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Forum Selection Bylaws Gain Additional Support in California

In adopting an exclusive forum selection bylaw, companies can avoid the cost and complication of multi-forum litigation after an M&A transaction.

In response to the wasteful and burdensome trend of multi-forum shareholder litigation, many companies have recently enacted forum selection bylaws designating a single jurisdiction for fiduciary duty claims and other intra-corporate litigation. In the past, some courts outside of Delaware had shown a reluctance to enforce such bylaws; however, Delaware courts have since upheld their validity as a general matter. Undeterred, some plaintiffs have continued to bring suits outside bylaw-designated forums, forcing courts outside Delaware to decide the issue in light of the recent Delaware decisions. On December 12, 2014, the Superior Court of California for Alameda County enforced one of these bylaws, a key development in the evolving jurisprudence regarding their enforceability.

In *Brewerton v. Oplink Communications Inc.*, a California court recognized the validity of an exclusive Delaware forum selection bylaw that was enacted at the same time a merger agreement was signed, rejecting the plaintiff's argument that the bylaw could not be enforced against stockholders who bought their shares before the bylaw. This is key precedent in a jurisdiction as large and commercially active as California, and marks a win for companies based there that are considering or have decided on a strategic transaction.

With the help of an exclusive forum selection bylaw, even if adopted at or near the signing of a merger agreement, forward-thinking companies can position themselves to conserve costs and avoid the risk of conflicting rulings by litigating the practically inevitable post-signing shareholder litigation in a single jurisdiction of their own choosing.

Enforceability of forum selection clauses generally

In 2013, then-Chancellor of the Delaware Court of Chancery, Leo E. Strine Jr., issued the first in a series of seminal decisions considering the enforceability of a forum selection clause. In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, Chancellor Strine held that forum selection clauses governing disputes pertaining to a corporation's internal affairs are valid under the Delaware General Corporate Law.[1] Chancellor Strine rejected plaintiff's argument that an exclusive forum selection bylaw was facially invalid because the shareholders never gave their approval. Instead, he held that bylaws are part of a binding contract between the company and its shareholders, and, if allowed by a company's charter, such bylaws may be amended by the board of directors at any time.[2]

In spring 2014, in *Groen v. Safeway*, the Superior Court of California for Alameda County adopted this reasoning and applied the holding of *Boilermakers* in dismissing a lawsuit brought in California. In the wake of Albertsons' acquisition of Safeway, plaintiff-shareholders of Safeway filed lawsuits in California and Delaware, alleging breaches of fiduciary duty. Safeway moved to dismiss the California litigation, relying on its forum selection bylaw designating Delaware as the exclusive forum to litigate such claims. The California court agreed, citing the "contractual principles" reasoning in *Boilermakers* and finding that the plaintiffs had failed to show why enforcement of the provision might be unreasonable.[3] The court rejected the plaintiffs' argument that the bylaw was invalid as a matter of California law, noting that pursuant to the Internal Affairs Doctrine, California courts apply the law of the state of incorporation in deciding intra-corporate disputes. Critically, the California court opted to follow *Boilermakers* instead of a California federal court that had refused to enforce an exclusive forum selection bylaw three years earlier.[4]

In *Safeway*, the bylaw was enacted months before the merger agreement was signed. After *Boilermakers* and *Safeway* the critical question remained; could a target permissibly enact a forum selection bylaw in conjunction with signing of a merger agreement?

Courts address bylaw timing

Current Chancellor of the Delaware Court of Chancery, Andre Bouchard, extended the *Boilermakers* precedent in *City of Providence v. First Citizens BancShares* earlier this year, in a ruling that included in-depth consideration of the relevance of the timing of a forum selection bylaw's enactment.[5]

BancShares, on the same day it entered into a merger agreement, adopted a forum selection bylaw designating North Carolina as the exclusive forum for all intra-corporate disputes. The plaintiff shareholder argued that enforcement of this bylaw "would be unjust because the Board's adoption of the Bylaw, which occurred simultaneously with the announcement of the unfair [proposed merger], goes well beyond [plaintiff's] reasonable expectations."[6] Chancellor Bouchard rejected this argument, noting that BancShares's stockholders were on notice that the board could unilaterally amend the company's bylaws at any time, and adding that the fact that the bylaw was adopted at the time of the merger agreement rather than on a "clear" day was "immaterial given the lack of any well-pled allegations...demonstrating any impropriety in this timing."[7]

Meanwhile, courts outside Delaware have split on whether or not to enforce an exclusive Delaware forum selection bylaw enacted at or near the time of alleged wrongdoing, though the balance of authority appears to be tipping towards enforcement.

