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ALERTS

Financial, Corporate Governance And M&A Litigation Alert - Delaware Court Of Chancery Refuses To Invalidate Forum-Selection Bylaws

June 28, 2013 | Atlanta | Chicago | Columbus | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

On June 25, 2013, the Delaware Court of Chancery refused to invalidate forum-selection bylaws which required that lawsuits regarding most shareholder suits be brought in Delaware.

In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 2013 Del. Ch. LEXIS 154 (Del. Ch. June 25, 2013), plaintiffs challenged identical bylaws that had been adopted unilaterally by the boards of directors of two corporations. Those bylaws provided that, absent written consent, actions asserting 1) claims under the Delaware General Corporation Law, 2) derivative claims, 3) breach of fiduciary duty claims against corporate offers, directors, or employees and 4) claims governed by the internal affairs doctrine must be filed in state or federal court sitting in Delaware. The rationale offered for adopting the bylaws was to avoid the costs of having to defend against the same claim in multiple courts at one time.

Chancellor Strine held that if a corporation's certificate of incorporation authorizes its board to adopt bylaws, the board has the power under the Delaware General Corporation Law to adopt a forum-selection bylaw such as those at issue. The court noted that the DGCL provides that bylaws may contain any provision concerning a corporation's affairs that is not inconsistent with law. Because the forum-selection bylaws at issue clearly related to the corporations' affairs and because Delaware law enforces forum-selection clauses in contracts, the court held there was no basis for finding the bylaws invalid as a matter of law.

Chancellor Strine also rejected plaintiffs' argument that the bylaws were invalid as a matter of contract law because they had been adopted by the boards unilaterally, without a shareholder vote. The court noted that "bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders, in the sense that the certificate of incorporation may authorize the board to amend the bylaws' terms and that stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations."

Left undecided were plaintiffs' claims that the boards at issue had breached their fiduciary duty in enacting the bylaws in the first place. The court also noted that if a shareholder should file suit in a forum other than that allowed by the bylaws, the shareholder is free to argue that the bylaw was being applied inequitably in breach of the directors' fiduciary duties under *Schnell v. Chris-Craft Indus.*, 285 A.2d 437 (Del. 1971), or that enforcement of the bylaw in that specific case would be unreasonable under the standards set out in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

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A bylaw requiring that derivative and similar claims be brought in the state of incorporation provides distinct benefits to a corporation, regardless of the state of incorporation. The corporation will not be subjected to the extraordinary expense of fighting the same claims in multiple jurisdictions, and any such claims will be decided by the courts that are most familiar with the law that governs those claims. Thus, it is not surprising that over 250 publicly held companies have already adopted such provisions. *The Boilermakers Local 154* decision puts to rest the uncertainty caused by *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174-75 (N.D. Cal. 2011), in which a federal court had refused to enforce a forum selection by¬law that had been adopted by Oracle, a Delaware corporation, because it had not been made a part of the company's corporate charter and adopted by shareholders.

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