Client Alert.

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Federal Court Finds Forum-Selection Clause Bylaw Unenforceable in Certain Cases

By Jordan Eth and Philip T. Besirof

On January 3, 2011, a Northern District of California court held that a forum-selection clause in Oracle Corporation's bylaws was not enforceable in two pending derivative cases. *Galaviz v. Berg*, No. 10-3392-RS, slip op. (N.D. Cal. Jan. 3, 2011).[1] The bylaw in question required that all derivative suits asserted on behalf of Oracle be brought in Delaware Chancery Court. Judge Richard Seeborg held that, under federal common law, the bylaw could not be enforced under the circumstances presented by the two cases. The court explicitly did not reach issues of Delaware law.

The derivative cases allege that Oracle's board wrongfully permitted alleged violations of the Federal False Claims Act during the period 1998 through 2006. Oracle adopted the bylaw in 2006. The court ruled that where the bylaw was adopted by the individuals named as defendants in the derivative actions after the alleged wrongdoing took place, the bylaw did not apply to claims brought by shareholders who purchased their shares before adoption of the bylaw. The court observed, however, that "were a majority of shareholders to approve" this type of provision (through a charter amendment, for example), "the arguments for treating the venue provision like those in commercial contracts would be much stronger, even in the case of a plaintiff shareholder who had personally voted against the amendment."

As the court noted, the motion presented an issue of first impression. Given the number of companies with forum-selection clauses in their bylaws or charters, there will likely be continued litigation of this issue.

To view the court's order, click here.

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[1] Morrison & Foerster represents nominal defendant Oracle Corporation in this action.

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