

VIII. *Forum Selection Bylaws in Delaware*

A. Introduction

Recently the Delaware Court of Chancery issued opinions in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*¹ and *City of Providence v. First Citizens BancShares, Inc.*² upholding validity of the forum selection bylaw, “a provision in a corporation’s bylaws that designates a forum as the exclusive venue for certain stockholder suits against the corporation, either as an actual or nominal defendant, and its directors and employees.”³ In turn, the plaintiffs’ bar has criticized the use of unilaterally-adopted forum exclusivity bylaws, citing constitutional concerns,⁴ and pointing out that such bylaws prevent shareholders from filing suit against wayward directors in a convenient forum.⁵

This Article examines the framework established by these two opinions and addresses their implications. Part B discusses the problem of multijurisdictional shareholder litigation and arguments in favor and against this practice. Next, Part C addresses two recent decisions of the Delaware Court of Chancery establishing the legal framework for forum selection bylaws. Part D then examines a two-step approach to the review of the forum selection bylaws suggested by the Delaware case law. Part E discusses implications of the Delaware approach to forum selection bylaws.

B. Background: Multijurisdictional Shareholder Litigation

In the current corporate litigation environment, shareholders rarely challenge mergers and acquisitions (“M&A”) deals or bring derivative suits exclusively in the state of the corporation’s incorporation.⁶ According to recent research, in 2013, “[s]ixty-two percent of

¹ 73 A.3d 934, 963 (Del. Ch. 2013).

² 99 A.3d 229, 235 (Del. Ch. 2014).

³ *Chevron*, 73 A.3d at 942.

⁴ See *infra* notes 68-69 and accompanying text (discussing potential dormant commerce clause challenges)

⁵ See *infra* notes 16-19 and accompanying text (analyzing commentators’ claims that plaintiffs require more, not less, protection from abusive boards).

⁶ Edward B. Micheletti & Jennes E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 3

[M&A] litigation was multijurisdictional, with Delaware, New York, California and Texas being the most popular forums.”⁷ Commentators emphasize that shareholders “regularly file identical claims in more than one forum and then compete with each other for position in settling with defendants.”⁸

Unsurprisingly, multijurisdictional litigation raises many concerns among practitioners and scholars.⁹ In particular, critics emphasize that identical shareholder claims brought in multiple courts cause waste of legal resources.¹⁰ Multijurisdictional shareholder litigation also presents the danger of conflicting court decisions.¹¹ Moreover, under the Full Faith and Credit Clause of the U.S. Constitution,¹² the first class of shareholder plaintiffs to settle a derivative suit precludes other courts considering identical claims from rendering any decisions.¹³ Accordingly, multiforum shareholder litigation creates “an active ‘market for preclusion’ in which parties seek to trade the preclusive effect of a judgment in exchange for compensation.”¹⁴ Some

(2012); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 469 (2014).

⁷ James L. Hallowell & Jefferson E. Bell, *Forum Selection Bylaws: One Year after Boilermakers*, DEL. BUS. CT. INSIDER (July 15, 2014), available at [http://www.gibsondunn.com/publications/Documents/HallowellBell-Forum SelectionByLaws.pdf](http://www.gibsondunn.com/publications/Documents/HallowellBell-Forum%20SelectionByLaws.pdf), archived at <http://perma.cc/BG4U-YUHW>.

⁸ Myers, *supra* note 6, at 469.

⁹ See, e.g., Frederick H. Alexander et al., *Forum Selection Bylaws: Where We Are and Where We Go from Here*, 27 INSIGHTS: CORP. & SEC. L. ADVISOR, no. 7, July 2013 at 2, 7; Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 333 (2013); Randall S. Thomas, *What Should We Do about Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1928 (2013).

¹⁰ Richard A. Rosen and Stephen P. Lamb, *Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, 4 (Jan. 8, 2015), http://www.paulweiss.com/media/2756381/fsc_article.pdf, archived at <http://perma.cc/389P-YQJ8>.

¹¹ Micheletti & Parker, *supra* note 6, at 27.

¹² U.S. CONST. art IV, § 1, cl. 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

¹³ Grundfest & Savelle, *supra* note 9, at 345.

