

Introduction

On June 25, 2013, the Delaware Court of Chancery upheld the validity of forum selection bylaws unilaterally adopted by the boards of directors of Chevron Corporation and FedEx Corporation, both Delaware corporations.¹ The bylaws in question were similar in nature, and the stockholder lawsuits filed in 2012 against Chevron and FedEx included the same substantive threshold legal challenges to the provisions. The consolidated ruling resolved two common questions of law with respect to these provisions, finding: (i) that the challenged bylaws are statutorily valid under the Delaware General Corporation Law (DGCL), and (ii) that the challenged bylaws are contractually valid and enforceable as forum selection clauses. Although the court's decision does not eliminate all possibility of challenges to these types of provisions, the ruling provides clarity on the threshold question of a board of directors' general authority under Delaware law to adopt forum selection bylaws and context for consideration of the appropriateness and usefulness of the board's adoption of such provisions.

Background

Chevron's and FedEx's certificates of incorporation empower their boards to adopt bylaws without requiring stockholder approval. Each company adopted forum selection bylaws covering four types of lawsuits – derivative suits, fiduciary duty suits, DGCL suits and internal affairs suits, and the plaintiffs challenged the validity of those bylaw provisions. The challenged provisions specify the particular forum in which such suits may be brought, subject to the corporation's consent to an alternative forum. These bylaws reflect recent attempts by public company boards to combat the "multiforum litigation" problem – namely, the inefficiencies and costs associated with having to defend against the same claim in multiple courts concurrently. According to sources cited by the defendants in their briefs, over 250 publicly traded companies have adopted similar bylaw provisions in the past three years.

Analysis

In concluding that the bylaws are statutorily valid, the court determined that the forum selection bylaws were within the scope of the boards' authority as they addressed a proper subject matter under Section 109(b) of the DGCL. Under Section 109(b), bylaws may address any subject "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 found the forum selection bylaws to be within the scope of the statute because they address only claims relating to the corporation's internal affairs— i.e., those most central to the corporation/ stockholder relationship – as opposed to external matters such as tort and commercial contract claims. Claims that the bylaws should be invalidated because they do not regulate "traditional" subject matters were rejected, as the court noted the validity of forum selection clauses used in limited liability company and stockholder agreements and emphasized the flexible and evolving nature of the DGCL.

In concluding that the bylaws are contractually valid, the court dismissed the contention that the unilateral adoption of the forum selection bylaws by the board rendered them contractually invalid. The court emphasized that bylaws are part of the "inherently flexible contract between the stockholders and the corporation," and that the DGCL allows that contract to change. The DGCL explicitly permits the certificate of incorporation to confer authority on a corporate board to adopt and amend bylaws unilaterally. As a result, stockholders of Delaware corporations are on notice of the ability of the board to unilaterally amend the bylaws where so authorized and, by purchasing the corporations' shares, have contractually assented to be bound by those amended bylaws, if valid under Delaware law.

Throughout its opinion, the court highlighted various corporate law controls on the misuse of the forum selection bylaws. Both bylaws in question reserved the board's right to consent to an alternative forum and, under Delaware law, stockholders may repeal board-adopted bylaws by majority vote. Stockholders also have annual opportunities to express their displeasure through the election of directors. In addition, certain types of challenges to forum selection provisions still may occur, such as challenges to the reasonableness of enforcing, and breach of fiduciary duty claims related to the enforcement of, forum selection provisions in particular cases.

¹ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, C.A.No. 7220-CS (Del. Ch. June 25, 2013), available at <http://courts.delaware.gov/opinions/download.aspx?ID=190990>

Implications

Assuming the Chancery Court's opinion is upheld on appeal, the decision opens the door for boards of Delaware corporations to adopt appropriate exclusive forum selection bylaws where the corporation's certificate of incorporation empowers the board to adopt bylaws unilaterally. The decision also provides clarity for other Delaware corporations and their investors regarding the basic validity and enforceability of previously adopted bylaws that are similar to the Chevron and FedEx provisions. Boards of Delaware corporations should evaluate proposed or existing provisions in light of this recent decision, bearing in mind the scope of claims covered, the benefit of including a provision allowing the board to waive application of the bylaw and consent to an alternative forum and the corporate law controls outlined by the court. Directors also should weigh the potential benefits of utilizing exclusive forum selection bylaws in light of their specific circumstances, including potential reactions to the adoption of such provisions by their particular stockholders and related proxy advisory firm considerations.

Additional Information

For additional information about implications of the Chancery Court's ruling and forum selection bylaws in general, please contact your principal Squire Sanders lawyer or any of the lawyers listed in this publication.

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