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The Reassertion of the Primacy of Delaware and Forum Selection Bylaws

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THE REASSERTION OF THE PRIMACY OF DELAWARE AND FORUM SELECTION BYLAWS

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I. OVERVIEW

Most mergers involving public companies face lawsuits,[2] thereby imposing what some have described as a "merger tax" on the transactions.[3] Likewise, derivative suits often arise in more than one jurisdiction. Additionally, concerns have arisen over the settlement costs associated with derivative suits.[4]

Although other mechanisms for consolidating these disputes exist, attention has focused on the increased use of forum selection bylaws. These bylaws require the filing of intra-corporate disputes in a specified forum. For the most part, this has meant Delaware. As a result, litigation is centralized in a single jurisdiction, eliminating multiple lawsuits.

Shareholders have challenged these bylaws. Although upheld in Delaware, the decisions in other jurisdictions have been mixed. State courts in at least eight states, listed in the appendix, have acknowledged the facial validity of forum selection bylaws unilaterally adopted by a board. One, however, declined to enforce a bylaw.[5] The court determined that the board's actions violated Oregon public policy and, as a result, enforcement would be "unfair and unjust" to shareholders.[6] Other deci-

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2. Bryce Cullinane, *Unilateral Forum Selection Clauses in Corporate Bylaws: A Synopsis of the Debate*, 7 J. BUS. ENTREPRENEURSHIP & L. 485, 485-86 (2014).

3. Leo E. Strine, Jr. et. al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 12-13 (2013)
("We think otherwise: multi-forum litigation does engender costs, and those costs are non-trivial."). One study estimated that nearly three-fourths of derivative suits of public companies involve multiple jurisdictions. Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 54 (2011) ("Approximately 80% of the public company suits were accompanied by two or more parallel lawsuits.").

4. Dave Bradford, *Shareholder Derivative Suits: A Growing Concern for Corporate Directors and Officers*, CNA (Jul. 2005), *available at* http://cnapro.com/pdf/ShareholderDeriviativeSuits_Advisen.pdf ("Shareholder derivative suits are increasingly filed in tandem with securities class action suits. This trend should be of concern to corporate directors and officers. If the securities class action suit exhausts the insurance recoveries available from a company's traditional D&O insurance policy, directors and officers may find themselves without coverage for the defense costs and any monetary settlement of the shareholder derivative suit.").

5. Roberts v. TriQuint Semiconductor, Inc., No. 1402-02441 (Ore. Cir. Ct. August 14, 2014); http://www.wlrk.com/docs/Triquint_oregon.pdf

6. *Id.*

sions have suggested that bylaws adopted after the filing of an action will be subject to successful challenge.[7]

This paper will discuss the problems associated with filing derivative suits in multiple jurisdictions and the possible solution offered by forum selection bylaws. The discussion will include an analysis of the provisions now being adopted by corporations. The paper will also discuss the legal validity of these provisions under Delaware law and the reception accord this approach by out of state courts. Finally, the paper will examine possible responses to these developments.

II. BOARDS AND BYLAWS

Bylaws prescribe the rules and regulations of the corporation.[8] Under Delaware law, shareholders have the authority to adopt bylaws.[9] Directors may also do so but only if the authority appears in the certificate of incorporation.[10] Bylaws can include "any provision, not inconsistent with the law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers of its stockholders, directors, officers, or employees."[11] Once adopted, a corporation's bylaws are presumed to be valid.[12]

Courts provide directors with broad discretion to adopt bylaws designed to regulate the internal affairs of the corporation. These include bylaws requiring advance notice to the board of any proposals or director nominees that will be introduced at a meeting of shareholders.[13] Delaware courts have held that these bylaws help bring organization and efficiency to board meetings.[14] Courts have likewise approved bylaws regulating indemnification and the advancement of expenses in litigation. [15]

In construing bylaws, Delaware courts have described the provisions as contracts between a corporation and shareholders.[16] Courts,

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7. Cobb v. Ironwood Country Club, 233 Cal. App. 4th 960, 963 (2015).

8. Bonnie White, *Reevaluating* Galaviz v. Berg*: An Analysis of Forum-Selection Provisions in Unilaterally Adopted Corporate Bylaws As Requirements Contracts*, 160 U. PA. L. REV. 390, 392 (2012).

9. DEL. CODE. ANN. tit. 8 § 109(a) (2015).

10. *Id.*

11. § 109(b).

12. Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985).

13. Jana Master Fund, Ltd. v. CNET Networks, Inc., 954 A.2d 335, 344 (Del. Ch. 2008).

14. AB Value Partners, LP v. Kreisler Mfg. Corp., No. CV 10434-VCP, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014) ("Such bylaws are said to be useful in permitting orderly shareholder meetings, but if notice requirements unduly restrict the stockholder franchise or are applied inequitably, they will be struck down."). *See also* Katz v. Common Wealth REIT, No. 24–C–13–001299, slip op., at 22–26 (Md. Cir. Ct. Feb. 19, 2014) (A Maryland court held a board adopted arbitration bylaw valid and enforceable.).

15. Underbrink v. Warrior Energy Servs. Corp., No. CIV.A. 2982-VCP, 2008 WL 2262316, at *11 (Del. Ch. May 30, 2008) (*"*With respect to the mandatory advancement bylaw, the court held the plaintiffs pled no facts which suggest that the bylaw amendment at issue is unreasonable in this case. Therefore, it is not subject to further scrutiny by this court.")

16. Airgas, Inc. v. Air Products & Chemicals, Inc., 8 A.3d 1182, 1188 (Del. 2010).

therefore, often rely on contract principles when construing the language of a bylaw.[17] As a result, resolution of interpretive issues may depend upon the intent of the parties.[18] Nonetheless, the meaning of bylaws is not limited to principles of contract. Delaware courts have also adopted approaches that arise out of the role of shareholders in the governance process.[19]

The facial validity of a bylaw does not guarantee enforceability. "[I]nequitable action does not become possible just because it is legally permissible under the Delaware General Corporation Law."[20] The application of equity requires a two-prong test.[21] Bylaws will be inequitable if resulting from fraud, undue influence or overweening bargaining power.[22] Likewise, a bylaw will be inequitable to the extent "unreasonable and unjust." [23] In applying equity, Delaware courts will consider both the purpose of the bylaw and the effect.[24]

III. THE PROBLEM OF MULTIPLE DERIVATIVE SUITS

Disputes between shareholders and directors were traditionally brought in the state of incorporation.[25] Determining the state of formation, therefore, effectively resulted in the selection of the forum.[26] Most public companies chose Delaware.[27]

Beginning around the new millennium, however, data suggests that derivative suits against Delaware corporations were increasingly filed in other jurisdictions.[28] A number of reasons have been asserted to explain the phenomena. Some have suggested that jurisdictions outside of Delaware have a more receptive view towards the payment of the legal fees

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17. *Id.* ("Corporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply.").

18. Waggoner v. Laster, 581 A.2d 1127, 1134 (Del. 1990) ("Courts must give effect to the intent of the parties as revealed by the language of the certificate and the circumstances surrounding its creation and adoption.").

19. *Airgas,* 8 A.3d at 1188. ("If charter or bylaw provisions are unclear, we resolve any doubt in favor of the stockholders' electoral rights.").

20. Schnell v. Chris-Craft Indus., Inc*.,* 285 A.2d 437, 439-40 (Del. 1971).

21. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13, 92 S. Ct. 1907, 1914-16, 32 L. Ed. 2d 513 (1972).

22. *Id.*

23. Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1146 (Del. 2010).

24. *Airgas*, 8 A.3d at 1188.

25. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 376 (2012).

26. *Id.*

27. Lewis S. Black, Jr., *Why Corporations Choose Delaware*, STATE OF DEL. (2007), *available at* http://corp.delaware.gov/whycorporations_web.pdf.

28. Robert M. Daines & Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions*, CORNERSTONE RES. (Feb. 2013), *available at* https://www.cornerstone.com/GetAttachment/9d8fd78f-7807-485a-a8fc-4ec4182dedd6/2012-Shareholder-Litigation-Involving-M-and-A.pdf. ("Before 2002, most M&A lawsuits were filed in the Delaware Court of Chancery. From 2002 through 2007, much of this litigation moved to other states (a phenomenon sometimes called the flight from Delaware.")

incurred by counsel for shareholders.[29] Others have contended that these jurisdictions were less management friendly in their decision-making.[30]

Reforms in other jurisdictions may also have eliminated advantages previously offered by Delaware.[31] In the past, Delaware was among the states most willing to allow pro hac vice motions.[32] Other states, however, have become more liberal in granting these motions.[33] This national trend has allowed counsel to create strong relationships with judiciaries in states other than Delaware.[34]