¹⁴ Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1057 (2013).

commentators argue that shareholder plaintiffs rarely receive the fair value of their claims in these settlements.¹⁵

In contrast, some consider shareholders' right to pursue litigation in the most convenient forum an important tool for protection against abuse by boards of directors.¹⁶ For example, Glass Lewis, a prominent proxy adviser, specifically stated that "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."¹⁷ Some commentators contend that multiforum litigation stimulates competition among plaintiffs' lawyers pursuing identical claims in different courts.¹⁸ Furthermore, binding shareholders to litigate in one court prevents aggrieved shareholders from choosing the forum that is most convenient for them.¹⁹ Some scholars suggest that enforcement of the forum selection bylaws, especially if such bylaws consistently designate Delaware courts as the exclusive forum, "may spark a backlash from other states, federal regulators, and plaintiffs' lawyers."²⁰ Finally, some commentators argue that Delaware needs competition in corporate law application.²¹

In 2010, Vice Chancellor Laster offered a solution to the problem of multiforum litigation, suggesting that the shareholders and directors could designate a specific forum for such disputes.²² Delaware law does not provide an exhaustive list of matters to be included in corporate bylaws; assuming the certificate of incorporation authorizes the board to change the bylaws, the board can add a forum selection clause in the bylaws by its unilateral decision.²³ Only recently,

¹⁵ *Id.* at 1096; Thomas, *supra* note 9, at 1946.

¹⁶ Thomas, *supra* note 9, at 1955.

¹⁷ Bob McCormick, *Glass Lewis on Exclusive Forum Provisions*, GLASS LEWIS (Sept. 25, 2013), <http://www.glasslewis.com/blog/glass-lewis-on-exclusive-forum-provisions/>, archived at <http://perma.cc/G6NK-RNB8>.

¹⁸ Micheletti & Parker, *supra* note 6, at 27; Myers, *supra* note 6, at 494.

¹⁹ Charles Nathan et al., *Designating Delaware's Court of Chancery as the Exclusive Jurisdiction for Intra-Corporate Disputes*, 24 INSIGHTS: CORP. & SEC. L. ADVISOR, no. 6, June 2010 at 15, 17.

²⁰ Thomas, *supra* note 9, at 1952.

²¹ *Id.* at 1941.

²² *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010).

²³ DEL. CODE ANN. tit. 8, § 109 (2011) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or

however, have the Delaware courts clarified their position on the validity of forum selection bylaws.²⁴

C. Recent Developments in Delaware

In 2013, three years after Vice Chancellor Laster's suggestion in *Revlon*, the Delaware Court of Chancery issued an opinion in the *Chevron* case expressly upholding the validity of the forum selection bylaw.²⁵ The boards of Chevron and FedEx, Delaware corporations, having relied on their powers granted by the certificate of incorporation,²⁶ amended their bylaws to designate Delaware courts as the exclusive forum for shareholder litigation.²⁷ Having reviewed the stockholders' complaints challenging those bylaws, the Delaware Court of Chancery found that the forum selection clauses were facially valid.²⁸

In *City of Providence*,²⁹ the Delaware Court of Chancery upheld a forum selection bylaw of a Delaware corporation designating North Carolina courts as the exclusive forum for shareholder litigation.³⁰ The board of First Citizens BancShares, Inc. ("FC North") changed its bylaws on the exact date it approved a merger with First Citizens Bancorporation, Inc. ("FC South").³¹ Shareholders of FC North brought an action in the Delaware Court of Chancery challenging the facial validity of the forum selection bylaw and the merger between FC North and FC South, while the FC North board moved to dismiss the plaintiffs' claim for failure to file in the proper venue.³² The

powers or the rights or powers of its stockholders, directors, officers or employees.").

²⁴ See *supra* notes 1-2 and accompanying text (discussing the recent holdings in *Chevron* and *City of Providence*).

²⁵ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

²⁶ DEL. CODE ANN. tit. 8, § 109 (2011).

²⁷ *Chevron*, 73 A.3d at 937.

²⁸ *Id.* at 939.

²⁹ *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229 (Del. Ch. 2014).

³⁰ *Id.* at 231.

³¹ *Id.* at 231-32.

³² *Id.* at 237-38.

