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Exclusive Delaware and Non-Delaware Forum Bylaw Amendments

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In *City of Providence v. First Citizens BancShares*, __ A.3d__, 2014 Del. Ch. LEXIS 168 (Del. Ch. Sept. 8, 2014), Delaware Court of Chancery Chancellor Andre G. Bouchard extended then-Chancellor Leo E. Strine Jr.'s decision in *Boilermakers Local 154 Retirement Fund v. Chevron*, 73 A.3d 934 (Del Ch. 2013), to address an "issue of first impression"—the validity of a board-adopted bylaw that designates an exclusive forum other than Delaware for intra-corporate disputes—and further clarified the circumstances under which such forum bylaws will be enforced by Delaware courts.

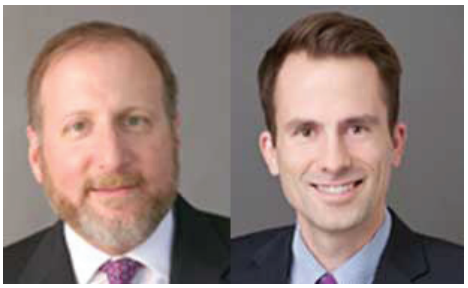
A growing number of public companies have adopted bylaws that designate an exclusive forum in which certain types of claims may be brought against the corporation or its directors and executives. In *Chevron*, Strine held that a bylaw designating Delaware courts as the exclusive forum for certain claims was facially valid. *Chevron* did not present the Chancery Court an opportunity, however, to address the enforceability of a non-Delaware exclusive forum bylaw provision in a real-world "as-applied" context. *Citizens* did.

The Chevron Foundation

In *Chevron*, the plaintiffs made a facial challenge to the validity of forum-selection bylaws adopted by the boards of Chevron and FedEx. The court rejected the challenge on two principal grounds.

First, the court held that the bylaws were statutorily valid under 8 Del. C. Section 109(b), which states that bylaws may "contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." The court explained that the bylaws fit within the scope of 8 Del. C. Section 109(b) "as a matter of easy linguistics" because they addressed internal-affairs claims and thus the "rights" of shareholders, and plainly related to the conduct of the corporation. Moreover, the bylaws were "process-oriented, because they regulate where stockholders may file suit, not whether the stockholder may file suit."

Second, the court held that the bylaws were contractually valid because the Chevron and FedEx certificates of incorporation authorized their boards to adopt bylaws unilaterally. This, in turn, meant that "stockholders have assented to a contractual framework ... [that] recognizes that shareholders will be bound by bylaws adopted unilaterally by their boards."



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The First Citizens Decision

In *Citizens*, the board of the defendant corporation amended its bylaws to designate as the exclusive forum for certain claims the courts of North Carolina—the state in which the defendant corporation maintained its principal place of business and most of its operations. Because the board adopted this forum-selection bylaw at the time the defendant corporation announced a merger with another company, with a controlling shareholder allegedly holding a large stake in both companies, Bouchard reviewed the forum-selection bylaw both "on its face" and "as applied."

Bouchard held that the forum-selection bylaw was enforceable on its face based on "the logic and reasoning of the *Chevron* decision." The court acknowledged that the forum-selection bylaw at issue in *Citizens* established courts in North Carolina rather than Delaware as the exclusive forum, but

saw "nothing in the text or reasoning of *Chevron* [that] can be said to prohibit directors of a Delaware corporation from designating an exclusive forum other than Delaware in its bylaws." The court added that while *Chevron* had indicated that choosing the state of incorporation as the exclusive forum "was the most obviously reasonable forum," the state in which a corporation had its principal place of business and most of its operations can be the "second-most obviously reasonable forum."

The chancellor also explained that *Chevron* outlined an "as applied" analysis guided by *The Bremen v. Zapata Off-Shore*, 407 U.S. 1 (1972): "Chevron cogently articulated the lessons of this case law: ... In *Ingres* [v. CA, 8 A.3d 1143 (Del. 2010)], our Supreme Court explicitly adopted [*Bremen*], and held not only that forum-selection clauses are presumptively enforceable, but also that such clauses are subject to as-applied review under *Bremen* in real-world situations to ensure that they are not used 'unreasonabl[y] and unjustl[y].'" Bouchard went on to note that "an additional lens through which the enforceability of the forum-selection bylaw may be reviewed is under *Schnell v. Chris-Craft Industries* and its teaching that 'inequitable action does not become permissible simply because it is legally possible,'" quoting *Schnell*, 285 A.2d 437, 439 (Del. 1971). In other words, the court provided a framework in which, depending on the allegations and circumstances before it, the court could determine that a facially valid forum-selection provision was unreasonable, unjust and/or inequitable, and thus unenforceable as applied.

The court determined, however, that it was "not unreasonable to apply the forum-selection bylaw" because (1) there were significant contacts between the defendant corporation and North Carolina; (2) jurisdiction could be obtained in North Carolina over the company's directors; and (3) the courts in North Carolina could provide "complete relief." Moreover, the court noted that any concerns regarding the merger, the actions of the directors, or the presence of controlling shareholders would still be subject to judicial review, and that the plaintiff had "not alleged any well-pled facts calling into question the integrity of the federal or state courts of North Carolina."

Of note, the court also rejected the argument that application of a forum-selection bylaw is unjust where shareholders cannot repeal it. The plaintiffs focused on a statement in *Chevron* that board-adopted bylaws can be checked because "stockholders ... can simply repeal them by majority vote," and asserted that repeal was effectively impossible because of the presence of a controlling stockholder. The court responded that the discussion in *Chevron* was "in the abstract" and "I do not interpret either the [Delaware General Corporation Law] or *Chevron* to mandate that a board-adopted forum-selection bylaw can be applied only if it is realistically possible that stockholders may repeal it."

The court found further support for its decision in "fundamental principles of judicial comity," noting that if parties want courts in other states to enforce exclusive Delaware forum-selection bylaws, "then, as a matter of comity, so too should this court enforce a Delaware corporation's bylaw that does not designate Delaware as the exclusive forum."

Varied Decisions on Exclusive Forum Bylaws

Different courts have reached varied decisions on these issues. See, for example, *Roberts v. TriQuint SemiConductor*, No. 1402-02441, at 9-10 (Or. Cir. Ct. Aug. 14, 2014) (declining to enforce a Delaware forum-selection provision adopted close in time to the alleged wrongdoing); *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011) (holding a Delaware forum-selection bylaw unenforceable); but see *Groen v. Safeway*, No. RG14716641, at 2 (Cal. Super. Ct. May 14, 2014) (distinguishing *Galaviz* as "a case that was decided before [*Chevron*] and that involved forum-selection bylaws that were adopted after the majority of the alleged wrongdoing had occurred"). Moreover, the Delaware Supreme Court has yet to address this issue.

Nevertheless, *Chevron* and *Citizens* provide significant guidance to the boards of Delaware corporations considering the adoption of exclusive forum bylaws. Strong arguments can be made that exclusive forum bylaws will be found facially valid in Delaware courts. Provided that there is a significant nexus between the company and the designated forum and there is nothing otherwise "unreasonable," "unjust" or "inequitable" about its application, an exclusive forum bylaw will likely pass "as-applied" scrutiny as well.

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