



*July 8, 2013*

## **CLIENT ALERT**

### **DELAWARE CHANCERY COURT UPHOLDS VALIDITY OF FORUM SELECTION BYLAWS**

The Delaware Court of Chancery upheld the validity of forum selection bylaws that provided that derivative actions, actions asserting a breach of fiduciary duty, actions relating to the internal affairs of a corporation and other claims arising under the Delaware General Corporation Law (“DGCL”) are to be brought exclusively in Delaware courts. The forum selection bylaws at issue were adopted by the boards of directors of two Delaware corporations, Chevron Corporation (“Chevron”) and FedEx Corporation (“FedEx”).

Shareholders sued the boards of directors of both Chevron and FedEx, respectively, challenging the validity of these forum selection bylaws. Over the last several years, Delaware corporations have been adopting forum selection bylaws clauses to address the high cost of defending “multi forum litigation”-- simultaneous litigation over a single transaction or board decision in more than one forum.

On June 25, Chancellor Leo E. Strine of the Delaware Chancery Court issued a decision in *Boilermakers Local 154 Retirement Fund, et al. v. Chevron Corporation, et al.*, C.A. No. 7220-CS and *IClub Investment Partnership v. FedEx Corporation, et al.*, C.A. No. 7238-CS (Del. Ch. June 25, 2013),\* in which he stated that the bylaws adopted were valid under 109(b) of the DGCL, which provides that bylaws of a corporation “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.”

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\* The court consolidated these two cases to resolve the issue as to whether forum selection bylaws are facially invalid under the DGCL and whether the board-adopted forum selection bylaws are facially invalid as a matter of contract law.

The court found that the provisions in these bylaws were facially statutorily valid in that they were within the authority of the board of directors of a Delaware corporation and that they were facially contractually valid notwithstanding having been unilaterally adopted by the board of directors without stockholder approval. The court stated that bylaws, together with the certificate of incorporation and the DGCL form part of a “flexible contract between corporation and stockholders” and that stockholders who invest in such corporations “assent to be bound by board-adopted bylaws when they buy stock in these corporations.” The court noted that notwithstanding its current decision, a plaintiff could still challenge the application of a forum selection bylaw in any “future, real world situation,” where it was being used unreasonably or in breach of a board’s fiduciary duties. The decision clarifies that under Delaware law forum selection bylaws are presumptively valid and will be treated like any other forum selection clause. Note, this decision may be appealed to the Delaware Supreme Court.

We will continue to monitor these proceedings and keep you advised of any developments.

Please consult with the undersigned or your regular Warsaw Burstein attorney to consider whether it is appropriate for your company to adopt forum selection bylaws.

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