



Client Alert

This alert describes a recent innovation under Delaware law of interest to corporate directors, especially those who may be considering a major corporate transaction.

Exclusive-Jurisdiction Charter or Bylaw Provisions

Corporate boards of directors should consider adopting a recent innovation for mitigating the potential costs and risks associated with shareholder lawsuits arising from mergers and other major transactions.

Immediately following the announcement of many mergers and similar transactions, shareholders are increasingly filing putative class action lawsuits challenging these transactions. Among public companies incorporated in Delaware, reports are that about 50% of all announced mergers are challenged in multiple lawsuits filed in different jurisdictions. These lawsuits pose a number of serious problems for the corporations involved, including the cost of duplicative motions and discovery and potential inconsistent rulings in the multiple actions.

As a possible solution to this problem, the Delaware Chancery Court, in its recent decision in *In re Revlon, Inc. Shareholders Litig.*, suggests that Delaware corporations might adopt charter provisions establishing the Chancery Court as the exclusive venue for adjudication of disputes over internal corporate affairs, including shareholder derivative claims and putative class action lawsuits in connection with corporate transactions.

If upheld, an exclusive-venue provision requiring



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complaining shareholders to resort to the Chancery Court, Delaware's special business court of equity, would afford several advantages to corporations and their shareholders, including:

- The legal process of the Chancery Court is much faster than the legal processes in other states such as California
- The likelihood that claims involving a corporation's internal affairs will be resolved more predictably by the expert judges on the Chancery Court than by other state courts applying Delaware law
- The increased availability of equitable remedies tailored to fit the specific circumstances involved
- The avoidance of added motion and discovery costs and other duplicative expenses associated with the defense of lawsuits in multiple venues involving the same claims
- The avoidance of potential inconsistent rulings in such competing lawsuits

On the other hand, there appear to be no obvious disadvantages of an exclusive-venue provision, so shareholders or shareholder interest groups should not necessarily object to such a provision.

The apparent sanctioning of an exclusive-venue provision by the Court in *Revlon* appeared in a footnote in the reported decision and referred only to an exclusive-venue charter provision—that is, one contained in a corporation's certificate of incorporation. Although not mentioned by the Court in its *dicta*, an exclusive-venue provision adopted as part of a corporation's bylaws should be equally effective. The adoption of a bylaw provision normally would require approval of the corporation's board of directors only, while an exclusive-venue charter provision also would require shareholder approval under Delaware law. For corporate boards of directors interested in adopting an exclusive-venue provision, it would be possible to adopt immediately a bylaw containing the exclusive-venue provision and at the same time adopt a charter provision to be presented for consideration at the next meeting of shareholders. (In presenting the charter provision to the shareholders, directors should indicate whether they

intend to retain or rescind the bylaw provision if the shareholders were to reject the proposed charter provision.)

It is important to note that the Court in the *Revlon* case did not rule definitively on the enforceability of exclusive-venue provisions. There are sound legal precedents, however, for enforcing such provisions, and it is likely that exclusive-venue provisions would be upheld, at least in Delaware, whether contained in a corporation's charter or its bylaws. Very few public companies have so far adopted exclusive-venue provisions, and it remains to be seen whether courts outside of Delaware will honor these provisions. In the meantime, however, given the ease of adopting such a provision and absence of any disadvantages of such provisions, directors should not be put off by the possibility that these provisions may not be upheld.

Adopting an exclusive-venue provision would seem to benefit many Delaware corporations, including some privately held corporations. This is especially true for publicly held corporations that may be planning a possible merger or similar transaction.

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If you would like to know more about exclusive-venue provisions, please contact [Dale Short](#), Chair of the firm's Corporate Department, or the TroyGould attorney with whom you regularly work.

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