Finally, the increase in the number of actions outside of Delaware may have a strategic explanation. [35] Some jurisdictions designate the first to file an action as lead counsel.[36] Delaware, however, looks to other criteria such as stock ownership and the skill of the law firm.[37] Plaintiffs' attorneys may, therefore, be incentivized to file in a jurisdiction with the most appealing provisions for designating lead counsel.[38]

Litigation in multiple jurisdictions imposes costs directly on companies and indirectly on shareholders.[39] Likewise, the increased filing of cases in other jurisdictions has the potential to diminish the role of Delaware in the interpretation of corporate law. As one academic noted: "Delaware law would be less developed (due to the smaller number of cases), possibly become less coherent (due to the presence of decisions

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29. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 376 (2012).

30. Adam B. Badawi, *Merger Class Actions in Delaware and the Symptoms of Multi-Jurisdictional Litigation*, 90 WASH. U.L. REV. 965, 974 (2013) ("This [management friendly] behavior may have led to plaintiffs' attorneys taking cases to courts where the judiciary did not share these sentiments.").

31. *Id.* at 975.

32. *Id.* at 976 ("The authors argue that being at the forefront of this approach allowed out-of-state counsel to forge strong relationships both with in-state counsel and with the Delaware judiciary. As other states have become more willing to allow out-of-state counsel to appear, parallel relationships may be forming elsewhere in a way that contributes to cases leaving Delaware.").

33. *Id.*

34. *Id.*

35. *Id.* at 975.

36. *Id.* at 968 ("Given that foreign jurisdictions often select lead counsel on the basis of the first to file the case, out-of-state counsel who lose the race to the courthouse have little to gain by filing in that foreign jurisdiction.").

37. *Id.* ("If, however, these counsel have a plausible chance at being named as lead counsel in Delaware--where the selection of lead counsel largely depends on the size of a plaintiffs' shareholdings and the perceived quality of its law firm--they can file in Delaware.").

38. *Id.* (Additionally, Delaware law is currently unclear on whether a shareholder represents the corporation before there is a determination of "demand excusal" or "demand futility." Therefore, fast-flier plaintiffs may be incentivized to file outside of Delaware. The Delaware Supreme Court "seemingly left open the possibility of a rebuttable presumption that fast-filing plaintiffs are inadequate representatives of the corporation.").

39. *Settlements of Shareholder Litigation Involving Mergers and Acquisitions: Review of 2013 M&A Litigation*, CORNERSTONE RES. (2014), *available at* https://www.cornerstone.com/getattachment/7bd80347-124b-4b69-add5-575e33c3f61b/Settlements-of-Shareholder-Litigation-Involving-Me.aspx (Plaintiff attorneys' requested an average fee of 1.1 million dollars per derivative suit in 2013. The precise amount of fees actually paid were not, however, reported.).

decided by other courts), and its judiciary could lose part of its expertise (due to the smaller number of cases heard)."[40] The result would also reduce the attractiveness of the state as a place to incorporate.[41]

To some degree, the courts could resolve the problem by consolidating all cases in a single jurisdiction. Such an approach would not, however, prevent the filing of multiple lawsuits. Moreover, courts would have to wait for the defendant to file the requisite "one forum motion" in pending jurisdictions.[42] Nor would courts necessarily select Delaware as the exclusive jurisdiction.[43]

III. FORUM SELECTION BYLAWS

Forum selection bylaws represent a possible solution to the problem of lawsuits in multiple jurisdictions. These provisions provide an ability to restrict suits involving a corporation's internal affairs to a single state or court.[44] The provisions have proved popular. First used in 2007 by Netsuite, over 100 companies adopted forum selection provisions between July and November of 2013.[45] By December 2014, more than 250 publicly traded companies had these bylaws in place.[46]

A. The Terms of the Bylaws

Corporations utilizing forum selection bylaws have generally followed a template similar to Netsuite.[47] First, they designate an exclusive

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40. Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 157-58 (2011).

41. Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713, 751 (2009).