Delaware Court of Chancery found that the clause was valid, both facially and as-applied, and granted the board's motion to dismiss.³³

D. Judicial Review of Forum Selection Bylaws: Steps in Analysis

1. Facial Validity

In *Chevron*, shareholders argued that the forum selection bylaws were (i) “statutorily invalid” because the board exceeded its mandate granted by Delaware law³⁴ and (ii) “contractually invalid”³⁵ as adopted without the shareholders’ approval.³⁶ The Delaware Court of Chancery explained that under section 109(b) of the Delaware General Corporation Law, the bylaws “may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”³⁷ Furthermore, according to the Delaware Court of Chancery, the board did not exceed its powers by adopting the forum selection bylaws because such bylaws merely bring “internal affairs cases into the courts of the state of incorporation.”³⁸

Addressing the plaintiffs’ contractual argument, the court based its reasoning “on implied consent, given when an investor acquires equity in a corporation,”³⁹ clarifying that “the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders.”⁴⁰ As long as the certificate of incorporation permits the board to amend the bylaws, the

³³ *Id.* at 231; David J. Berger, *Delaware Court of Chancery Upholds Forum Selection Bylaw*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Sept. 18, 2014, 9:04 AM), <http://blogs.law.harvard.edu/corpgov/2014/09/15/delaware-court-of-chancery-upholds-forum-selection-bylaw/>, archived at <http://perma.cc/SL44-MFVJ>.

³⁴ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 938 (Del. Ch. 2013).

³⁵ *Id.* at 938.

³⁶ *Id.* at 954-55.

³⁷ *Id.* at 939.

³⁸ *Id.* at 951.

³⁹ Deborah A. DeMott, *Forum-Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269, 279 (2015).

⁴⁰ *Chevron*, 73 A.3d at 939.

shareholders buying the stock of such corporation consent to the terms of such contract that “presupposes the board’s authority to [amend the] bylaws.”⁴¹

In *Chevron*, the shareholder plaintiffs challenged validity of the forum selection bylaws as a matter of law and therefore “took on the stringent task of showing that the bylaws cannot operate validly in any conceivable circumstance.”⁴² Although the plaintiffs listed hypothetical situations in which the forum selection bylaws could have operated inequitably, the court refused to consider them “in the absence of a genuine controversy with concrete facts.”⁴³ Having found that the forum selection bylaws are valid on their face, the court explained that “a plaintiff burdened by [such bylaws] could still challenge the application of such a provision on a case-by-case basis for breach of fiduciary duty or under general rules of contract law as set forth by the U.S. Supreme Court in *[M/S] Bremen v. Zapata Off-Shore Company*.”⁴⁴

2. Fiduciary Duty and Validity as-Applied

In *City of Providence* the Delaware Court of Chancery followed the *Chevron* holding that the forum selection bylaw is presumptively valid, but then went one step further examining as-applied enforceability of the forum selection clause.⁴⁵ The court

⁴¹ *Id.* at 940; Holly J. Gregory, *The Elusive Promise of Curbing Investor Suits with Bylaws*, LAW360 (June 16, 2014, 12:49 PM), <http://www.law360.com/articles/548381/the-elusive-promise-of-curbing-investor-suits-with-bylaws>.

⁴² *Chevron*, 73 A.3d at 940.

⁴³ *Id.*; see also Robert Anderson et al., *Fall 2013 Symposium: Contemporary Trends in Corporate Litigation*, 7 J. BUS. ENTREPRENEURSHIP & L. 397, 419-20 (2014); George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 302 (2014); Grundfest & Savelle, *supra* note 9, at 332.

⁴⁴ Robert A. Friedel & Melissa L. Nunez, *Forum Selection Bylaws Help Combat Multijurisdictional Shareholder Litigation: State Courts Are Increasingly Upholding Forum Selection Provisions in Corporate Bylaws*, PEPPER HAMILTON LLP, (Sept. 3, 2014), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=3030, archived at <http://perma.cc/Q5K7-FFQC>; see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

⁴⁵ *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 299, 237 (Del. Ch. 2014); Joseph M. McLaughlin, *Enforceability of Board-Adopted Forum Selection Bylaws*, SIMPSON THACHER & BARTLETT LLP, 3 (Oct. 9, 2014), <http://www.stblaw.com/docs/default-source/Publications/ny-law->

addressed the plaintiffs' contention that the board's adoption of the forum selection clause was "self-interested."⁴⁶ The court applied a business judgment standard to the board's decision concerning the forum selection bylaws, holding that the plaintiffs' allegations were without basis since the clause did not prevent judicial review of the FC North-FC South merger.⁴⁷ The court emphasized that the plaintiffs still possessed the right to challenge the disputed merger in North Carolina courts.⁴⁸