Six months before the *BancShares* ruling, an Illinois court enforced a forum selection bylaw adopted between the time that the buyer approached the target and the merger agreement was executed, noting that plaintiffs had failed to allege any wrongdoing at the time that the bylaw was enacted.[8] The Illinois court rejected the plaintiffs' argument that the adoption of the bylaw was a "defensive maneuver" designed to limit shareholders' ability to sue directors, as the bylaw did not insulate the defendants from being sued but rather merely designated the forum.

A month before *BancShares*, in what now appears to be an outlier, an Oregon court found that a forum selection bylaw adopted on the same day as a merger agreement was announced was unenforceable. The Oregon court based its decision on the "closeness of the timing of the bylaw amendment to the board's alleged wrongdoing," the lack of opportunity for shareholders to vote against the amendment prior to initiating litigation, and the plaintiffs' allegation that the board had anticipated not just litigation in the abstract but "this exact litigation."[9]

Two weeks after *BancShares*, however, an Ohio federal court expressly addressed and rejected that Oregon ruling and followed *BancShares* instead, holding that a bylaw was not unenforceable "simply because it was adopted after the purported wrongdoing."[10]

The *Brewerton* decision

In *Brewerton*, the Oplink board enacted the bylaw at issue, designating Delaware as the "sole and exclusive forum" for any breach of fiduciary duty action, the same day that Oplink signed a merger agreement. Shortly after Oplink announced the transaction, plaintiffs brought suits in California and Delaware, alleging that Oplink and its individual directors had breached their fiduciary duties in connection with the transaction and that the purchaser had aided and abetted those breaches.

Oplink moved to dismiss the California complaint on the basis of the exclusive forum selection bylaw. At argument, the California plaintiff maintained that the bylaw should be disregarded because of the timing of its enactment, and purportedly because it was enacted "for the specific purpose of frustrating the dissident shareholders...."[11] The plaintiff had not, however, pled any allegations in her complaint about this purported "specific purpose."

The Superior Court of California for Alameda County sided with Oplink, finding the forum selection bylaw to be enforceable and granting the motion to dismiss. In upholding the general enforceability of such a bylaw, the court relied on the framework established in *Boilermakers* and *Safeway* regarding the "contractual principles at play" between the shareholders and the corporation adopting the bylaw.[12] The court further found nothing inherently nefarious about the fact that the enactment of the bylaw coincided with the signing of the merger agreement: "Here the complaint does not challenge the bylaws on either a facial or an as-applied basis... [T]he only basis Plaintiff cited for possibility invalidating the bylaw was the fact that the timing coincided with the approval of the challenged transaction." Citing to *BancShares*, the court "dispose[d]" of this timing argument, and found no other reason why the bylaw should not be enforced.[13]

Conclusion

The *Brewerton* decision is noteworthy for both its endorsement of the validity of a forum selection bylaw enacted in conjunction with a merger and for its clarification of the state of play for such bylaws in California, a locus of significant corporate activity. With the growing momentum of courts enforcing exclusive forum selection bylaws, even if adopted contemporaneously with the signing of a merger agreement, companies can be increasingly confident that they will be able to realize the efficiency and predictability that such bylaws are designed to achieve.

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Endnotes

[1] 73 A.3d 934 (Del. Ch. 2013).

[2] *Id.* at 954-58.

[3] Alameda County No. RG14-716641.

[4] *See Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

[5] 99 A.3d 229 (Del. Ch. 2014)

[6] *Id.* at 240.

[7] *Id.* at 241.

[8] *Miller v. Beam*, No. 2014 CH 00932 (March 5, 2014); *see also Daugherty v. Ahn*, No. CC-11-06211-C, slip. op. p. 1 (Tex. Cnty. Ct., Dallas Cnty. Feb. 15, 2013) (granting motion to dismiss based on forum-selection bylaw despite argument that bylaw was adopted after wrongdoing).

[9] *Roberts v. TriQuint SemiConductors, Inc.*, No. 1402-02441 (Ore. Cir. Ct. Aug. 14, 2014).

[10] *North v. McNamara*, 2014 WL 4684377, at *6 (S.D. Ohio Sept. 19, 2014).

[11] Alameda County No. RG14-750111.

[12] *Id.*

[13] *Id.*