JONES DAY

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GOVERNANCE PERSPECTIVES

Exclusive Forum Provisions Become Mainstream

In June 2013, the Delaware Chancery Court upheld the validity of a bylaw adopted by Chevron's board of directors that designated the Delaware courts as the sole and exclusive forum for the adjudication of certain disputes, including M&A litigation and other shareholder strike suits. Although the Delaware Supreme Court has not yet considered the validity of these bylaws, we expect that it would uphold the *Chevron* decision.[1] Even despite the lack of Supreme Court review, the overwhelming view of corporate law experts is that exclusive forum provisions are valid and enforceable under Delaware law.[2]

Since the Chancery Court published the *Chevron* decision, more than 150 companies have implemented exclusive forum bylaws, often coupled with a consent to jurisdiction clause. While these provisions do not guarantee that all claims will be heard in Delaware, recent cases suggest that non-Delaware courts may be willing to enforce these provisions. Moreover, the use of these provisions is not limited to Delaware corporations; companies incorporated outside of Delaware may also seek to designate a single jurisdiction—presumably their home state—for these types of cases. Conversely, some Delaware corporations may face specific circumstances that lead them to determine that another state would be a more appropriate forum for disputes.

The impact that exclusive forum provisions will have on M&A litigation is yet to be determined. In recent years, M&A litigation has become a routine and expected element of public company M&A—in 2013, lawsuits were filed in 94% of deals having a value of $100 million or more. Of course, an exclusive forum bylaw is not intended to prevent plaintiffs from bringing deal-related litigation, but instead to prevent forum-shopping, to avoid the costs and expenses of multiforum litigation, and to ensure that the litigation is heard in Delaware by Delaware judges.

1 The plaintiffs in the *Chevron* litigation filed an appeal of the Chancery Court's decision but quickly withdrew it. Chevron itself then certified the question of the bylaw's validity to the Delaware Supreme Court in connection with litigation pending in California, but the plaintiffs then moved to dismiss the California litigation. The plaintiffs' motion to dismiss, which the defendants have opposed, is still pending as of the date of this publication.

2 The reasoning in *ATP* also supports upholding exclusive forum bylaws.

There is, however, a bylaw provision that could dramatically reduce the number of strike suits filed in the M&A context and otherwise—a bylaw that requires the plaintiff to reimburse the defense's litigation costs if the plaintiff does not obtain a judgment on the merits or substantially achieve the full remedy it sought. Interestingly, the Delaware Supreme Court recently upheld such a "fee-shifting" bylaw in its *ATP Tour, Inc. v. Deutscher Tennis Bund* decision, which was the subject of a May 2014 issue of *Governance Perspectives*. The ATP court held that while bylaws are unenforceable if adopted for an improper purpose, the intent to deter litigation "is not invariably an improper purpose." While the ATP case involved a closely held Delaware membership corporation, we believe that the court's reasoning should be equally applicable in the context of a stock corporation.[3]

Of course, the adoption of an exclusive forum provision may have negative consequences. Glass Lewis's voting policies recommend withhold votes for the chairs of governance committees of companies that adopt an exclusive forum bylaw without shareholder approval. (To date, ISS has not adopted a director election policy relating to exclusive forum bylaws, and it makes recommendations on shareholder proposals to rescind these bylaws—and management proposals to ratify them—on a case-by-case basis.) It is somewhat difficult to explain Glass Lewis's negative stance on these bylaws, given the costs of duplicative shareholder litigation. Companies considering the adoption of an exclusive forum provision, particularly Delaware companies participating in substantial M&A transactions, should consider whether the potential benefits of the bylaw outweigh the possible risks, or whether to adopt the provision and later submit it to a vote of shareholders. In all events, companies considering strategic assessment processes, or faced with activists or other risks, may be well served by considering both measures.

3 In late May 2014, however, the Corporation Law Section of the Delaware Bar Association was provided with a proposed amendment to the Delaware statutes that would restrict the application of the *ATP* holding to non-stock corporations, and that proposal is currently under review.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

GOVERNANCE TEAM LEADERS

Lizanne Thomas
Atlanta
+1.404.581.8411
lthomas@jonesday.com

Lyle G. Ganske
Cleveland
+1.216.586.7264
lganske@jonesday.com

Robert A. Profusek
New York
+1.212.326.3800
raprofusek@jonesday.com

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