When addressing the validity of the forum selection bylaw as applied, the court followed the framework of *Bremen* and *Schnell v. Chris-Craft Industries, Inc.*⁴⁹ Under *Bremen*, a forum selection clause is presumptively valid unless the enforcement of that clause "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."⁵⁰ In the context of corporate relations, *Schnell* sharpens the *Bremen* test by prohibiting a board of directors to act if such act would lead to inequitable results.⁵¹

The plaintiffs contended that the court should not enforce the forum selection bylaw because FC North's board changed the bylaw in anticipation of a shareholder challenge of the merger in Delaware.⁵² Moreover, in plaintiffs' view, because FC North's controlling shareholder would definitively vote in favor of the disputed bylaw, upholding the bylaw's adoption to dismiss the minority shareholders' lawsuit would be unfair.⁵³ The Delaware Court of Chancery stated that given that the headquarters of FC North was in North Carolina, and the absence of "an overarching public policy of [Delaware] that prevents boards of directors of Delaware corporations from adopting bylaws to require stockholders to litigate intra-corporate disputes in a foreign

journal_joe-mclaughlin_corporate-litigation-column_10_09_2014.pdf,
archived at <http://perma.cc/83YE-AA4N>.

⁴⁶ *City of Providence*, 99 A.3d at 236-37.

⁴⁷ *Id.* at 241.

⁴⁸ *Id.* at 237.

⁴⁹ *Id.* at 242; see *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437, 439 (Del. 1971).

⁵⁰ *Bremen*, 407 U.S. at 15.

⁵¹ *Schnell*, 285 A.2d at 439.

⁵² *City of Providence*, 99 A.3d at 238.

⁵³ *Id.* at 238-39.

jurisdiction,”⁵⁴ the bylaw designating North Carolina courts as the exclusive forum for FC North shareholder disputes was enforceable.⁵⁵

Addressing the timing of the board’s decision, the court stated that simply because the board adopted the bylaws on the same day it approved the challenged merger does not make the bylaws unreasonable on their face.⁵⁶ The court thus rejected the approach of California and Oregon courts that focused their review on the timing of boards’ adoption of the forum selection clause.⁵⁷ Furthermore, “the presence of a controlling shareholder who wanted a forum selection bylaw adopted did not make enforcement of the bylaw *per se* unreasonable.”⁵⁸

City of Providence concerned bylaws that chose courts located in the state of the company’s headquarters, a forum that appears to be a logical alternative to a state of incorporation.⁵⁹ The Delaware Court of Chancery, however, did not hold that the forum selection bylaws can designate only the state of the company’s incorporation or principal place of business.⁶⁰ To the contrary, commentators emphasize that Delaware courts court are unlikely to insist on a showing of the link between the state designated by the forum selection bylaws and the corporation if shareholder plaintiffs fail to prove that the forum selection clause is “unreasonable, unjust or inequitable”⁶¹

E. Implications

The *Chevron* decision triggered rapid corporate adoption of forum selection bylaws.⁶² Commentators count more than one hundred Delaware corporations that “adopted or announced plans to adopt exclusive forum bylaws from June 25, 2013, through October 31,

⁵⁴ *Id.* at 240.

⁵⁵ *Id.* at 241.

⁵⁶ *Id.*

⁵⁷ *E.g.*, Galaviz v. Berg, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011); Roberts v. TriQuint Semiconductor, Inc., No. 1402-02441, slip op. at 9-10 (Or. Cir. Ct. Aug. 14, 2014); *City of Providence v. First Citizens Bancshares, Inc., et al.*, SULLIVAN & CROMWELL LLP, 1 (Sept. 15, 2014), <http://www.sullcrom.com/city-of-providence-v-first-citizens-bancshares-inc-et-al>, archived at <http://perma.cc/D4Y7-6UGD>.

⁵⁸ *Corporate Litigation*, 27 BUS. TORTS REP. 15, 17 (2014).

⁵⁹ *City of Providence*, A.3d at 235.

⁶⁰ *Id.*

⁶¹ *City of Providence v. First Citizens Bancshares, Inc., et al.*, *supra* note 57 at 1.

⁶² Rosen & Lamb, *supra* note 10.