42. C. Barr Flinn and Kathaleen St. J. McCormick, *The Delaware Court of Chancery Endorses Motions as a Solution to Multi-Jurisdictional Litigation Young, Conaway Stargatt & Taylor*, LLP (2011), *available at* http://www.youngconaway.com/files/Uploads/Documents/CorporateFall2011[1].pdf
See also ("[The Defendant should] go into all the Courts in which the matters are pending and file a common motion that would be in front of all of the judges that are implicated, asking those judges to please confer and agree upon, in the interest of comity and judicial efficiency, if nothing else, what jurisdiction is going to proceed and go forward and which jurisdictions are going to stand down and allow one jurisdiction to handle the matter.") *In re Allion Healthcare Inc. Shareholders Litig.,* No. CIV.A. 5022-CC, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011).

43. Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 158-59 (2011) ("The approach relies on judges in various jurisdictions coordinating litigation in the interests of comity and judicial efficiency. There is no guarantee that judges will agree to coordinate cases, especially high profile cases.").

44. *Id.* at 164.

45. See Claudia H. Allen, *Trends in Exclusive Forum Bylaws, 3* (Jan. 2015); http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411715

46. Andrew B. Kratenstein, *Delaware Court of Chancery Upholds Forum Selection Bylaws*, Winter 2014; http://www.mwe.com/Inside-MA---Winter-2014/

47. Claudia H. Allen*, Study of Delaware Forum Selection Charters and Bylaws*, (2012) ("The forum selection charter provision adopted by Netsuite, Inc. in 2007 has effectively served as the template for the current generation of exclusive forum provisions."); http://www.kattenlaw.com/Files/45103_Jan_%202012_Forum_Study.pdf

jurisdiction. Most also permit an alternative forum when the board consents, effectively providing a "fiduciary out" if in the best interest of the corporation.[48] More than half of these provisions include language informing the shareholders that they have consented to the forum selected.[49]

The bylaws also specify the types of actions covered by the provision. The typical provision covers actions for breach of a fiduciary duty owed by any director, officer, or employee; any action asserting a claim pursuant to the Delaware General Corporation Law or the certificate of incorporation or bylaws; or any action asserting a claim pertaining to the internal affairs of the corporation.[50] One common variation requires that the selected forum have personal jurisdiction over the "indispensable party." Another deviation from the Netsuite model has been a shift away from granting exclusive jurisdiction to the Delaware Court of Chancery.[51] Many corporations, in "an apparent effort to ensure the effectiveness of the bylaw in light of the Court of Chancery's jurisdictional limitations," have instead selected "state or federal courts in Delaware."[52] Others designate the state or federal courts where they are headquartered.[53]

B. The Validity of the Bylaws

The first court to consider the validity of a forum selection bylaw unilaterally adopted by the board struck down the provision.[54] In *Galaviz v. Berg,*[55] the shareholders asserted that the company failed to provide the government with certain discounts, resulting in significant overcharges.[56] After the behavior occurred but before any action was filed, the board of directors adopted a bylaw designating Delaware as the forum for all intra-corporate disputes.[57] Shareholders filed suit in California and argued that the forum selection clause was unenforceable.[58]

In defending the bylaw, Defendants relied on principles of contract. In applying this approach, the court found that the adoption of the bylaw

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48. *See* Claudia H. Allen, *Trends in Exclusive Forum Bylaws*, THE CONF. BOARD DIRECTOR NOTES (Jan. 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411715 (According to one study, 97% have chosen to include it.).

49. *Id.*

50. Forum Selection Bylaw adopted by National Bank Holdings Corporation. http://www.sec.gov/Archives/edgar/data/1475841/000147584114000058/nbhc_20140930ex32.htm Section 10.2 Article X page 21.

51. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 364 (2012).

52. *Id.*

53. *Id.*

54. Michael Van Gorder, *Boilermakers v. Chevron: Are Board Adopted Arbitration Bylaws Valid Under the Delaware General Corporation Law?*, 39 DEL. J. CORP. L. 443, 446 (2014).

55. Galaviz v. Berg, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011).

56. *Id.* at 1172

57. *Id.*

58. Id. at 1173

lacked mutual consent between the board and shareholders.[59] The Defendant had "not pointed to any commercial contract case upholding a venue provision that was inserted by a purported unilateral amendment to existing contract terms."[60] Moreover, the provision at issue was "adopted by the directors who [were] defendants in this action, after the majority of the purported wrongdoing [was] alleged to have occurred, and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect."[61] Accordingly, the court held the bylaw unenforceable.

