CHALLENGES TO THE VALIDITY OF DELAWARE FORUM SELECTION BYLAWS COMMENCE

In recent years, Delaware corporations have increasingly adopted forum selection bylaws requiring that their shareholders initiate all corporate governance-related lawsuits in the Delaware Court of Chancery. The rationale for these forum selection bylaws is sound. The Court of Chancery is widely viewed as having significant expertise in resolving disputes under Delaware corporate law. Further, shareholder litigation—particularly challenges to mergers and acquisitions—has been brought more and more often in jurisdictions other than Delaware, often in multiple jurisdictions at the same time, which can be both costly and inefficient for companies.

The validity of forum selection bylaws is now under attack. Last week, several putative shareholder class actions were filed in the Delaware Court of Chancery asserting that forum selection provisions are invalid because they (1) are overbroad; (2) are waivable by the company but not by shareholders; and (3) were imposed by the boards unilaterally without a shareholder vote. The actions, which have been assigned to Chancellor Leo Strine, Jr., seek to have the bylaws declared invalid and unenforceable.

The actions filed in Delaware present the first opportunity for the courts in that state to consider squarely the validity of this type of forum selection bylaw. Vice Chancellor J. Travis Laster of the Court of Chancery recently suggested that "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes." *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010). But no Delaware court has ruled on the validity of such a provision.

At the same time, at least one court outside of Delaware has found a forum selection bylaw to be invalid. In *Galaviz v. Berg*, a federal court in the Northern District of California refused to dismiss a derivative action against Oracle Corporation on the basis of a bylaw providing that "'[t]he sole and exclusive forum for any actual or purported derivative action brought on behalf of [Oracle] shall be the Court of Chancery in the State of Delaware.'" 763 F. Supp. 2d 1170, 1172 (N.D. Cal. Jan. 3, 2011). The court declined to enforce the forum selection provision because it "was unilaterally adopted by the directors who are defendants in this action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect." The court went on to hold that under those circumstances "there is no basis for the Court to disregard the plaintiffs' choice of forum" and defer to the bylaw provision. *Id.* at 1174.

Forum selection bylaws provide significant benefits to companies and their shareholders, especially given that shareholders' attorneys have increasingly filed shareholder actions outside of Delaware, increasing the expense and inefficiency of litigation to the detriment of all parties.

Given that forum selection provisions are relatively untested in Delaware and have been rejected by one court outside of Delaware (at least on the specific facts at issue there), the recently filed cases may provide needed clarity on this issue. In all events, it is important for corporations and their boards to monitor developments in these cases in assessing the utility of forum selection clauses in corporate bylaws going forward.

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