



Delaware Chancery Court Upholds Forum Selection Bylaws

June 27, 2013

On June 25, 2013, Chancellor Strine issued a long-awaited decision in the *Boilermakers Local 154 Retirement Fund v. Chevron Corporation* and *Iclub Investment Partnership v. FedEx Corporation* cases, rejecting legal challenges to the validity of director-adopted bylaw provisions mandating Delaware as the exclusive forum for certain types of stockholder litigation.

In recent years, plaintiff law firms have increasingly brought lawsuits against Delaware corporations in multiple state and federal courts, particularly in connection with merger-related litigation. Defending and resolving these actions can be challenging and burdensome because of the lack of any definitive means to consolidate or stay similar actions pending in different jurisdictions and the risk that other jurisdictions may misapply Delaware law. To address this problem, a number of corporations in recent years have adopted bylaws providing that certain claims against the corporation and its directors and officers, including stockholder derivative suits and fiduciary duty suits, may only be litigated in the courts of the corporation's jurisdiction of incorporation.

Chancellor Strine held that the forum selection bylaws of Chevron and FedEx, both Delaware corporations, were valid as a general matter, although their enforcement could be subject to challenge in situations where their enforcement would unreasonably burden stockholders or breach the board's fiduciary duties (for example, by precluding a stockholder from bringing a lawsuit it would otherwise be entitled under law to bring). Chancellor Strine expressly disagreed with an earlier decision by a California federal court in *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011), which concluded that a board-adopted forum selection bylaw of a Delaware corporation was invalid because the stockholders did not consent to be bound by it.

Background

Under Delaware law, a corporation may, in its certificate of incorporation, authorize its board of directors to adopt or amend bylaws unilaterally. Both Chevron and FedEx, like many Delaware corporations, had such provisions in their certificates of incorporation. In reliance on that authority, the boards of directors of Chevron and FedEx adopted bylaws designating, in the case of Chevron, the state or federal courts located in Delaware and, in the case of FedEx, the Delaware Court of Chancery, as the sole and exclusive venue for any derivative action, any action asserting a claim of breach of fiduciary duty, any action asserting a claim under a provision of the Delaware General Corporation Law and any action asserting a claim governed by the "internal affairs" doctrine. The bylaws also provided that the corporation could consent in writing to the selection of an alternative forum.

Plaintiffs challenged the bylaws, arguing, among other things, that the bylaws were beyond the boards' authority as a substantive matter under Delaware law and that the bylaws were

contractually invalid because they were unilaterally adopted by the boards of Chevron and FedEx without stockholder consent.

Analysis

As an initial matter, Chancellor Strine found that forum selection bylaws were substantively within the Chevron and FedEx boards' authority. He noted the long-standing Delaware principle that bylaws are generally procedural and process-oriented, and that the forum selection provisions were consistent with that principle because they regulated where, rather than whether, a stockholder could sue. Chancellor Strine also held that the unilateral adoption of these bylaw provisions was well within the boards' powers.

Chancellor Strine then noted that when stockholders purchased Chevron or FedEx stock, they were on notice that the certificates of incorporation gave the boards the authority to adopt and amend bylaws unilaterally, and that board-adopted bylaws were binding on stockholders (subject to any subsequent repeal or amendment by the requisite vote of stockholders).

Even though forum selection bylaws were determined to be statutorily and contractually valid, Chancellor Strine indicated that such bylaws would not be enforceable in situations where (1) under the principles adopted in *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971), they were used for inequitable purposes inconsistent with the directors' fiduciary duties or (2) enforcement would be unreasonable under the standards established for the evaluation of contractual forum selection clauses by the United States Supreme Court in its decision in *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972).

It remains to be seen whether the plaintiffs appeal Chancellor Strine's decision, and how courts in jurisdictions outside of Delaware will address the forum selection question if a stockholder seeks to pursue a non-Delaware forum despite a director-adopted bylaw provision designating a Delaware forum. Nevertheless, Chancellor Strine's opinion removes some of the uncertainty relating to the legal propriety of forum selection bylaws in Delaware and provides a framework for assessing claims relating to the enforcement of such bylaws in the future.

The decision provides an impetus for boards of Delaware corporations, taking into account their particular governance arrangements and giving due regard to the recommendation policies of proxy advisory firms, to consider (or re-consider) adopting forum selection bylaws to the extent they have authority to do so under their corporation's certificate of incorporation. Given that the application and enforceability of forum selection bylaws could, under certain circumstances, be viewed as inequitable and in breach of the directors' fiduciary duties, forum selection bylaws should include a right of the corporation or its board of directors to waive their application or to consent to the selection of an alternative forum. In addition, the decision does not address the use of forum selection bylaws for a broader set of potential claims, such as certain federal securities law actions, for which federal law provides an exclusively federal forum.

You can download a copy of the opinion by clicking [here](#).

For more information about the decision or related matters, please contact any of the members of our Mergers and Acquisition or Litigation Practice, including those listed below.

[Lee Meyerson](#)
(212) 455-3675
lmeyerson@stblaw.com

[Bill Curbow](#)
(212) 455-3160
wcurbow@stblaw.com

[Mario Ponce](#)
(212) 455-3442
mponce@stblaw.com

[Eric Swedenburg](#)
(212) 455-2225
eswedenburg@stblaw.com

[Avrohom J. Kess](#)
(212) 455-2711
akess@stblaw.com

[Joe McLaughlin](#)
(212) 455-3242
jmclaughlin@stblaw.com

[Paul Gluckow](#)
(212) 455-2653
pgluckow@stblaw.com

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UNITED STATES

New York

425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston

2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto

2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.

1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London

CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing

3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul

West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo

Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo

Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000