



Delaware Court of Chancery Upholds Board-Adopted Forum Selection Bylaw Designating North Carolina as Exclusive Forum

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On September 8, the Delaware Court of Chancery upheld, in *City of Providence v. First Citizens BancShares*, a forum selection bylaw of a Delaware corporation designating the courts of North Carolina as the exclusive forum for intra-corporate disputes. The opinion, by Chancellor Andre G. Bouchard, expands on then-Chancellor Strine's decision in the *Boilermakers Local 154 Retirement Fund v. Chevron Corporation* and *Iclub Investment Partnership v. FedEx Corporation* cases, and upheld the bylaw as both facially valid and, even though adopted simultaneously with the event being challenged, enforceable.

BACKGROUND

On June 10, First Citizens BancShares, a bank holding company incorporated in Delaware and headquartered in North Carolina, announced that it had entered into a merger agreement to acquire its commonly-controlled affiliate, First Citizens Bancorporation. On the day the merger was announced, the BancShares board of directors also amended the company's bylaws to add a forum selection provision designating the federal and state courts in North Carolina as the exclusive forum for breach of fiduciary duty and other internal affairs claims. The plaintiff, a stockholder of the North Carolina-based company, filed complaints in Delaware against BancShares and its directors, challenging both the merger and the validity of the newly-adopted exclusive forum bylaw.

THE COURT'S DECISION

As an initial matter, relying on the text and reasoning of the *Chevron* opinion, the court held that a forum selection bylaw of a Delaware corporation that designated an exclusive forum other than Delaware for intra-corporate disputes is facially valid. The court observed that Delaware has no "overarching public policy" against courts of other states deciding Delaware corporate law cases. Chancellor Bouchard also noted that the Delaware General Corporation Law does not have any provisions granting exclusive jurisdiction to Delaware courts. In addition, the BancShares forum selection bylaw stated that it was applicable only "to the fullest extent permitted by law," and therefore did not purport to cover any claims for relief that could only be asserted in the Delaware Court of Chancery. The Chancellor noted that all of the plaintiff's claims challenging the proposed merger were Delaware common law claims that could be asserted in a non-Delaware forum. Accordingly, the court concluded that the bylaw permissibly regulated only where, and not whether, a stockholder could file suit for relief.

The court also dismissed the plaintiff's breach of fiduciary duty claims against the BancShares board of directors for adopting the bylaw, holding that the selection of North Carolina as the exclusive forum was a decision protected under the business judgment rule. The court noted

that the plaintiff had failed to show how the BancShares board of directors advanced its alleged “self-interests” by having claims challenging the proposed merger adjudicated in North Carolina rather than Delaware, and in particular noting that the plaintiff had not alleged that the relevant federal or state courts in North Carolina would not have jurisdiction over BancShares or its directors and officers. Chancellor Bouchard also noted that the choice of North Carolina was not “irrational” because BancShares was headquartered and had most of its bank operations in North Carolina. Finally, the court rejected the plaintiff’s argument that the adoption of the forum selection bylaw, because it occurred concurrently with the announcement of the merger, was beyond the plaintiff’s reasonable expectation, noting that BancShares’ stockholders, at the time they purchased BancShares stock, were on notice that the BancShares board of directors could unilaterally amend the company’s bylaws at any time.

SIGNIFICANCE OF THE DECISION

The decision extends the principles established by the *Chevron* decision by confirming the validity of forum selection bylaws that designate an exclusive forum for intra-corporate litigation other than Delaware. As a result, the focus of litigation in future cases will likely shift towards whether a forum selection bylaw, while facially valid, will in a particular case be unenforceable because of a substantive impact on the outcome of specific litigation. The *First Citizens* decision does not, however, provide guidance on the potential effect of a more attenuated relationship between the corporation and the exclusive jurisdiction selected in its bylaws.

By according deference to other states as suitable exclusive forums for hearing Delaware corporate law cases and focusing on the desirability of avoiding multi-forum litigation, the Court of Chancery also potentially increases the likelihood that out-of-state courts will honor bylaws giving exclusive jurisdiction to Delaware and other states. To date, state courts in California, Illinois, New York and Texas have done so, while a federal court in California (in a decision predating *Chevron*) and recently an Oregon state court refused to enforce such a bylaw. The Oregon decision of August 14, 2014 (*Roberts v. Triquint Semiconductor*) involved a company which allegedly entered into a merger agreement in order to avoid a proxy solicitation by a group of activist shareholders seeking to oust the incumbent board of directors. The exclusive forum bylaw was adopted by the Triquint board of directors concurrently with the approval of the merger and allegedly in contemplation of litigation by shareholders opposing the merger. The Oregon court ruled that the timing of adoption of the bylaw was unfair because it deprived the Triquint shareholders of the opportunity to repeal the bylaw before the alleged wrongdoing occurred, impermissibly restricting the plaintiffs’ choice of forum.

You can download a copy of the *First Citizens* decision by clicking [here](#).

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