

Enforceability of Corporate Forum-Selection Bylaws Continues to Strengthen

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In recent years, corporations have responded to the threat of duplicative stockholder lawsuits in multiple courts across the country, as well as “forum shopping” by plaintiffs, by enacting forum-selection bylaws. Under these bylaws, shareholders must pursue deal litigation, breach of fiduciary duty claims and derivative lawsuits filed on behalf of the corporation in a particular jurisdiction established by the bylaws. The state of incorporation (most often Delaware) is commonly the required forum. Though these bylaws have been criticized and challenged legally, a growing number of courts across the U.S. have supported their enforceability.

Recently, those challenges have played out in California in the context of derivative litigation. In 2015, a federal court in the Central District of California (a popular forum of the plaintiffs’ bar) departed from a prior California federal decision that refused to enforce a forum-selection bylaw. The analysis employed in this new decision, *In re CytRx Corp. Stockholder Derivative Litigation*, likely will be employed by other federal courts and promises to strengthen the trend of courts enforcing forum-selection bylaws.

Boilermakers

Central to current case law on forum-selection bylaws is a Delaware Court of Chancery decision from two years ago. The Court of Chancery held in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* that a forum-selection bylaw adopted by the board of directors of a Delaware corporation is valid, binding and enforceable. At the heart of the *Boilermakers* reasoning was the contractual nature of the relationship between a Delaware corporation and its shareholders. During the past year, the Delaware legislature amended the Delaware General Corporation Law to effectively codify the *Boilermakers* decision.

Most state courts encountering forum-selection bylaws since *Boilermakers* have followed its reasoning and dismissed actions filed in the wrong venue. However, due to the constructs of federal jurisdiction, a federal court faced with a forum-selection bylaw requiring a derivative case to be filed in a state court (such as the Delaware Court of Chancery) encounters unique jurisdictional issues.

The analysis from *In re CytRx* likely will be employed by other federal courts and promises to strengthen the trend of courts enforcing forum-selection bylaws.

Atlantic Marine

Recently the U.S. District Court for the Central District of California, in *In re CytRx*, dismissed a suit that was required to be filed in the Delaware Court of Chancery under the corporation’s bylaw, becoming the first within the U.S. Court of Appeals for the Ninth Circuit to enforce a forum-selection bylaw unilaterally adopted by a board of directors. Unlike the prior courts that had addressed the enforceability of a forum-selection bylaw, however, the Central District of California followed the framework set forth by the U.S. Supreme Court in *Atlantic Marine Const. Co. v. U.S. District Court W.D. Tex.* (2014), which addresses a forum-selection clause in a contract as opposed to a corporate bylaw. The Court in *Atlantic Marine* held that when a federal court is presented with a forum-selection contractual clause, it should not consider the clause in the procedural context of a motion to dismiss for improper venue; rather, the court should apply a modified version of the doctrine of *forum non conveniens*. This doctrine affords a court the discretionary power to decline jurisdiction for the convenience of the parties, if justice

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would be served by the action being heard in another forum. The Court further held that under this modified *forum non conveniens* doctrine, “forum-selection clauses should control except in unusual cases,” largely because the two parties to the contract agreed to the expectation of the forum to resolve a dispute.

In *In re CytRx*, the Central District of California held that the *Atlantic Marine* framework applies equally to forum-selection bylaws. The court agreed with *Boilermakers* regarding the enforceability of forum-selection bylaws, accepting that the bylaws are consistent with the contractual nature of the corporation-shareholder relationship. The court further determined that, under the public interest factors at play in a *forum non conveniens* analysis, the *CytRx* forum-selection bylaw did not present one of those unusual cases where selection should not be enforced.

The decision by the Central District of California continues the trend of courts enforcing forum-selection bylaws. The *In re CytRx* decision extends to forum-selection bylaws the Supreme Court’s framework in *Atlantic Marine* that strongly favors enforcement of contractual clauses to forum-selection bylaws. That extension, if followed by other federal courts, will further the trend of forum-selection bylaws being enforced absent unusual cases. The expected result is that derivative plaintiffs who file in either a state or federal court will now face a growing body of case law that will compel them to adhere to corporate forum-selection bylaws.