

## Recent Decisions Confirm That Forum Selection Bylaws Are Best Considered on a Clear Day - But May Be Beneficial Later as Well

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"Exclusive forum" bylaws and charter provisions are a powerful tool for managing the risk of parallel corporate governance litigation against a company and its directors in multiple forums, allowing stockholders to bring such litigation but requiring that they bring it in one specified jurisdiction, typically the company's state of incorporation. The Delaware Chancery Court, in its 2013 Chevron decision, held that such provisions are generally enforceable, and courts in several other states have dismissed stockholder litigation based on Delaware forum selection provisions. As a result, more companies are adopting such provisions.

We have previously noted that public companies may wish to consider adopting such provisions, either as part of their general corporate governance regime or when they see events on the horizon — such as a potential M&A process — that may spur intra-corporate litigation, and reviewed several of the factors, including potential stockholder reaction, that companies might want to take into account. Two conflicting recent decisions highlight the potential significance of the timing of enactment of exclusive forum bylaws, relative to the timing of the actions that may be the subject of litigation.

### *Oregon Court Declines to Enforce an Exclusive Forum Provision Adopted Concurrently with Board Approval of Merger Agreement*

Bucking the general trend towards enforcement of exclusive forum bylaws, an Oregon court, in *Roberts v. TriQuint SemiConductors, Inc.*, refused to enforce a corporate bylaw designating Delaware as the exclusive forum for intra-corporate litigation. In February 2014, TriQuint (a Delaware corporation headquartered in Oregon) announced a merger agreement with RF Micro Devices, and on the same day adopted by action of the board the exclusive forum bylaw. As the court noted, before agreeing to the merger, TriQuint had (in December 2013) received from an activist shareholder a letter announcing the activist's intent to nominate a competing slate of directors at the next shareholder meeting.

Following announcement of the merger agreement, TriQuint shareholders filed suits in both Delaware and Oregon. In Delaware, the court declined the shareholders' request to expedite the litigation, finding that the plaintiffs had failed to state sufficiently a claim for those purposes, though the litigation continued. In Oregon, TriQuint moved to dismiss the suit based on its exclusive forum provision, but the Oregon court refused to enforce the provision.

While the Oregon court acknowledged the Delaware Chancery Court's decision in *Chevron*, the court held that TriQuint's bylaw should not be enforced because the bylaw was enacted at the same board meeting during which the board approved the merger that was the subject of the underlying suit. The court suggested that the bylaw would have been enforced "had the board . . . adopted it prior to any alleged wrongdoing, and with ample time for shareholders to accept or reject the change." As a result, TriQuint must now defend against virtually identical allegations in two different courts, unless it can convince one of the courts to stay the litigation in deference to the other.

#### *Delaware Chancery Court Enforces an Exclusive Forum Provision Adopted Concurrently with Board Approval of Merger Agreement*

Soon after the Oregon court's decision in *TriQuint*, the Delaware Chancery Court, in *City of Providence v. First Citizens Bancshares, Inc.*, enforced an exclusive forum provision that — like the provision in *TriQuint* — was enacted on the day the company announced a merger agreement.

*First Citizens* arose from a challenge to the agreement of First Citizens BancShares, Inc. ("FC North"), a Delaware corporation based in North Carolina, to acquire by merger First Citizens Bancorporation, Inc. ("FC South"), a company incorporated and based in South Carolina. On the day the merger was announced, FC North's board also amended the company's bylaws to, among other things, adopt a forum selection clause designating North Carolina courts as the exclusive forum for most intra-corporate disputes. The City of Providence, an FC North stockholder, filed suit in Delaware Chancery Court challenging the validity of the forum selection clause and asserting various class and derivative claims in connection with the announced merger. Because FC North designated North Carolina (and not Delaware) as the exclusive forum, this was the rare case in which the enforceability of an exclusive forum bylaw was decided in the Chancery Court. The court upheld the forum selection bylaw and dismissed the stockholders' action.

The Chancery Court rejected the stockholders' argument that enforcing the forum selection bylaw would be unjust because it was adopted simultaneously with the announcement of the merger. The court found that the stockholders did not call into question the integrity of North Carolina's courts or otherwise explain how the board would improperly advance its own self-interests by having challenges to the merger agreement adjudicated in North Carolina. According to the court, without "well-pled allegations . . . demonstrating any impropriety in [the] timing," the fact that the board adopted the forum selection provision "on an allegedly 'cloudy' day when it entered into the merger agreement with FC South rather than on a 'clear' day is immaterial."

In so holding, the Delaware court noted the *TriQuint* decision and explained that, to the extent *TriQuint* rested on an interpretation of Delaware law, it was "based on a misapprehension of Delaware law regarding the facial validity and as-applied analysis of forum selection bylaws."

### *Conclusion*

While *First Citizens* provides some comfort to boards considering adopting an exclusive forum provision during, or even at the very end of, a transaction process, in the typical case—where a board has designated Delaware as the exclusive forum—those provisions will be enforced in courts outside Delaware. The *TriQuint* decision shows that enacting an exclusive forum provision on a clear day, before a company sees the storm clouds of litigation on the horizon, may support the enforceability of the provision in courts outside Delaware. Failing that, in a transaction context, sell-side boards should consider enacting such provisions (and buyers should consider discussing the issue with potential sellers) as early in the transaction process as is practical to minimize the potential that a court will decline to give effect to the forum selection provision.

For companies that are unable to do so and find themselves in a transaction process or on the cusp of entering into a transaction without an exclusive forum provision in place, it is still worth considering whether to adopt such a provision. The *TriQuint* decision notwithstanding, courts may enforce the provision, particularly given the Chancery Court's decision in *First Citizens*. Indeed, the majority of courts facing the question have enforced exclusive forum provisions even when they were enacted during a transaction process. On the other hand, even if the court declines to enforce the provision, the company is likely no worse off for having enacted it. *TriQuint*, for example, likely would have faced duplicative litigation over the transaction in the same two forums even if its board had not enacted an exclusive forum bylaw.