C. Chevron

In the aftermath of *Galaviz,* shareholders of a dozen large U.S. companies filed complaints against their respective boards for unilaterally adopting forum selection bylaws.[62] In response, ten companies repealed their provisions while two sought to defend the bylaws in Delaware.[63]

In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,[64] the Chancery Court upheld as facially valid bylaws adopted by Chevron and FedEx that granted exclusive jurisdiction to the Delaware Courts for intra-corporate disputes. In assessing facial validity, the Chancery Court noted that the Delaware Code authorized bylaws that related to the "business of the corporation."[65] The bylaw did so by "channeling internal affairs cases into the courts of the state of incorporation."[66]

The court emphasized the contractual nature of bylaws.[67] Investors understood at the time of the acquisition of shares that the board had the ability to unilaterally adopt bylaws. Accordingly, additional shareholder consent was unnecessary. The bylaws were not, however, always valid in practice. As the court noted: "the real-world application of a forum selection bylaw can be challenged as an inequitable breach of fiduciary duty."[68] The court, however, did not address whether the bylaws at issue were invalid as applied.

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59. *Id.* at 1171.
60. *Id.* at 1174.
61. *Id.*
62. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 944 (Del. Ch. 2013) ("Within the course of three weeks in February 2012, a dozen complaints were filed in this court against Delaware corporations, including Chevron and FedEx, whose boards had adopted forum selection bylaws without stockholder votes.").
63. *Id.* at 945
64. 73 A.3d 934 (Del. Ch. 2013).
65. DEL. CODE. ANN. tit. 8 § 109(b) (2015).
66. *Chevron*, 73 A.3d at 951.
67. Id. at 939
68. *Id.* at 954.

IV. FORUM SELECTION BYLAWS "AS-APPLIED"

Although finding forum selection bylaws facially valid, the court in Chevron left open the possibility that they could be challenged as inequitable.[69] The as-applied challenge exists "precisely to ensure that facially valid forum selection clauses are not used in an unreasonable manner in particular circumstances."[70] That said, a forum clause should be enforced unless there is strong evidence its enforcement would be unreasonable to shareholders.[71]

A. Post Chevron Cases in Delaware

Delaware courts have so far proved unwilling to invalidate the use of forum selection bylaws when challenged as inequitable. In *City of Providence,*[72] the plaintiff contested a bylaw adopted by First Citizens Bancorporation that gave exclusive jurisdiction to the courts of North Carolina.[73] The bylaw was otherwise substantially identical to the one at issue in *Chevron.*[74]

City of Providence asserted that the bylaw had been adopted on the same day the company announced a merger and was intended to provide the board with a more favorable forum in the event of litigation.[75] Plaintiff also argued that the Chancery Court had exclusive jurisdiction to hear all matters relating to the Delaware General Corporation Law, effectively prohibiting the designation of another state as the exclusive forum.[76]

Rejecting these arguments, the court determined that "[there was] no basis to infer, even under the reasonable conceivability standard, that the forum selection bylaw was the product of a breach of fiduciary duty."[77] Rather than shield the board from judicial review, the bylaw only attempted to centralize litigation in a single jurisdiction.[78] Moreover, nothing about the application of the bylaw was unreasonable.[79] As for the claim of exclusive jurisdiction, the court found that Delaware law did not

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69. *Id.* at 958.

70. Roberts v. TriQuint Semiconductor, Inc., No. 1402-02441 (Ore. Cir. Ct. August 14, 2014).

71. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L. Ed. 2d 513 (1972) ("Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.").

72. City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229, 235 (Del. Ch. 2014).

73. *City of Providence v. First Citizens BancShares, Inc.,* 99 A.3d 229, 235 (Del. Ch. 2014) ("the fact that the Board selected the federal and state courts of North Carolina—the second most obviously reasonable forum given that FC North is headquartered and has most of its operations there—rather than those of Delaware as the exclusive forums for intra-corporate disputes does not, in my view, call into question the facial validity of the Forum Selection Bylaw.").

74. *Id.* at 234.

75. Plaintiff gave no reason for why North Carolina would be more favorable forum.

76. Id. at 235.

77. *City of Providence v. First Citizens BancShares, Inc.*, No. CIV.A. 9795-CB, 2014 WL 4409816, at *237 (Del. Ch. Sept. 8, 2014).

78. *Id.* at 236.

79. Id. at 240

mandate that all cases involving the state's corporate law be litigated in that jurisdiction.[80]

B. Enforcement

Companies with forum selection bylaws designating Delaware continue to be subject to derivative suits and other actions relating to the internal affairs in other states. They have sometimes sought relief by asking Delaware courts to enjoin parties filing actions outside of the state. The approach, however, has not met with significant success.

