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Proposed DGCL Amendment Aims to Codify Forum Selection Bylaws

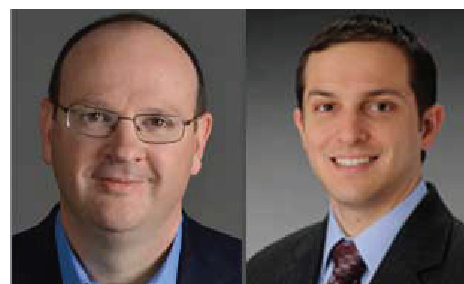
By Paul J. Collins and Michael J. Kahn

In March, the Corporation Law Council of the Delaware State Bar Association proposed several amendments to the Delaware General Corporation Law. Responding to two seminal opinions from the Delaware Chancery Court regarding forum selection bylaws—*Boilermakers Local 154 Retirement Fund v. Chevron*, 73 A.3d 934 (Del. Ch. 2013), and *City of Providence v. First Citizens Bancshares*, 99 A.3d 229 (Del. Ch. 2014)—the proposal would give exclusive forum bylaws the official blessing of the DGCL. That is, with one caveat: Although the as-amended DGCL would codify the legality of articles of incorporation or bylaws that select Delaware as the exclusive forum for litigation arising from the internal affairs of Delaware corporations, the proposal would prohibit corporations from denying plaintiffs access to Delaware courts through the use of provisions designating another forum as the exclusive forum. In other words, as discussed below, the amendment codifies *Chevron*, which approved a bylaw designating Delaware as the exclusive forum for stockholder litigation, but overturns *First Citizens*, which designated North Carolina (the corporation's principal place of business) as the exclusive forum.

'Chevron' and 'First Citizens'

In *Chevron*, then-Chancellor Leo E. Strine Jr. upheld bylaws adopted by the boards of Chevron and FedEx providing that litigation regarding the internal affairs of the corporations must be conducted in Delaware. The boards enacted the bylaws in response to the prospect of multiforum litigation, which the companies argued imposes high costs on corporations (and their stockholders) without corresponding benefits. The court held that the bylaws are legal under Section 109(b) of the DGCL, as they deal with the internal affairs of the corporations, as well as under common law as a contract among the directors, officers and stockholders of the corporations. Further, the bylaws are appropriate because they are "process-oriented," as "they regulate where stockholders may file suit, not whether the stockholder may file suit or the kind of remedy that the stockholder may obtain," the court held. Moreover, the court found that the bylaws are sensible because Delaware is "the most obviously reasonable forum" to select given that "internal affairs cases will be decided in the courts whose Supreme Court has the authoritative final say as to what the governing law means."

In *First Citizens*, Chancellor Andre G. Bouchard addressed a similar bylaw, but one that made North Carolina the exclusive forum for such litigation. He held the bylaw valid for the same reasons that the bylaws were found valid in *Chevron*. Although recognizing that Delaware might be the "most obviously reasonable forum," he reasoned that North Carolina



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was also sensible because the corporation and most of its business were based there, its courts were perfectly able to adjudicate the dispute at issue, and no Delaware public policy counseled against allowing litigation to proceed there.

Since *Chevron*, courts in numerous states, including New York, Illinois, Ohio, Texas and California, have enforced bylaws designating Delaware as the exclusive forum for internal affairs litigation. The two exceptions to date—*Roberts v. TriQuint Semiconductor*, No. 1402-02441 (Or. Cir. Ct. Aug. 14, 2014), and *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011)—rested on a "misapprehension of Delaware law," according to Bouchard.

The Proposal

The proposed amendment provides that "the certificate of incorporation or the bylaws may require … [that] intracorporate claims shall be brought solely and exclusively in any or all of the courts in this state, and no provision of the certificate of incorporation or the

bylaws may prohibit bringing such claims in the courts of this state." In an explanatory paper accompanying the proposal, the Corporation Law Council commented that the amendment "would give statutory force to the *Boilermakers* decision" but "would not address the validity of a bylaw specifying a non-Delaware venue" like that at issue in *First Citizens* (other than "that no such provision could preclude bringing intracorporate claims in Delaware courts").

