



California Corporate & Securities Law

Will Delaware Exclusive Forum Bylaws Founder on the CGCL's Rocks?

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Many practitioners took note last spring when Vice Chancellor Laster wrote “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.” *In Re Revlon, Inc. S’holders Litig.* Since then, I’ve noticed that several corporations, including [Berkshire Hathaway Inc.](#) have adopted [bylaw](#) amendments providing that unless the corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for any:

- Derivative action or proceeding brought on behalf of the corporation,
- Action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation’s stockholders,
- Action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law or the corporation’s certificate of incorporation or by-laws, or
- Other action asserting a claim governed by the internal affairs doctrine.

See [Form 8-K](#) filed on November 9, 2010.

It is, of course, possible that plaintiffs will file derivative and other actions in California notwithstanding such a bylaw provision. The question will then be whether California courts will uphold such a bylaw. Ironically, Vice-Chancellor Laster cited as authority a Delaware Supreme Court opinion that sustained a California forum selection clause in a Delaware limited liability company agreement. *Elf Atochem N. America, Inc. v. Jaffari*, 727 A. 2d 286 (Del. 1999).

Several provisions of the California General Corporation Law (CGCL) would appear to present challenges to the enforcement of a Delaware exclusive forum bylaws. These include:

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- Section 304 which provides that the California Superior Court may remove directors for specified causes in a suit by shareholders holding at least 10% of the number of outstanding shares of any class. This statute is applicable to “pseudo-foreign” corporations pursuant to Section 2115.
- Section 709 which provides for a procedure in the California Superior Court to determine the validity of an election or appointment of a director. This statute expressly applies to elections or appointments of directors of foreign corporations (Cal. Corp. Code § 171) if the election was held or the appointment was made in California.
- Section 800 which sets forth various substantive and procedural matters with respect to derivative actions instituted or maintained in the right of both domestic and foreign corporations.

Moreover, California courts may take a less absolutist view to the internal affairs doctrine than did the Delaware Supreme Court in *VantagePoint v. Examen, Inc.*, 871 A. 2d 1108 (Del. 2005). See my articles: *The War Between the States – Delaware’s Supreme Court Ignores California’s Outreach Statute*, 19 Insights 19 (July 2005); *California Court of Appeal Applies California Inspection Rights to Delaware Corporation*, 17 CEB California Business Law Reporter 168 (1996); and *In Shareholder Derivative Suits Determining What Law Governs Isn’t Easy*, Los Angeles Daily Journal (June 18, 2010).

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