Recent Amendments to the Delaware General Corporation Law Address Fee-Shifting and Forum Selection Provisions

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It has become almost axiomatic that when a public company merger is announced, stockholder litigation quickly follows. In recent years, some studies have indicated that more than 90 percent of transactions valued at more than $100 million draw such litigation. In many instances, litigation is filed in multiple forums, despite the fact that the challenged transaction typically involves Delaware corporate entities and claims governed by Delaware law. This dynamic often forces Delaware corporations and their fiduciaries to fight a multifront litigation war, which poses, among other things, increased costs and burdens, as well as the risk of dueling discovery tracks and inconsistent court rulings on virtually identical issues on behalf of the same purported stockholder class.

Courts, practitioners and commentators have expressed concerns about the issues raised by the increase of such multiforum deal litigation. However, the issues were not squarely addressed by the Delaware courts until 2013, when the Delaware courts issued rulings generally confirming the validity of fee-shifting (or "loser pays") provisions and forum selection provisions in the organizational documents of Delaware corporate entities. These decisions, which sparked significant commentator reactions both in favor of and against the holdings, in turn prompted the Delaware legislature to work with the Corporation Law Council of the Delaware State Bar Association to establish balanced corporate policy on these issues. On June 24, 2015, after several months of public debate, Delaware Gov. Jack Markell signed into law important amendments to the Delaware General Corporation Law (DGCL), which are intended to clarify Delaware law in light of the courts' holdings.

Fee-Shifting Provisions

Amendments to Sections 102 and 109 of the DGCL were designed to prohibit fee-shifting provisions in a stock corporation's charter or bylaws. The genesis of these amendments is the direct result of the Delaware Supreme Court's decision in *ATP Tour Inc. v. Deutscher Tennis Bund, et al.*, which held that fee-shifting bylaws are facially valid in the context of non-stock corporations. The bylaw at issue in *ATP* provided that if a claiming party did not "obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought," such claiming party must reimburse the counterparties for "all fees, costs and expenses of every kind" incurred in connection with such claim. Reimbursable claims were expressly defined in the bylaw as claims that are based upon a violation of an officer's, director's or stockholder's duty or as to which the DGCL confers jurisdiction on the Court of Chancery.

The reaction to the *ATP* decision was swift, resulting in strong views from both the plaintiff and defense bars, as well as academics and business media commentators. Some believed that the case should be applied only to non-stock corporations. Others, however, believed that the case might not be read so narrowly, and that it had the potential to tip the playing field against stockholder plaintiffs in litigation — including in deal litigation. The flip side of the coin was that many companies and defense lawyers saw fee-shifting provisions as the answer to the multiforum litigation problem because they would deter meritless litigation from ever being filed.

Ultimately, the DGCL amendments were designed to maintain what the legislature felt was a level playing field, by barring fee-shifting provisions and — according to the legislative synopsis — to preserve the efficacy of the enforcement of fiduciary duties in stock corporations. The statutory amendments, however, have limits — they do not disturb the *ATP* decision insofar as it relates to non-stock corporations, nor do they invalidate any fee-shifting provision in a stockholders' agreement or other writing

signed by the stockholder against whom the provision is sought to be enforced.

Forum Selection Provisions

Despite the ban on fee-shifting provisions, the Delaware legislature took measures in the amendments to help curtail multiforum litigation by statutorily endorsing the Court of Chancery's decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, in which the court upheld the facial validity of forum selection provisions in a certificate of incorporation or bylaws. New Section 115 of the DGCL provides that the certificate of incorporation or bylaws of a corporation, consistent with applicable jurisdictional requirements, (i) may contain a provision requiring that any or all intracorporate claims be brought exclusively in any or all courts of the state of Delaware and (ii) may not contain a provision prohibiting such claims from being brought in Delaware courts. In other words, Section 115 permits a corporation to select Delaware or both Delaware and a non-Delaware forum for resolving intracorporate disputes, but a corporation cannot exclude Delaware as an available forum. The amendments do not disturb the application of a non-Delaware forum selection provision if it is contained in a stockholders' agreement or other writing signed by the stockholder against whom the provision is sought to be enforced.

Although the amendments do not permit fee-shifting bylaw provisions (which, arguably, would have curtailed stockholder litigation generally, not just the multiforum variety), they are intended to address the multiforum stockholder litigation concern by expressly authorizing exclusive forum selection charter and bylaw provisions requiring litigation to be filed exclusively in Delaware courts. The effectiveness of such provisions may depend largely on whether non-Delaware courts will enforce such provisions, if and when stockholder litigation is filed in a non-Delaware forum against a Delaware corporation that has enacted an exclusive forum selection bylaw picking Delaware. The fact that most courts faced with the issue prior to the adoption of Section 115 enforced exclusive forum selection bylaws should provide some degree of comfort that such bylaws will continue to be respected and enforced. The adoption of Section 115 should help in this regard, but the context in which a forum selection bylaw was adopted may affect the willingness of a court to uphold it.

Accordingly, Delaware corporations should strongly consider whether this type of provision would be helpful to them in ensuring that intracorporate disputes are resolved by Delaware's pre-eminent business courts, as well as managing the costs and burdens associated with multiforum stockholder litigation. Among other things, exclusive forum selection provisions may provide defendants greater confidence that they can strongly defend deal litigation on the merits (as well as any related requests for expedited discovery and injunctive relief) without concern that plaintiffs in a non-Delaware forum will attempt to undermine or circumvent such efforts.

As with any corporate decision, a board of directors should carefully consider whether adopting an exclusive forum provision is in the best interests of the company and its stockholders. In doing so, a board may wish to consider information including:

- the multiforum litigation problem discussed above and, in particular, any experience the corporation may have had in defending such litigation;
- the empirical evidence surrounding stockholder suits in publicly traded companies;
- the offering of various solutions to the multiforum litigation problem, including the adoption of exclusive forum selection bylaws;
- the possibility of litigation resulting from the enactment of a forum selection bylaw; and
- possible stockholder relations and proxy advisory service ramifications.

The above factors are by no means exclusive and the board of directors of each corporation must consider all relevant facts and circumstances before making any determination on the adoption of an exclusive forum provision.