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Commentary

DELAWARE CHANCERY COURT FINDS FORUM-SELECTION BYLAW PROVISIONS ENFORCEABLE

Jordan Eth, Esq., and Kevin A. Calia, Esq. [\[FNaa1\]](#)

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Morrison & Foerster partners Jordan Eth and Kevin A. Calia, who specialize in corporate and securities law, discuss a recent landmark Delaware court decision that lets companies adopt bylaws effectively requiring most shareholder suits to be brought in the state.

A decision issued June 25 by the Delaware Court of Chancery, [Boilermakers Local 154 Retirement Fund v. Chevron Corp., No. 7220-CS, 2013 WL 3191981 \(Del. Ch. June 25, 2013\)](#), may make it easier for Delaware corporations to minimize the risk of facing duplicative derivative lawsuits in multiple jurisdictions. As we wrote previously, there has been a significant rise in the filing of duplicative derivative actions brought in multiple courts against the same defendants for the same alleged wrongdoing.

To combat the inefficiencies of facing redundant suits in multiple jurisdictions, many Delaware corporations have adopted bylaws selecting a single, exclusive forum for bringing suits related to the internal affairs of the corporation. Usually, these provisions select the Delaware Court of Chancery (or the federal courts in Delaware) as the exclusive forum.

In the June 25 decision, Chancellor Leo Strine rejected a challenge to forum-selection provisions adopted in the bylaws of Chevron and FedEx. That decision is subject to review by the Delaware Supreme Court in the likely event that plaintiffs appeal.

Chancellor Strine held that Delaware statutes provide broad authority to adopt bylaws “relating to the business of the corporation, the conduct of its affairs, and ... the rights or powers of its stockholders.” [8 Del. C. § 109\(b\)](#). Bylaws channeling lawsuits regarding the internal affairs of a Delaware corporation into Delaware courts fall within this broad authority. Thus, forum-selection provisions adopted in bylaws are presumptively valid and enforceable.

Chancellor Strine also rejected plaintiffs' argument that these bylaw provisions could not be enforced because

shareholders did not vote to approve the bylaws. Under Delaware law, “bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders.” Delaware law allows the board of directors to adopt bylaws without a shareholder vote and most corporations include this power in their certificates of incorporation. An agreement to be bound by validly enacted bylaws is thus “an essential part of the contract agreed to when an investor buys stock in a Delaware corporation.”

Chancellor Strine noted that there are several ways stockholders would be protected against unreasonable applications of forum-selection provisions. For example, stockholders can repeal a bylaw provision by majority vote. Courts will also review the reasonableness of applying forum-selection provisions in specific cases. But, “in most internal affairs cases the bylaws will not operate in an unreasonable manner.”

The Chevron decision will give corporations that have already adopted forum-selection bylaws comfort that such provisions will be enforced. It also provides a good opportunity for corporations to take another look at the potential benefits of adopting a forum-selection bylaw.

[\[FNaa1\]](#). Jordan Eth and Kevin A. Calia are partners with **Morrison & Foerster** in San Francisco. Eth is co-chair of the firm's securities litigation, enforcement and white-collar defense group. Calia, whose practice includes securities, antitrust and general commercial litigation, has experience representing public companies and their officers and directors in securities class actions, derivative actions, SEC investigations, internal investigations, and other litigation in state and federal courts.