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EXPERT ANALYSIS

The Future of Exclusive-Forum Bylaws in Restricting Multi-Jurisdictional Litigation

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The Delaware Court of Chancery on June 25, 2013, upheld the validity of “exclusive forum” clauses, which mandate that all derivative actions, stockholder class actions and other intra-corporate disputed contracts be litigated exclusively in a specific forum. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, No. 7220, 2013 WL 3191981 (Del. Ch. June 25, 2013).

The purpose behind exclusive-forum clauses is to stop shareholder plaintiffs from “forum shopping” and filing multiple, similar-fact suits in multiple jurisdictions to pressure corporate defendants into settling rather than face burdensome and expensive multiple litigations in multiple jurisdictions.

To combat multi-jurisdictional litigation, corporations began enacting by-laws stating that any and all shareholder litigation must be brought to a specific forum, usually Delaware. Once the Delaware Court of Chancery in *Chevron* upheld the validity of these “exclusive forum” clauses, many Delaware corporations enacted similar exclusive-forum bylaws. In fact, according to a study conducted by Claudia Allen of Katten Muchin Rosenman, by Oct. 31, 2013, 112 corporations had adopted exclusive-forum clauses naming Delaware as the exclusive forum for shareholder litigation.

WHAT'S NEXT?

The next question in the exclusive-forum progression is whether jurisdictions outside Delaware that are not bound by the *Chevron* decision will abide by *Chevron* or, on the other hand, how aggressive the Delaware Court of Chancery will be in forcing other jurisdictions into recognizing exclusive-forum clauses. It is important to note that there is still no Delaware Supreme Court precedent directly on point and therefore the *Chevron* decision is not binding on non-Delaware courts or even the vice chancellors of the Delaware Court of Chancery.

Although plaintiffs have contracted, through the enactment of corporate bylaws or through shareholder agreements that contain exclusive-forum clauses in them, to bring all shareholder actions in a specific forum, plaintiffs nonetheless still have the right to bring their case in any jurisdiction in which the defendant has sufficient contacts. *Int'l Shoe v. Washington*, 326 U.S. 310 (1945).

Now that the Delaware Court of Chancery, through the *Chevron* decision, has drawn the proverbial line in the sand, the next questions will be: (1) How will other jurisdictions react and will they willingly uphold exclusive forum-selection clauses wherein the contracted forum is not the forum where the

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plaintiff brought the action? and (2) if the other nonexclusive forums are unwilling to enforce the exclusive-forum clause, how aggressive will the contracted forum be in enforcing the forum clause?

ASSERTING EXCLUSIVITY

In September the Chancery Court looked ready to further engrain its position of exclusivity when it entered an anti-suit injunction in *BE&K Engineering v. RockTenn CP*, No 8837-VCL, 2013 WL 5486180 (Del. Ch. Sept. 27, 2013).

BE&K was involved in two actions based on the same contract, one in Georgia filed by the defendants despite the presence of a forum-selection clause designating Delaware as the exclusive forum for shareholder disputes, and one in Delaware filed by BE&K. The Delaware Court of Chancery granted BE&K's preliminary injunction that barred defendants from litigating in Georgia, further solidifying the validity of exclusive forum-selection clauses.

The Delaware Court of Chancery then seemed to pump the brakes in the latest litigation over exclusive-forum clauses in *Edgen Group Inc. v. Genoud*, No. 9055, order issued (Del. Ch. Nov. 5, 2013). Edgen Group Inc. is a Delaware corporation that has a forum-selection clause holding, among other things, that any claim alleging fiduciary violations by directors be brought in the Delaware Court of Chancery. Jason Genoud, a stockholder of Edgen, brought a suit against Edgen's directors and controlling shareholders, alleging they breached their fiduciary duties in connection with the sale of Edgen to another corporation. Genoud, despite the forum-selection clause, brought his shareholder action in Louisiana state court. Edgen, armed with the Delaware forum-selection clause, countersued in the Delaware Court of Chancery, seeking an anti-suit injunction prohibiting the Louisiana action from continuing, similar to the BE&K litigation.

ANTI-INJUNCTION SUIT DENIED

On Nov. 5, 2013, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery held a hearing on Edgen's motion to expedite the Delaware proceeding and for a temporary restraining order. In his ruling, Vice Chancellor Laster stated that the forum-selection clause found in Edgen's stockholders' agreement is valid, citing the *Chevron* ruling. However, Vice Chancellor Laster denied Edgen's temporary restraining order on other grounds. Specifically, he held that it was unclear under the language of the stockholder agreement whether the Delaware Court of Chancery had personal jurisdiction over Genoud. Second, the court held that an anti-suit injunction was not appropriate in this situation, citing *Carlyle Investment Management LLC v. National Industries Group*, 2012 WL 4847089 (Del. Ch. Oct. 11, 2012). The *Carlyle* court stated three ways to enforce forum-selection clauses:

- Moving to dismiss the complaint in the foreign forum
- Obtaining a default judgment in the established forum and then seeking *res judicata* in the foreign forum.
- Moving for an anti-suit injunction.

The *Carlyle* court's list of remedies seems to flow from least aggressive to most in terms of inter-jurisdictional sovereignty.

PREDICTIONS

Given the Delaware Court of Chancery's latest decisions, it is safe to assume that exclusive forum bylaws are valid and enforceable. With that said, it appears that the Delaware Court of Chancery will be cautious when dealing with other jurisdictions and will be unlikely to grant an anti-suit

injunction as a remedy of first resort. Instead it appears that the Delaware Court of Chancery feels more comfortable if defendants relying on an exclusive forum-selection clause first bring a motion to dismiss in the foreign forum, thereby allowing the forum jurisdiction to remain in control of its decisions. A much larger sample of decisions by non-Delaware courts regarding exclusive-forum clauses is needed to make a definitive statement as to the viability of exclusive-forum clauses. In the end, only time will tell how successful exclusive forum-selection clauses will be in preventing multi-forum litigation.



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