In *Genoud v. Edgen Group, Inc.*,[81] a Canadian citizen brought suit in Louisiana against the directors and controlling shareholder of Edgen Group, a Delaware corporation, for a breach of fiduciary duty.[82] Having adopted a forum selection clause granting exclusive jurisdiction to the Delaware Court of Chancery, Edgen Group filed an injunctive proceeding seeking to prevent the continuation of the action in Louisiana. The Delaware Court held that the shareholder violated the forum selection provision but declined to issue the injunction.[83] The court noted concerns with personal jurisdiction.[84] Owning stock in a Delaware corporation was arguably not enough to confer personal jurisdiction over the shareholder filing the action.[85] Louisiana, however, honored the forum selection provision and dismissed the case for improper venue.[86]

IV. THE RECEPTION OF FORUM SELECTION CLAUSES IN OTHER JURISDICTIONS

The reception of courts outside of Delaware to the *Chevron* decision has generally been favorable. No court since *Galaviz* has facially invalidated forum selection bylaws. As a result, they have rejected challenges based upon the unilateral adoption by the board.[87] Additionally, most have declined to overturn the bylaw as inequitable.

As-applied challenges have also, for the most part, been rejected. Courts have considered claims that a forum selection bylaw was "unreasonable or inequitable."[88] Most such arguments have centered around adoption after alleged wrong doing. Courts, however, have been unwilling to invalidate bylaws in these circumstances. California courts have

80. *Id.* at 235 (The Chancery Court determined plaintiff's interpretation would violate of the Supremacy Clause and federal diversity jurisdiction.).

81. Genoud v. Edgen Group, Inc., No. 625244, 2014 WL 2782221, at *1 (La. Dist. Ct. Jan. 17, 2014).

82. Id.

83. Genoud v. Edgen Group, Inc. No. 9055-VCL, at 43 (Del. Ch. Nov. 5, 2013), available at http://lawprofessors.typepad.com/files/110513tc9055vcljl.pdf

84. Id. at 4.

85. Id. at 7 (Del. Ch. Nov. 5, 2013 ("Historically, as a general rule, simply owning stock in a Delaware corporation is not sufficient to confer personal jurisdiction on a Delaware Court.").

86. *Genoud*, *supra* note 77, at *1.

87. *See* Cobb v. Ironwood Country Club, 233 Cal. App. 4th 960, 963 (2015).

88. *Id.*

upheld the bylaws where the plaintiff alleged their adoption was an effort to shield the board from litigation after wrongdoing.[89] Similarly, an Ohio court found that a forum selection clause did not become unenforceable because it was adopted after the purported wrongdoing.[90]

Courts have not, however, always upheld the bylaws. At least one state court found a bylaw unenforceable due its proximity with alleged wrongdoing.[91] The Oregon court did so by adding a requirement that the bylaw not violate public policy.[92] The court determined that enforcement of a bylaw after alleged wrongdoing and in anticipation of a specific lawsuit was an infringement on shareholders' rights and therefore a violation of public policy.[93]

Likewise, a California court invalidated a bylaw mandating arbitration that was adopted four months after an action filed against the board. The court accepted the characterization of the bylaw as a contract and applied the covenant of good faith and fair dealing. The principle precluded "amendments that operate[d] retroactively to impair accrued rights."[94] The board's actions "unreasonably interfere[d] with the opposing party's expectations regarding how the agreement applied to those claims."[95] As a result, the court invalidated the bylaw.[96]

V. CONCLUSION

The Delaware Chancery court has approved the use of forum selection bylaws unless inequitable. States outside of Delaware have generally adopted this approach. An Oregon court, however, has added an addi-

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89. Groen v. Safeway, Inc., No. RG14716641, slip op., at 1–2, 2014 WL 3405752 (Super.Ct.Cal., Alameda Cnty., May 14, 2014); *Brewerton v. Oplink Communications Inc (Super. Ct. Cal. Alameda Cnty, Dec. 12, 2014). See http://investor.oplink.com/secfiling.cfm?filingID=1104659-14-86731 Item 8.*