Consistent with the intent of forum selection provisions, the CLC's proposed amendment, if enacted, would continue to serve as a bulwark against "abusive stockholder litigation." Indeed, as the number of corporations adopting such provisions has increased (including provisions adopted contemporaneously with significant M&A transactions), the number of transactions resulting in suits in multiple jurisdictions has declined. According to Cornerstone Research's Review of 2014 M&A Litigation, 60 percent of transactions involving targets incorporated in Delaware resulted in suits filed in two or more jurisdictions in 2012, but just 40 percent of transactions involving Delaware-incorporated targets resulted in multiforum litigation in 2014.

Is Federal Court Now the Alternative Venue of Choice?

Even if adopted, however, the CLC's proposal may not be entirely effective in preventing multijurisdictional litigation. In several recent transactions in which the boards of Delaware target corporations have enacted forum selection provisions designating Delaware as the exclusive forum for stockholder litigation, stockholders have attempted to circumvent Delaware by pleading claims under Section 14(a) of the Securities Exchange Act of 1934 and SEC Rule 14a-9, and appending Delaware fiduciary duty claims pursuant to the federal courts' supplemental jurisdiction under 28 U.S.C. Section 1367(a).

Following announcement of the sale of Safeway Inc. to Albertsons in 2014, for example, stockholders brought fiduciary duty litigation in the Delaware Court of Chancery, Safeway's state of incorporation, and the California Superior Court for Alameda County and the U.S. District Court for the Northern District of California, where Safeway maintained its principal place of business. Although Safeway successfully obtained dismissal of the Alameda County cases based on its bylaw designating the Chancery Court as the exclusive forum for stockholder litigation, the plaintiffs in the federal litigation responded to a motion to dismiss by amending their complaint to assert a Section 14(a) claim, and the case—*Steamfitters Local 449 Pension Fund v. Safeway*, No. 14-cv01670-JSW (filed April 10, 2014)—was settled before the plaintiffs' motion for preliminary injunctive relief was heard.

Likewise, HP's recently announced acquisition of Aruba Networks resulted in lawsuits in both the Chancery Court and the Northern District of California—despite adoption by Aruba's board designating Delaware as the exclusive forum—with federal jurisdiction based on an alleged Section 14(a) claim. That case was captioned *Newfield v. Aruba Networks*, No. 15-cv-01502-JST (filed April 1, 2015).

The Securities Exchange Act's exclusive jurisdiction provision with respect to Section 14(a) claims precludes any guarantee that disputes arising out of public company M&A transactions will be litigated exclusively in a single forum. Because of this, however, many exclusive forum provisions are being drafted to include Delaware federal court as an alternative forum. In addition, although a corporate bylaw cannot divest a federal court of its exclusive jurisdiction over Section 14(a) claims, it remains to be seen whether federal courts will exercise their supplemental jurisdiction under 28 U.S.C. Section 1367 to address Delaware law claims that are otherwise subject to an exclusive forum provision.

Given that Delaware case law—and potentially statutory law, if the proposed amendment is adopted—allows Delaware corporations to insist that internal affairs litigation be conducted in Delaware, and in light of the U.S. Supreme Court's holding in *Kamen v. Kemper Financial Services*, 500 U.S. 90 (1991), that the internal affairs doctrine applies to intracorporate disputes, it would seem that federal courts have a basis to decline supplemental jurisdiction over such claims. Based on 28 U.S.C. Section 1367(c)(2), federal courts may decline supplemental jurisdiction where a state law claim "substantially predominates" over a federal law claim, and based on Section 1367(c)(4), federal courts may decline supplemental jurisdiction where "compelling reasons" counsel against exercising supplemental jurisdiction. Regardless, including a Delaware federal court option in the bylaw would, at a minimum, materially increase the likelihood that any federal litigation would properly be subject to a motion to transfer venue.

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