2013.”⁶³ Moreover, corporations from other states also followed the Delaware lead.⁶⁴ *City of Providence* reinforced the *Chevron* pronouncements and clarified that Delaware would enforce forum selection bylaws designating not only Delaware courts as the only forum for shareholder litigation, but also courts of other states.⁶⁵

The Supreme Court of Delaware, however, has not yet directly affirmed the approach to the forum selection clauses developed by *Chevron* and *City of Providence*.⁶⁶ Nonetheless, it appears safe to conclude that the Supreme Court of Delaware would endorse the holding of *Chevron* and *City of Providence*, given that former Chancellor Strine, an author of the *Chevron* opinion, is currently Chief Justice of the Delaware Supreme Court.⁶⁷

On the other hand, some commentators note that “plaintiff’s lawyers don’t give up easily and there are still some interesting challenges to be made to forum selection bylaws, including constitutional issues under the Dormant Commerce Clause.”⁶⁸ Plaintiffs may potentially argue that Delaware law, by enforcing the forum selection bylaws designating Delaware as the exclusive forum, discriminates against interstate commerce by benefiting the Delaware economy at the expense of out-of-state interests.⁶⁹ However, *City Providence* demonstrated that Delaware courts apply the same reasoning to uphold the

⁶³ Claudia H. Allen, *Trends in Exclusive Forum Bylaws* 3 (Jan. 2014), http://www.conference-board.org/retrievefile.cfm?filename=TCB_DN-V6N2-141.pdf&type=subsite, archived at <http://perma.cc/97VD-Z8V7>.

⁶⁴ *Exclusive Forum Bylaws Gain Momentum*, SULLIVAN & CROMWELL LLP, 3 (May 28, 2014), <http://www.sullcrom.com/exclusive-forum-bylaws-gain-momentum>, archived at <http://perma.cc/TLV4-ZB5B> (remarking that companies have amended their bylaws to include forum exclusivity provisions in “Florida, Maryland, Nevada, Oregon, Pennsylvania, South Carolina, Texas and Virginia.”).

⁶⁵ *City of Providence v. First Citizens Bancshares, Inc., et al.*, *supra* note 57, at 3.

⁶⁶ *See, e.g.*, *United Techs. Corp. v. Treppel*, No. 127, 2014, slip op. at 12 (Del. Dec. 23, 2014).

⁶⁷ *Judicial Officers of the Delaware Supreme Court*, DELAWARE STATE COURTS, <http://courts.delaware.gov/supreme/justices.stm> (last visited Feb. 2, 2015), archived at <http://perma.cc/4YUP-TL7T>.

⁶⁸ Alison Frankel, *Forum Selection Clauses Are Killing Multiforum M&A Litigation*, REUTERS (June 24, 2014), <http://blogs.reuters.com/alison-frankel/2014/06/24/forum-selection-clauses-are-killing-multiforum-ma-litigation/>, archived at <http://perma.cc/864C-8HBX>.

⁶⁹ *Id.*; *see also* *McCoy v. Gamesa Tech. Corp.*, 2012 U.S. Dist. LEXIS 9278, 17 (N.D. Ill. Jan. 26, 2012).

validity of forum selection bylaws designating an out-of-state court as the exclusive forum, as well as Delaware.⁷⁰

Others express concerns about the foundation of the *Chevron* decision—“flexible contract between the stockholders and the corporation”⁷¹—and argue in favor of defining the board’s powers in the Delaware statutes.⁷² For example, when facing an analogous ambiguity with respect to the fee-shifting bylaws, Delaware clarified its position on the matter by changing the relevant statutes.⁷³ These commentators opine that absent clear statutory definition of the board’s unilateral powers, the broad contractual interpretation of the bylaws in *Chevron* and *City of Providence* opens doors to other controversial innovations such as arbitration and class action waiver.⁷⁴

At the national level there is even less certainty with respect to the forum selection bylaws.⁷⁵ Assuming Delaware case law is settled, there is no guarantee that other states will enforce the forum selection bylaws in the same manner.⁷⁶ On the other hand, observers note that “[w]hile most state courts have not yet had an opportunity to consider the question, [post-*Chevron* cases in New York, Illinois and California] relating to exclusive forum provisions in non-Delaware courts demonstrate a judicial willingness to honor exclusive forum bylaws.”⁷⁷

Furthermore, *City of Providence* illustrates that even if the states uniformly uphold the facial validity of forum selection bylaws,

⁷⁰ *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 299, 241 (Del. Ch. 2014).

⁷¹ *Chevron*, 73 A.3d at 957; DeMott, *supra* note 39, at 286.

⁷² DeMott, *supra* note 39, at 293-96.

