

[Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE— DelCh: Chevron, FedEx forum selection bylaws upheld, \(Jun. 25, 2013\)](#)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

The Delaware Chancery Court today held that forum selection bylaws adopted by Chevron Corporation (Chevron) and FedEx Corporation (FedEx) are statutorily valid under Delaware law and thus enforceable. The cases arose from shareholder suits contesting these companies' authority to elect Delaware as the site for litigating internal affairs matters.

The chancery court decided the *Chevron* and *FedEx* cases together for reasons of judicial efficiency because they raised “nearly identical” issues and had been filed just days apart by parties who employed the same law firm. Initially, the plaintiffs had filed suits against 12 companies, but only Chevron and FedEx opted to litigate; the other 10 companies repealed their similar bylaws ([Boilermakers Local 154 Retirement Fund v. Chevron Corporation and IClub Investment Partnership v. FedEx Corporation](#), June 25, 2013, Strine, L.).

Background. Chevron and FedEx are Delaware corporations that both adopted bylaws that require matters regarding their internal affairs to be litigated in the Delaware chancery court. Each company's certificate of incorporation grants its board authority to adopt bylaws under Delaware law. Chevron and FedEx cited the risk of multiforum litigation as the main reason for adopting forum selection bylaws.

The plaintiffs, consisting of municipal retirement funds, challenged Chevron's and FedEx's forum selection bylaws on the grounds that these companies' boards lacked authority under Delaware law to adopt them and because the bylaws are contractually invalid. The plaintiffs also alleged that Chevron's and FedEx's boards breached their fiduciary duties. The chancery court held for Chevron and FedEx and dismissed two of the plaintiffs' counts with prejudice.

Bylaws upheld. The chancery court first held that the Chevron and FedEx boards validly exercised their authority under Delaware law. Delaware Code Chapter 8, Section 109(b), said the chancery court, gives a company wide latitude to adopt bylaws “not inconsistent” with its certificate of incorporation. The court readily found the bylaws here were not facially invalid.

The chancery court also found the forum selection bylaws to be contractually valid. Chancellor Strine noted that a company's bylaws are a “broader contract” between the company, its officers and directors, and its shareholders, which the Delaware General Corporation Law allows a board to unilaterally amend. According to the chancery court, Chevron's and FedEx's shareholders understood this arrangement when they bought their shares.

The chancery court also noted that forum selection clauses are judged under the Supreme Court's 1972 *Zapata* standard. As a result, a court may strike a forum selection clause only if it is inequitable or violates positive law. In denying the plaintiffs here, the chancery court said that this was not a case where the plaintiffs could assert the unreasonableness of the forum selection clause because they merely offered hypothetical scenarios of how Chevron's and FedEx's bylaws could impact them.

Vested rights inapt. The chancery court also rejected the plaintiffs' vested rights theory. The plaintiffs had argued that only bylaws adopted by shareholders are contractually enforceable. By contrast, bylaws adopted solely by a company's board are contractually non-binding. The chancery court said that Delaware case law has consistently upheld the right of company boards to unilaterally amend bylaws if investors are on notice of the contractual arrangement between the company and its shareholders.

The case is Civil Action [No. 7220-CS](#).

Attorneys: Michael Hanrahan (Prickett, Jones & Elliott, P.A.), Marc A. Topaz (Kessler Topaz Meltzer & Check, LLP), and Robert D. Klausner (Klausner, Jensen & Levenson) for Boilermakers Local 154 Retirement Fund, Key West Police & Fire Pension Fund, and IClub Investment Partnership. William B. Chandler III (Wilson Sonsini Goodrich & Rosati, P.C.) for Chevron Corporation, Samuel H. Armacost, Linnet F. Deily, Robert E. Denham, Robert J. Eaton, Chuck Hagel, Enrique Hernandez, Jr., Franklyn G. Jenifer, George L. Kirkland, Sam Nunn, Donald B. Rice, Kevin W. Sharer, Charles B. Shoemate, John G. Stumpf, Ronald D. Sugar, Carl Ware, and John S. Watson. A. Gilchrist Sparks, III (Morris, Nichols, Arsht & Tunnell LLP) for Defendants FedEx Corporation, James L. Barksdale, John A. Edwardson, J.R. Hyde, III, Shirley A. Jackson, Steven R. Loranger, Gary W. Loveman, Susan C. Schwab, Frederick W. Smith, Joshua I. Smith, David P. Steiner, and Paul S. Walsh.

Companies: Chevron Corporation; FedEx Corporation; Boilermakers Local 154 Retirement Fund; Key West Police & Fire Pension Fund; IClub Investment Partnership

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