
Delaware Court of Chancery Once Again Upholds Forum Selection Bylaw Requiring Intra-Corporate Litigation to Be Brought in a Forum Chosen by the Board of Directors

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On September 8, 2014, Chancellor Andre G. Bouchard reaffirmed and extended a decision from last year by then-Chancellor, now Chief Justice, Leo E. Strine, Jr. that Boards of Directors may permissibly adopt forum selection bylaws to avoid the expense of multi-forum litigation. In *City of Providence v. First Citizens Bancshares, Inc. (Citizens Bancshares)*, Chancellor Bouchard dismissed litigation challenging a proposed merger holding that the rationale from *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (*Chevron*), in which the court upheld the facial validity of forum selection bylaws requiring litigation be brought in the Delaware courts, equally applied to compel the dismissal of a suit challenging the facial and as-applied validity of a bylaw requiring litigation be brought in the courts of North Carolina.

Plaintiffs' Claims

The plaintiffs challenged the facial validity of the bylaw and asserted a claim for breach of fiduciary duty in connection with the adoption of the bylaw on the same day that the proposed merger was announced. The plaintiffs also challenged the proposed merger by asserting that the board and a controlling shareholder had breached their fiduciary duties in connection with the proposed transaction by agreeing to overpay for the company to be acquired in the transaction to the benefit of the controlling shareholder that had an interest in the company to be acquired. The parties agreed to have the motion to dismiss the validity of the bylaw heard in advance of any preliminary injunction or motions to dismiss the Complaint on other grounds.

The Court's Analysis

Facial Challenges

The court first noted that the forum selection bylaw, like those at issue in *Chevron*, sought to regulate the filing of certain lawsuits into a single forum.¹ The forum selection bylaw was virtually identical to the ones that then-Chancellor Strine found to be facially valid in *Chevron*, except that it selected the forum of the United States District Court for the Eastern District of North Carolina, or, if

that court lacked jurisdiction, any North Carolina State Court, instead of the State or Federal Courts of Delaware. The bylaw in *Citizens Bancshares*, unlike that in *Chevron*, is also applicable only "to the fullest extent permitted by law."

The court then adopted the analysis used by then-Chancellor Strine in *Chevron*. Channeling the suits into North Carolina, where the Company was headquartered and had most of its operations, did not call into question the facial validity of the forum selection bylaw. Nor did it contravene the provisions of the DGCL by depriving the Delaware court of its exclusive jurisdiction to hear and determine matters with respect to the DGCL. The court concluded that the exclusive jurisdiction arguments were hypothetical and did not need to be addressed.

Fiduciary Duty and As Applied Challenges

The court then rejected the argument that the adoption of the bylaw was a breach of fiduciary duty because it was supposedly self-interested. The court concluded the bylaw did not insulate the board's approval of the proposed merger from judicial review, but simply required that that review take place in a court based in North Carolina. The court noted that the court in *Chevron* did not reach the question of as-applied challenges, but only considered the facial validity of forum selection bylaws. The court then applied the test articulated by the United States Supreme Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) in which the court held that forum selection clauses are valid provided they are "unaffected by fraud, undue influence, or overweening bargaining power" and that they should be enforced "unless enforcement is shown ... to be unreasonable."

The court easily dispensed with the as-applied challenges. First, it found no overarching public policy of Delaware that prevented boards from adopting this type of bylaw. Second, it just as easily rejected the argument that the adoption of the bylaws simultaneously with the announcement of the proposed merger was somehow unreasonable. The court concluded that the plaintiff had not alleged any well-pled facts calling into question that the board was advancing the self-interest of the controlling stockholder in adopting the bylaw. The fact that the board adopted the bylaw on an allegedly "cloudy" day when it entered into the merger agreement, rather than on a "clear" day, is immaterial given the lack of well-pled allegations demonstrating any impropriety in the timing of the adoption. Finally, the court rejected the argument that the existence of a majority shareholder somehow made the adoption of the bylaw unreasonable because the minority shareholders could not repeal it. The court rejected this *per se* unreasonable argument noting it would otherwise render questionable all board-adopted bylaws of controlled corporations. The court concluded that the interests of judicial comity also supported its analysis; if "Delaware corporations are to expect, after *Chevron*, that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for intra-corporate disputes, then, as a matter of comity," the Delaware Chancery Court should enforce bylaws designating a forum other than Delaware as the exclusive forum.

Concluding Thoughts

The adoption of a forum selection bylaw can eliminate the unnecessary expense and distraction of dealing with multi-forum litigation, most notably the expense and distraction that comes with the filing of multiple lawsuits in multiple jurisdictions after the announcement of nearly every merger transaction. In light of *Chevron*, and now *Citizens Bancshares*, boards of Delaware companies are empowered to adopt forum selection bylaws to regulate and reduce the costs of such litigation by channeling the suits to the Delaware courts or the courts where the company is headquartered.

In assessing whether or not to adopt such bylaws and whether to apply them in any given case, boards will need to consider whether such bylaws meet their particular needs, including whether certain shareholder groups oppose the adoption of these bylaws, whether to adopt the state of incorporation as opposed to the state where the company is headquartered as the forum, whether to adopt them on a "clear" or "cloudy" day, and other considerations that boards should discuss with their counsel.

¹ The bylaws apply to derivative claims; claims for breach of fiduciary duty by a director or officer of the corporation; claims arising out of the provisions of the DGCL; and claims governed by the internal affairs doctrine.

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