

## The Future of Exclusive Forum Bylaws

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As we previously discussed (*Should Your Board Adopt an Exclusive Forum Bylaw?*, July 2013), in recent years many public companies have adopted “exclusive forum” bylaws, a trend that received a boost when Chancellor Leo E. Strine of the Delaware Court of Chancery issued an opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*<sup>1</sup> rejecting arguments that exclusive forum bylaws adopted by two boards of directors were facially invalid. According to Glass Lewis, following that opinion approximately 70 companies enacted exclusive forum provisions. In October, there was another twist, when the plaintiffs in the *Boilermakers* cases withdrew their appeal to the Delaware Supreme Court. This leaves Chancellor Strine’s opinion as the only Delaware decision directly addressing the issue. Even so, however, this is more likely the end of Act I of this closely watched drama than a final denouement.

Although there are different formulations, an exclusive forum bylaw typically makes a particular jurisdiction (often Delaware) the exclusive forum for litigating certain claims involving the “internal affairs” of a corporation, such as derivative claims asserted on behalf of the corporation and breach of fiduciary claims against directors and officers. This has been trumpeted by some as a solution to the problem of multi-jurisdictional stockholder litigation in which corporations have been compelled to defend against substantially similar claims in multiple states, unnecessarily duplicating costs without any concomitant benefit. Not everyone in the governance space, however, has welcomed this development. Several stockholder activist groups have opposed these bylaw provisions, and neither of the principal proxy advisory firms has wholeheartedly endorsed the idea. Instead, Glass Lewis and Institutional Shareholder Services (ISS) have both indicated that while they make determinations on a case-by-case basis, they will generally oppose exclusive forum bylaws. In fact, Glass Lewis has taken this approach a step further, indicating that it will also recommend voting against the governance committee chair if a board enacts an exclusive forum provision without stockholder approval (most public companies have charter provisions allowing a board to amend the bylaws without stockholder approval).

All of this leaves the future development of exclusive forum provisions in an uncertain state. Exactly what role they will play in the governance landscape will likely depend on the answers to four questions:

- *How Will Courts Outside of Delaware Respond?* The success of exclusive bylaw provisions necessarily depends on the views of courts outside of Delaware and whether they determine that

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<sup>1</sup> 73 A.3d 934 (Del. Ch. 2013).

their own law conflicts with Delaware's. After all, even if Delaware courts view a forum bylaw as valid, that is of little import unless the courts outside of Delaware are willing to dismiss actions brought in other jurisdictions. Before Chancellor Strine's opinion in *Boilermakers*, a California federal District Court refused to enforce an exclusive forum provision in Oracle Corp.'s bylaws based on federal common law principles because the provision was inserted into the bylaws without stockholder approval.<sup>2</sup> In *Boilermakers*, Chancellor Strine rejected the California court's reasoning as failing "to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders." Nevertheless, this issue will likely resurface over the coming years as other non-Delaware forums consider these provisions.

- *How Will Exclusive Forum Provisions Be Applied in Specific Situations?* Although a significant victory for exclusive forum proponents, *Boilermakers* only directly addressed the facial validity of forum selection bylaws. In so doing, the court explicitly refused to render an advisory opinion on arguments that such provisions would be invalid if applied in certain circumstances (for example if there is no personal jurisdiction over some defendants). In the coming years courts will have to decide whether there are particular situations in which an exclusive forum provision cannot be applied. As with many areas of the law, the exceptions may prove as important as the rule.
- *Will Other Courts Adopt Chancellor Strine's Reasoning?* It is also important to note that while Chancellor Strine is a respected jurist and his opinion is well-reasoned, there is still no Delaware Supreme Court precedent directly on point. Accordingly, the *Boilermakers* opinion is, as a technical matter, at least, not binding on non-Delaware courts or even the Vice Chancellors of the Delaware Court of Chancery (although the Vice Chancellors will likely adopt Chancellor Strine's reasoning). That being said, any court addressing the issue will almost certainly feel compelled to address Chancellor Strine's logic.
- *What Will Happen Outside the Courtroom?* Finally, even as the legal contours of this issue are fleshed out, practical realities will play an important role in determining whether exclusive forum provisions will actually gain widespread acceptance. Since the benefit of an exclusive forum provision is to some extent remote and contingent (multi-jurisdictional litigation is only typical where a corporation pursues a sale transaction or there is some evidence of corporate wrongdoing), some boards may opt not to enact exclusive forum provisions in order to avoid unnecessary conflict now. In fact, the procedural history behind *Boilermakers* suggests that many boards may prefer not to lead the charge on this issue. That case started when the same law firm filed complaints against twelve companies that had adopted exclusive forum bylaws. All but two of those companies (Chevron and FedEx) ultimately chose to repeal their exclusive forum bylaw provisions rather than defend the provisions in court. Many of the companies that recently

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<sup>2</sup> See *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (2011).

enacted bylaw provisions after *Boilermakers* may make similar decisions if the pressure from stockholders becomes significant. Nevertheless, if exclusive forum bylaws enjoy success in the courts and become more common, opposition to them may soften over time.

Other possible non-legal factors include pressure from insurance companies offering D&O insurance (which would militate in favor of adopting exclusive forum provisions) and stockholder amendments to the bylaws designed to repeal exclusive forum bylaws.

Ultimately, each company must look at its particular situation to determine the best way forward. We suggest that public companies give strong consideration to enacting an exclusive forum provision, particularly if an anticipated event like a sale transaction is likely to result in duplicative litigation. In addition, since the proxy advisory firms are currently opposing such provisions, private companies looking to go public should consider amending their certificates of incorporation to include exclusive forum provisions before going public (amendments to a certificate of incorporation require the approval of both the board of directors and stockholders). And, in all cases in which a corporation decides to avail itself of such a provision it should make sure it puts in place the right one, making appropriate provision for issues like exclusive federal jurisdiction and allowing the corporation, in its discretion, to consent to jurisdiction outside of the chosen forum.

We will continue to provide updates as this area of the law develops.

## About the Authors

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