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Forum Selection Bylaws Gain Ground

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As we previously discussed (*Should Your Board Adopt an Exclusive Forum Bylaw?*, July 2013; *The Future of Exclusive Forum Bylaws*, November 2013), forum selection bylaws (also sometimes called exclusive forum bylaws) have become something of a hot topic in governance circles. The motivating goal behind such bylaws is to modify the default forum rules for suits by stockholders by requiring that all suits be brought in a single jurisdiction, most often the place of incorporation (Delaware for the preponderance of public U.S. corporations). This can be particularly useful given the proliferation of merger-related lawsuits, with almost every public transaction of any size garnering such a suit, and often multiple suits across jurisdictions. Adopting a forum selection bylaw funnels any merger litigation into a single forum, avoiding duplication of effort. As we discussed in previous alerts, these provisions passed a crucial test last June when the then-Chancellor of the Delaware Court of Chancery, who has since become the Chief Justice of Delaware's Supreme Court, rejected arguments that exclusive forum bylaws are facially invalid.

Even more support was delivered this September, when Chancellor Andre G. Bouchard, the new Chancellor of the Delaware Court of Chancery, addressed the application of a forum selection bylaw in *City of Providence v. First Citizens Bancshares, Inc.*,¹ an opinion that clears up many previously-unexplored questions about the reach of such bylaws. At issue in *First Citizens* was a proposed merger between two bank holding companies allegedly controlled by the same family through majority or near majority stockholdings. The same day that the merger was announced, the acquirer, referred to as "FC North" in the opinion, adopted a forum selection bylaw requiring that, to the extent permitted by law, all intra-corporate suits be brought in North Carolina, where FC North has its headquarters and most of its operations. In dual complaints, the City of Providence challenged both the bylaw and the merger, asserting that the controlling family used its control stake to force FC North to overpay for the target.

In the ensuing motion to dismiss for improper venue, Chancellor Bouchard addressed novel issues concerning the use of forum selection bylaws.

¹ *City of Providence v. First Citizens Bancshares, Inc.*, ___ A.3d ___, C.A. 9795-CB, 2014 WL 4411604 (Del. Ch. Sept. 8, 2014).

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Can Forum Selection Bylaws Specify a Jurisdiction Other Than the State of Incorporation? Most opinions to date have dealt with bylaws requiring that suits be filed in the state of incorporation. The logic behind this choice is that the law of the state of incorporation generally applies to intra-corporate disputes. And, so the argument goes, having Delaware courts apply Delaware law ensures that disputes are handled by courts experienced with the relevant jurisprudence. FC North, however, opted not for a Delaware forum, but rather for North Carolina courts. Providence asserted that this distinguished the FC North bylaw from prior case law, but the distinction turned out to be one with little force; Chancellor Bouchard viewed North Carolina, the location of FC North's headquarters and "most of its operations," as "the second most obviously reasonable forum."² Although Chancellor Bouchard's analysis gives weight to the choice made by directors, it is not entirely clear that a choice of forum in another state with less of a connection to FC North would have been similarly respected.

The opinion leaves open the possibility that in very limited circumstances Delaware might have a sufficient interest to override a forum selection bylaw opting for another jurisdiction as the exclusive forum for a Delaware corporation. This possibility dovetails with other Delaware cases which generally defer to first-filed suits outside of Delaware unless there is a novel issue of law that should be addressed by a Delaware court.³ Applying this logic to forum selection bylaws, Delaware courts may refuse to yield in favor of an out of state forum in a case involving a novel and/or particularly pressing issue of Delaware law. At any rate, the claims against FC North did not meet this standard.⁴

Chancellor Bouchard may have saved the most significant part of his analysis for the concluding paragraph of his legal discussion:

If Delaware corporations are to expect . . . that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for intra-corporate disputes, 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. In my opinion, to conclude otherwise

² *Id.* at *4.

³ See *In re Topps Co. Shareholders Litig.*, 924 A.2d 951, 960 (Del. Ch. 2007) ("Delaware has an important policy interest in having its courts speak to these emerging issues [regarding the then-current wave of private equity acquisitions] in the first instance, creating a body of decisional authority that directors and stockholders may confidently rely upon." (footnote omitted)).

⁴ *First Citizens*, 2014 WL 4411604, at *8.

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would stray too far from the harmony that fundamental principles of judicial comity seek to maintain.⁵

Put differently, if Delaware courts do not honor a choice of forum outside of Delaware, then other fora might not honor a Delaware choice of forum, and the problem of competing lawsuits across jurisdictions will remain unresolved.

Can a Forum Selection Bylaw be Adopted Simultaneously with a Merger? Also novel in *First Citizens* was the timing of the bylaw, which was adopted on the same day the merger was announced. Providence claimed that it would be inequitable to apply a forum selection bylaw approved in connection with a self-interested merger transaction. The Court, however, concluded that Providence had failed to allege facts that would rebut the business judgment rule with respect to the adoption of the forum selection bylaw. Specifically, the Court reasoned that Providence had not:

alleged any well-pled facts calling into question the integrity of the federal or state courts of North Carolina or explaining how the defendants have advanced their “self-interests” by having the claims in the Merger Complaint adjudicated in those courts instead of a Delaware court. The conduct of the FC North Board in approving the proposed merger will not be absolved from judicial review; that review simply must occur in a North Carolina court.⁶

From a practical perspective, adopting a forum selection bylaw on the eve of a merger announcement (or slightly thereafter) may avoid unnecessary difficulties with proxy advisors, who have generally taken a dim view of unilaterally adopted forum selection bylaws. Adopting such a bylaw once a transaction is announced allows a company to capture a large amount of the benefit of the bylaw without drawing the ire of proxy advisors during annual elections. This is because proxy advisors do not have as much leverage where a corporation will cease to be publicly held and therefore no longer have to hold director elections that proxy advisors can influence. This is not to say, however, that there is no danger, especially for directors that may serve on the boards of other public companies.

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⁵ *Id.* at *10.

⁶ *Id.* at *8.

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As we have previously cautioned, the vitality of forum selection bylaws will ultimately turn on case law outside of Delaware as state and federal courts wrestle with the effect that they will give to forum selection bylaws. To date, only a bare majority of courts that have considered such bylaws have considered them to be valid and binding.⁷ By according comity to the choice of a non-Delaware forum, Chancellor Bouchard is no doubt hoping to tip the scales even further toward recognition of forum selection bylaws. Accordingly, while it seems clear that forum selection bylaws will play a large role in years to come, it is too early to say for certain exactly what that role will be.

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⁷ See *id.* at *10 n.54 (collecting cases).



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