90. N. v. McNamara, 1:13-CV-833, 2014 WL 4684377 (S.D. Ohio Sept. 19, 2014). The court rejected the ruling in *Roberts v. TriQuint Semiconductor, Inc*., No. 1402-02441 (Ore. Cir. Ct. August 14, 2014) ("Corporation's adoption of Delaware forum-selection by-law after purported wrongdoing of corporate officers and directors did not have improper purpose, and thus was enforceable, since by-law allowed for consolidation of litigation brought on behalf of Delaware corporation into single forum to reduce costs and prevent duplication, and by-law did not insulate officers and directors from suit, and proceeding in Delaware courts would not have been unfairly advantageous to interests of officers and directors."). Found at http://www.wlrk.com/docs/Triquint_oregon.pdf

91. *Roberts v. TriQuint Semiconductor, Inc*., No. 1402-02441 (Ore. Cir. Ct. August 14, 2014), *Groen v. Safeway, Inc.,* No. RG14716641, slip op., at 1–2, 2014 WL 3405752 (Super. Ct. Cal., Alameda Cnty., May 14, 2014).

92. *Roberts v. TriQuint Semiconductor, Inc*., No. 1402-02441 (Ore. Cir. Ct. August 14, 2014).

93. *Roberts v. TriQuint Semiconductor, Inc*., No. 1402-02441 (Ore. Cir. Ct. August 14, 2014)
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94. Cobb v. Ironwood Country Club, No. G050446, 2015 WL 358794, at *1 (Cal. Ct. App. Jan. 28, 2015).

95. *Id.* at *3.

96. *Id. See also* In re Facebook, Inc., IPO Sec. & Derivative Litig., 922 F. Supp. 2d 445, 463 (S.D.N.Y. 2013) (declining to enforce forum selection provision in articles that was not in effect at the time plaintiffs purchased shares in IPO).

tional element and invalidated a bylaw adopted after alleged wrong doing as against public policy. In addition, a California court held that a bylaw mandating arbitration violated the covenant of good faith and fair dealing when adopted after an action was filed. Accordingly, bylaws adopted in close proximity to behavior likely to be challenged or after a claim has been filed have greater risk of being invalidated. Boards can reduce the likelihood by adopting the bylaws at a time when no threatened or actual litigation is pending.

Even if legally valid, however, forum selection bylaws raise other concerns. In one survey, 72% of investors agreed that a board should not unilaterally adopt a bylaw that restricted the rights of shareholders.[97] Proxy advisory firms have expressed concerns, at least where the bylaws were adopted without shareholder involvement.[98] The unilateral adoption of these bylaws, therefore, may weaken the relationship between management and shareholders.

Perhaps reflecting some legal uncertainty, the Corporation Law Council, a committee of the Delaware State Bar Association, submitted draft legislation that would authorize forum selection bylaws by statute. Specifically, the legislation confirms that a corporation, through its certificate of incorporation and bylaws, has the authority to select Delaware as an exclusive forum for intra corporate disputes arising under the Delaware General Corporation Law. In addition, however, the proposal would overturn the reasoning in *City of Providence v. First Citizens BancShares, Inc.,* 99 A.3d 229, 235 (Del. Ch. 2014) that would allow companies incorporated in Delaware to select an exclusive forum in another jurisdiction, such as where it is headquartered. The proposal does so by invalidating provisions that preclude Delaware Courts from hearing or arbitrating a case. The legislation, however, fails to address the validity of a provision selecting Delaware and an additional forum outside of the state. That being said, forums outside of Delaware may be selected after shareholders have given written consent. Accordingly, the future reception of unilaterally adopted forum selection bylaws granting exclusive jurisdiction to a single state has become even less certain.

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97. *See Policy 2014–2015 Policy Survey Summary of Results*, ISS (Sep. 2014), *available at* http://www.issgovernance.com/file/publications/ISS2014-2015PolicySurveyResultsReport.pdf

98. *Glass Lewis on Exclusive Forum Provisions*, GLASS LEWIS & CO. (Sep. 25, 2013), http://www.glasslewis.com/blog/glass-lewis-on-exclusive-forum-provisions/ ("Glass Lewis believes that such exclusive forum bylaws are generally not in shareholders' interests since they unnecessarily limit full legal recourse by preventing shareholders from bringing suit in a forum of their choosing. Like for other bylaw provisions that affect shareholder rights, Glass Lewis believes shareholders should have the opportunity to vote on the adoption of such bylaws."); *see also* ISS, *supra* note 90. ("While this authority may benefit shareholders by allowing the board to address routine matters without the expense or delay caused by holding a meeting, this authority can also be used to adopt provisions that may be adverse to shareholders' interests." ISS recommends evaluating each case on a case-by-case basis.).