⁷³ Ralph C. Ferrara & Rachel O. Wolkinson, *When the Camel’s Nose Gets Under the Tent: Fee-Shifting and Forum Selection in Delaware*, 22 CORP. GOV. ADVISOR, no. 5, Sept.-Oct. 2014, at 6, 11.

⁷⁴ DeMott, *supra* note 39, at 275.

⁷⁵ *Delaware Court of Chancery Upholds Forum Selection Bylaw Adopted Concurrently with Merger Agreement and Designating North Carolina as Exclusive Forum*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Sept. 9, 2014), <http://www.paulweiss.com/media/2639475/9sept14alert.pdf>, archived at <http://perma.cc/NHK7-M5LX>.

⁷⁶ *See, e.g., Roberts v. TriQuint Semiconductor, Inc.*, No. 1402-02441, slip op. at 9-10 (Or. Cir. Ct. Aug. 14, 2014) (refusing to dismiss a shareholder suit based on a board-adopted bylaw because enforcing the bylaw “would be unfair and unjust.”). *But see, e.g., North v. McNamara*, No. 1:13-cv-833, slip op. at 12 (S.D. Ohio Sept. 19, 2014) (adopting the *Chevron* reasoning and enforcing the bylaw).

⁷⁷ *Exclusive Forum Bylaws Gain Momentum*, *supra* note 64, at 5.

their approaches to the reasonableness of such bylaws and timing of the board's decision may still differ.⁷⁸ In addition, difficulties arise because the procedural law of an enforcing state—"which may or may not differ from the procedural law of Delaware"⁷⁹—governs the second step in the as-applied analysis endorsed by *Chevron* and *City Providence*.⁸⁰ Thus, the disagreement between Oregon and Delaware courts in connection with reasonableness and timing of the board's decision addressed in *City of Providence* "serve[s] as a reminder that the law with respect to forum selection bylaws is not uniformly settled across jurisdictions as to its application to particular situations."⁸¹

F. Conclusion

Recently the Delaware Court of Chancery has rendered two opinions upholding validity of the forum selection clause in the corporate bylaws.⁸² *Chevron* made it clear that bylaws of a Delaware corporation designating Delaware courts as the exclusive forum for shareholder litigation are presumptively valid.⁸³ *City of Providence* extended this presumption to forum selection bylaws choosing courts outside of Delaware.⁸⁴

It remains to be seen, however, whether the courts of other states will follow Delaware's lead in connection with the forum

⁷⁸ Jeff C. Dodd & James Edward Maloney, *Delaware Chancery Court Provides Further Support for Forum Selection Bylaws*, ANDREWS KURTH, 3 (Sept. 18, 2014), http://www.andrewskurth.com/assets/pdf/article_1137.pdf, archived at <http://perma.cc/V5HW-33SG>.

⁷⁹ Frederick H. Alexander et al., *supra* note 9, at 5-6.

⁸⁰ Grundfest & Savelle, *supra* note 9, at 330.

⁸¹ Daniel G. Dufner, Jr. et al., *Courts Differ on Enforceability of Unilaterally Adopted Forum Selection Bylaws*, WHITE & CASE LLP (Sept. 2014), <http://www.whitecase.com/files/Publication/b95380e7-a41b-43f0-80d9-a90a34bcd8df/Presentation/PublicationAttachment/3ca69768-f1ec-47e8-8da1-af5c02036dc8/courts-differ-enforceability-unilaterally-adopted-forum-selection-by-law.pdf>, archived at <http://perma.cc/VHV6-LTDS>.

⁸² *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 235 (Del. Ch. 2014); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 963 (Del. Ch. 2013).

⁸³ *Chevron*, 73 A.3d at 939.

⁸⁴ *City of Providence*, 99 A.3d at 231.

selection bylaws.⁸⁵ Although the states that validated such bylaws exercised the same approach to the facial validity of the forum selection bylaws, the second step of the analysis—validity of the forum selection bylaw as-applied—requires application of procedural law of the state in which the suit is filed and therefore leaves room for disagreement among the states.⁸⁶

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⁸⁵ See *supra* notes 75-77 and accompanying text (explaining that not all the states have yet expressed their positions on the validity of the forum selection bylaws).

⁸⁶ See *supra* notes 78-81 and accompanying text (highlighting that courts apply procedural law of the forum to review validity of forum selection clauses as-applied).

⁸⁷ Student, Boston University School of Law (J.D. 2016).