

July 9, 2013

**Exclusive Forum Selection Bylaws in Maryland**

As widely reported, two weeks ago the Chancery Court of Delaware, in a well reasoned opinion by Chancellor Strine, upheld exclusive forum selection provisions in the bylaws of both Chevron Corporation and FedEx Corporation. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, Del. Ch. C.A. No. 7220-CS, and *IClub Investment Partnership v. FedEx Corp.*, Del. Ch. C.A. No. 7238-CS. More specifically, the Chancellor held that forum selection bylaws designating a state or federal court in Delaware as the exclusive forum for certain stockholder suits against the corporation and its directors and employees (including claims under the Delaware General Corporation Law (“DGCL”) or involving the internal affairs doctrine) are valid under the DGCL and are valid and enforceable under Delaware contract law as well.

As a result of this decision, as well as collateral authority in Maryland, we are now recommending exclusive forum selection bylaws for consideration by our Maryland corporation and real estate investment trust clients. We believe that a carefully drafted forum selection bylaw, based principally on the Chevron/FedEx bylaw provisions and adopted after appropriate deliberation and advice, is valid and enforceable under Maryland law for the following reasons:

1. The provisions of the DGCL and the Maryland General Corporation Law (“MGCL”) on the permissible provisions of bylaws are substantively very similar. DGCL §1-109(a) authorizes the bylaws to “contain any provision, 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.” MGCL §2-110(a) permits the bylaws to “contain any provisions not inconsistent with law or the charter of the corporation for the regulation and management of the affairs of the corporation.” Courts in both Maryland and Delaware recognize that the business and affairs of a corporation include the decision to institute litigation. *Bender v. Schwartz*, 172 Md. App. 648, 665, 917 A.2d 142, 152 (2007); *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990).

2. In addition to similar statutory provisions on the contents of bylaws, many of the points made by Chancellor Strine would also apply to judicial review of an exclusive forum selection bylaw of a Maryland corporation. For example, multi-forum litigation “imposes high costs on the corporations and hurts investors,” which “are not justified by rational benefits for stockholders . . . .” We have seen multi-forum stockholder litigation against our Maryland-formed clients. In addition, the general subject matter of forum selection bylaws – the internal affairs of the corporation – “relates quintessentially” to the matters specified in the DGCL and MGCL as a proper subject for bylaws. As well, forum selection bylaws “are process-oriented, because they regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation.” (Emphasis original.) In this sense, and as recognized by Chancellor Strine, an exclusive forum

selection bylaw seems analogous to advance notice bylaws, which are valid in both Maryland and Delaware.

3. As a matter of contract law, said Chancellor Strine, plaintiffs' "artificial bifurcation" between stockholder-adopted bylaws (contractually valid) and unilaterally board-adopted bylaws (not contractually valid) is wrong. The charter and bylaws put everyone on notice that they may be amended at any time and give rise to no vested rights prohibiting amendment. The Chancellor noted that "when investors bought stock in Chevron and FedEx, they knew . . . that . . . the certificates of incorporation gave the boards the power to adopt and amend bylaws unilaterally . . . and . . . that board-adopted bylaws are binding on the stockholders." We agree that stockholders take their stock with notice of the contents of the charter and bylaws and that the restrictions imposed by the charter and bylaws are part of stockholders' investment. In addition, the charters (and stock certificates) of many of our Maryland clients contain a provision specifically stating that the rights of all stockholders and the terms of all stock are subject to the provisions of the charter and the bylaws, thus providing stockholders with notice of the same. *See Corvex Management LP v. CommonWealth REIT*, No. 24-C-13-001111 (Md. Cir. Ct. May 8, 2013).

4. In language that will be helpful in other cases involving the validity and enforceability of charter and bylaw provisions, the Chancellor stated that "there is a presumption that bylaws are valid" and that plaintiffs "must show that the bylaws cannot operate lawfully or equitably *under any circumstances*." (Emphasis original.)

5. While there is no controlling Maryland case on point, the Court of Appeals of Maryland (our highest state court), our intermediate appellate court and our trial courts, as well as other courts interpreting Maryland law, "have historically found Delaware law in matters involving business law highly persuasive." *In re Nationwide Health Properties, Inc. Shareholder Litigation*, No. 24-C-11-001476, slip op. at 16 (Md. Cir. Ct. May 27, 2011) (opinion of Berger, J., now a judge of the Court of Special Appeals of Maryland). Subject to any appeal, we think that Chancellor Strine's opinion provides strong authority supporting the adoption of an exclusive forum selection bylaw by the board of a Maryland corporation or real estate investment trust.

6. Among the many bases for upholding the forum selection provision, Chancellor Strine noted that such provisions are subject to attack by the stockholders who could seek to repeal the provision. Unlike the DGCL, the MGCL permits the charter or bylaws of a Maryland corporation to give exclusive power to amend the bylaws to the board, and the bylaws of most of our clients so provide. We do not believe that this distinction should make a difference to a Maryland court analyzing a forum selection bylaw provision. Indeed, in Chancellor Strine's words, "stockholders assent to not having to assent to board-adopted bylaws."

Based on the foregoing we have drafted a form of exclusive forum selection bylaw that is closely based on the Chevron/FedEx bylaw provisions upheld by Chancellor Strine and that we have customized to Maryland law. It is important to note, however, that, as with any board

action, there are always two questions: First, whether the action is valid and enforceable as a matter of corporation law and, second, whether the board complied with its legal duties in taking the action. While it is our view that our form of Maryland-specific exclusive forum selection bylaw is valid and enforceable under Maryland law, it is critically important that directors considering and adopting the bylaw and in later applying it to specific situations do so in full compliance with the standard of conduct for directors under Maryland law. In this regard, we note that (1) the duties of directors of a Maryland corporation are set forth in the MGCL (unlike the duties of directors of a Delaware corporation, which are set forth in case law) and (2) these duties apply individually to each director, director by director, not collectively to the board.

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As always, our colleagues and we are available at any time to discuss these or other matters.

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