The ability for corporations to adopt forum selection provisions will, however, ensure that Delaware retains its influence in the development of corporate law.[99] This, however, could have negative long-term effects.[100] Access to non-Delaware courts to interpret Delaware law currently serves as a check and balance.[101] If shareholders become deprived of this option, Delaware courts could find themselves overreaching.[102]

99. Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 165 (2011).
100. *Id.*
101. *Id.* at 187.
102. *Id.*

Appendix of cases by state that have acknowledged the facial validity of forum selection bylaws unilaterally adopted by the board:

1. California
    a. Groen v. Safeway, Inc., No. RG14716641, 2014 WL 3405752, at * 1–2 (Super. Ct. Cal. May 14, 2014), *available at* http://blogs.reuters.com/alison-frankel/files/2014/06/safeway-MTDopinion.pdf
    b. *Brewerton v. Oplink Communications Inc.*, No. RG14-750111 (Super. Ct. Cal. Dec. 12, 2014)*, available at* http://investor.oplink.com/secfiling.cfm?filingID=1104659-14-86731
    c. *Cobb v. Ironwood Country Club,* No. G050446, 2015 WL 358794, at *1 (Cal. Ct. App. Jan. 28, 2015), *available at* http://www.courts.ca.gov/opinions/documents/G050446.PDF
2. Delaware
    a. *City of Providence v. First Citizens Bancshares, Inc.,* 99 A.3d 229, 241 (Del. Ch. 2014), *available at* http://jenner.com/system/assets/assets/8334/original/City_20of_20Providence_20v._20First_20Citizens.pdf
3. Illinois
    a. *Melissa's Trust v. Seton,* No. 14 C 02068, 2014 WL 3811241 (N.D. Ill. July 31, 2014), *available at* http://docs.justia.com/cases/federal/district-courts/illinois/ilndce/1:2014cv02068/294052/33
    b. *Miller v. Beam, Inc.,* No.2014 CH 00932, Tr. of Oral Arg. (Ill. Cir. Ct. Mar. 5, 2014), *available at* http://www.sidley.com/~/media/Files/News/2014/06/The%20Elusive%20Promise%20of%20Reducing%20Shareholder%20Liti__/Files/View%20Miller%20v%20Beam%20Inc%20Decision/FileAttachment/Link_4_060314
4. Louisiana
    a. *Genoud v. Edgen Grp., Inc.,* No. 625,244, 2014 WL 2782221 (La. Dist. Ct. Jan. 17, 2014)
5. New York
    a. *Hemg Inc. v. Aspen Univ.,* No. 650457/13, 2013 WL 5958388 (N.Y. Sup. Ct. Nov. 4, 2013), *available at* https://scholar.google.com/scholar_case?case=18096402955226304483&hl=en&as_sdt=6&as_vis=1&oi=scholarr
6. Ohio
    a. *N. v. McNamara,* No. 1:13-CV-833, 2014 WL 4684377 (S.D. Ohio Sept. 19, 2014), *available at*

http://docs.justia.com/cases/federal/district-courts/ohio/ohsdce/1:2013cv00833/167332/28

7. Oregon
    a. *Roberts v. TriQuent Semiconductor, Inc*., No. 1402-02441 (Ore. Cir. Ct. Aug. 14, 2014), *available at* http://www.wlrk.com/docs/Triquint_oregon.pdf
8. Texas
    a. *Daugherty v. Ahn*, Cause No. CC-11-06211 (Cnty. Ct. No. 3, Dallas Cnty. Tex., Feb. 15, 2013)
    b. *In re MetroPCS Commc'ns, Inc.*, 391 S.W.3d 329 (Tex. App. 2013).
9. Maryland (arbitration bylaws)
    a. *Katz v. Common Wealth REIT,* No. 24–C–13–001299, slip op. at 22–26 (Md. Cir. Ct. Feb. 19, 2014), *available at* http://blogs.reuters.com/alison-frankel/files/2014/03/commonwealthDJ-marylandopinion.pdf
    b. *Corvex Mgmt. LP v. Commonwealth REIT*, Case No. 24-C-13-001111 (Md. Cir. Ct. May 8, 2013), *available at* http://www.courts.state.md.us/businesstech/pdfs/mdbt4-13.pdf