

Exclusive Forum Bylaws Upheld By Delaware Court

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Chancellor Leo E. Strine Jr., on June 25, 2013, rejected statutory and contractual challenges to exclusive forum bylaws adopted unilaterally by the boards of directors of Chevron Corporation and Federal Express Corporation. See ***Boilermakers Local 154 Retirement Fund, et al. v. Chevron Corp., et al.***, C.A. No. 7220-CS and ***Iclub Inv. v. FedEx Corp.***, C.A. No. 7238 (Del. Ch. June 25, 2013).

The Chancellor determined that, if a board of directors has been granted the authority to adopt bylaws without the approval of shareholders under the certificate of incorporation, then the board has the power under the Delaware General Corporation Law to adopt exclusive forum bylaw provisions and that such a bylaw becomes part of the contractual agreement between the corporation and its shareholders despite the fact the stockholders did not vote to approve it. The Court made clear that shareholder plaintiffs retain the right to challenge the enforcement of exclusive forum bylaws and left open the possibility that the adoption of such bylaws could be challenged as a breach of fiduciary duty.

The Chevron and FedEx boards had adopted bylaws providing that, unless the corporation consented to an alternate forum, a state or federal court located in Delaware would be the sole and exclusive forum for (i) any derivative action brought on behalf of the corporation, (ii) any action asserting breach of fiduciary duty claims, (iii) any action arising under the Delaware General Corporation Law, or (iv) any action governed by the internal affairs doctrine.

Stockholders claimed that the boards exceeded their statutory authority under Delaware law when adopting these provisions. The Court disagreed, holding that the bylaws were permissible under 8 Del. C. § 109(b), which states that bylaws “**may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights and powers or the rights and powers of its stockholders, directors, officers or employees.**” The Court held that because the exclusive forum bylaws “**address internal affairs claims, the subject matter of the actions the bylaws govern relates quintessentially to ‘the corporation’s business, the conduct of its affairs, and the rights of its stockholders [qua stockholders].’**” The Court further held the bylaws were valid because they regulate where stockholders may file suit not whether they may file suit.

The Court also considered and rejected plaintiffs’ claim that the bylaws were invalid as a matter of contract law because the boards had adopted the bylaws unilaterally, without the vote of the

stockholders. The Court reasoned that the provisions of the Delaware General Corporation Law and the terms of the certificates of incorporation created a contractual framework which put stockholders on notice that a board may unilaterally adopt bylaws under 8 Del. C. § 109(b) and such a unilateral change “is not extra-contractual simply because the board acts unilaterally; rather it is the kind of change that the overarching statutory and contractual regime the stockholders buy into explicitly allows the board to make on its own.”

There was significant uncertainty regarding the validity of exclusive forum bylaws prior to the issuance of this opinion and this development could make such provisions more popular among corporations.

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