Corporation, declined to repeal the bylaw provisions at issue and proceeded with the litigation.

Chancellor Strine consolidated the two remaining cases, *Boilermakers Local 154 v. Chevron Corp.* and *IClub Investment Partnership v. FedEx Corp.* The Court consolidated the cases because Chevron and FedEx's bylaw forum selection provisions were nearly identical (the text of each appears at the bottom of this Alert), and because the outcome of each case turned on the same questions of law: whether the bylaws were invalid under the DGCL, and whether the bylaws were invalid as a matter of contract law.

### Decision

Chancellor Strine ruled in favor of the defendants on both questions, rejecting the plaintiffs' contentions that the bylaws were beyond the board's authority to enact bylaws under the DGCL and that the bylaws were invalid as a matter of contract law.

With respect to the statutory claim, the plaintiffs contended that the forum selection bylaw provisions were invalid as being beyond the scope of acceptable subject matter for bylaws, as enumerated in Section 109(b) of the DGCL. Section 109(b) states in part that corporate bylaws may contain any provision relating to the business of the corporation, the conduct of its affairs, its rights or powers or the rights or the powers of its stockholders. Plaintiffs contended that the forum selection clause did not relate to any of these enumerated topics. Chancellor Strine disagreed, noting that the provisions clearly addressed the rights of stockholders, because they regulated where stockholders could exercise their rights to bring the types of claims enumerated in the bylaws on behalf of or against the corporation or against its officers or directors.

Plaintiffs also argued that the forum selection bylaw provision was invalid as a matter of contract law, as it was adopted unilaterally by the defendant corporations' boards rather than by the stockholders, and without the stockholders' assent. Chancellor Strine declined to give weight to this argument as well. He first noted that, as conceded by the plaintiffs, forum selection clauses are presumed valid. He went on to note that even forum selection clauses in unilaterally drafted contracts are valid. Most importantly, he explained, bylaws constitute a binding part of the contract between Delaware corporations and their stockholders and that, when a Delaware corporation's charter allows for board adoption of bylaws, stockholders have assented to a contractual framework in which such unilateral choices bind the stockholders until the stockholders take contrary action.

## Implications

Despite Chancellor Strine's strong opinion that forum selection bylaw provisions are valid, Delaware corporations may nevertheless be unable to avail themselves of the protection of such provisions. Under the DGCL, stockholders have the power to amend or repeal an undesirable bylaw (setting aside, for the moment, the question of whether objecting stockholders can get the matter on the agenda of a stockholders meeting). Chancellor Strine also noted that, if stockholders are truly unhappy with board decisions, including with respect to bylaws, they can simply elect new directors.

Further, in refusing to even discuss a series of hypothetical situations offered by plaintiffs demonstrating that the forum selection bylaw provisions could be unfairly applied, Chancellor Strine noted that the case in front of him dealt only with questions of law and whether the bylaw provisions were facially valid. He acknowledged that a plaintiff might be able to present facts supporting the argument that litigating the claim in Delaware was unfair or that the board's enforcement of the forum selection bylaw provision would itself be a breach of fiduciary duty. Whether such facts exist is a question for another day.

Commentators generally agree that the Delaware Supreme Court will uphold Chancellor Strine's decision. In reaching a result, Chancellor Strine emphasized his deferral to the defendant corporations' stated reason for adopting the forum selection bylaw provisions, which was that they addressed the inefficient and costly process of defending identical claims in multiple courts at one time. In a jurisdiction as experienced as Delaware with stockholder litigation, it is hard to imagine that the Delaware Supreme Court would disagree with this reasoning.

## Text of Bylaws at Issue

The following is the text of the bylaw provisions on which the Court of Chancery ruled.

**FedEx's bylaw provision:** *"Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw]."*

**Chevron's bylaws** contained an identical provision but were amended after the commencement of the litigation to include federal courts in Delaware in addition to the Delaware Court of Chancery.

As amended, **Chevron's bylaw provision reads:** *"Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the state of Delaware, in all cases subject to the court's having personal jurisdiction over the indispensable parties named as defendants. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw]."*

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