

Commercial Division Enforces Forum-Selection Bylaw

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Delaware courts have recently approved of corporate forum-selection bylaws, in which corporations select a single, exclusive forum—typically, the Delaware Chancery Court—for suits, including shareholder derivative suits, related to the company's internal affairs. Corporations will, of course, only need to enforce those provisions when they face suits outside the selected forum. So courts outside Delaware will, in the first instance, be called upon to actually enforce these provisions. As a result, corporations, directors, and their attorneys are closely watching the next wave of litigation over forum-selection bylaws to see if the momentum to enforce these provisions continues in courts outside of Delaware. A decision late last year from the Commercial Division of the New York Supreme Court, [Hemg v. Aspen University](#), No. 650457/13, 2013 WL 5958388 (N.Y. Sup. Ct. Nov. 4, 2013), dismissing shareholder derivative claims based on a forum-selection bylaw, is an important advancement in the enforcement of Delaware forum-selection bylaws.

Background

Over the past several years, corporations and their officers and directors have increasingly faced duplicative derivative suits in multiple courts against the same defendants for the same alleged wrongdoing. Often corporations face nearly identical lawsuits in both their state of incorporation and their headquarters state. In response to this inefficient and burdensome practice, many Delaware corporations have adopted forum-selection bylaws, seeking to ensure that they only have to defend against the same claims once in a single forum.

Proponents of these provisions scored a major victory when the Delaware Chancery Court in [Boilermakers Local 154 Retirement Fund v. Chevron](#), 73 A.3d 934 (Del. Ch. 2013), rejected a facial challenge to forum-selection bylaws adopted by corporate boards, holding that such provisions are valid under Delaware law. In *Boilermakers*, the defendant corporations' boards had enacted the provisions without shareholder votes, but pursuant to company charters permitting the boards to amend corporate bylaws.

The court in *Boilermakers* noted that "in most internal affairs cases the bylaws will not operate in an unreasonable manner." But, because the case presented a facial challenge to the forum-selection bylaws, the court left the door open for challenges to the "real-world enforcement" of forum-selection bylaws, "when there is a genuine extant controversy in which the forum selection bylaw is being applied."

The Chancery Court also expressly recognized that challenges to forum-selection bylaws would necessarily be heard, in the first instance, in the plaintiffs' chosen forum, not in Delaware courts. As a result, corporations, directors, and their attorneys are closely monitoring how courts around the country will respond to *Boilermakers* and how enforcement of forum-selection bylaws will evolve outside of Delaware.

Aspen University Decision

The Commercial Division's decision in *Aspen University* is the first decided case that we have seen relying on *Boilermakers* to dismiss shareholder derivative claims under a forum-selection bylaw. In *Aspen University*, Patrick Spada, a shareholder and the former CEO of for-profit online university Aspen University brought both derivative and direct claims against the company's directors and officers. As in *Boilermakers*, Aspen's board

had amended the company's bylaws—without a shareholder vote but pursuant to the board's authority under the company's certificate of incorporation—to designate Delaware Chancery Court as the exclusive forum for any derivative action brought on the company's behalf.

While the court sustained certain of Spada's direct claims, it dismissed all of his derivative claims based on the company's forum-selection bylaw. In doing so, the court relied heavily on the Delaware Chancery Court's *Boilermakers* decision. In particular, the court rejected Spada's argument that Aspen's shareholders had to approve the forum-selection bylaw for it to be binding on them—the same argument raised and rejected in *Boilermakers*.

Several other challenges to shareholder derivative complaints based on forum-selection bylaws are currently pending around the country, as well, including one in Texas state court (*In re MetroPCS Comm'ns*, No. 05–12–01577–CV (Tx. Dist Ct.)) and another in a California federal district court (*Bushansky v. Armacost*, No. 12 Civ. 1597 (N.D. Ca.)). There may well be other cases working their way through the system that have not yet received attention, given the inconsistent ways that states and counties report state trial court decisions. In addition, since the decision in *Aspen University*, in *Genoud v. Edgen Group*, No. 625244 (La. Dist. Ct.–19th Dist.), a Louisiana state court dismissed on forum non conveniens grounds a shareholder derivative complaint against a company with a Delaware forum-selection corporate bylaw. But the court in *Genoud* did not issue a written opinion and the summary order does not make clear whether the court relied on the corporation's forum-selection bylaw or on more traditional forum non conveniens principles. As a result, *Aspen University* remains the only opinion we have seen dismissing shareholder derivative claims under a forum-selection bylaw based on the reasoning in *Boilermakers*.

Conclusion

Boilermakers made clear that, as a matter of Delaware law at least, forum-selection bylaws are permissible and enforceable. But it will be up to courts in other jurisdictions to actually enforce them. Coming from the commercial court in the center of the U.S. financial markets, *Aspen University* indicates that courts outside Delaware will enforce forum-selection bylaws and dismiss derivative claims brought outside a corporation's chosen forum.

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