INSIGHTS

THE CORPORATE & SECURITIES LAW ADVISOR

Volume 28 Number 3, March 2014

CORPORATE LITIGATION

Enforcing Exclusive Forum Selection Clauses in Corporate Organizational Documents

Vice Chancellor Laster's recent decision in Edgen Group, Inc. v. Genoud *illustrates the practical difficulties that Delaware corporations face in actually enforcing exclusive forum selection clauses. Although Vice Chancellor Laster criticized an Edgen Group stockholder for ignoring Edgen's forum selection clause and filing suit in Louisiana, he denied Edgen's request for an anti-suit injunction barring that Louisiana suit. Instead, he held that exclusive forum selection provisions should be enforced—at least in the first instance—in the non-Delaware jurisdiction in which the offending suit was filed.*

By Peter L. Welsh and Martin J. Crisp

As Delaware and M&A practitioners know all too well, M&A litigation has become nearly universal in public company change of control transactions.[1] The number of such suits has steadily increased in recent years, and repeat player plaintiffs' attorneys are now also filing breach of fiduciary duty claims in connection with "say-on-pay" votes and executive compensation disclosures in proxy statements filed in connection with corporations' annual meetings.[2] In order to maximize their settlement leverage and corresponding fee awards, plaintiffs' attorneys often file suit in the state or federal courts of the jurisdiction in which the target corporation is headquartered. This trend also has increased in recent years, sparking a corresponding increase in the total number of lawsuits filed in connection with each transaction,[3] and creating an unfortunate dynamic in which defendants are forced to litigate simultaneously in the state in which the corporation is incorporated (often Delaware) and the state in which the corporation is headquartered.

Drawing inspiration from Vice Chancellor Laster's comments in *Revlon* and the need for a practical solution to the proliferation of multi-jurisdictional deal litigation, many Delaware corporations enacted exclusive forum selection clauses in their bylaws or certificates of incorporation mandating that stockholder derivative actions and internal affairs claims be filed in Delaware.[4] Importantly, in his 2013 opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* (*Chevron*), then-Chancellor Strine expressly upheld the validity of such exclusive

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forum selection clauses.[5] But even though the Court of Chancery clearly has held that such provisions are valid under Delaware law, Delaware corporations cannot simply rely on stockholder plaintiffs' lawyers to respect those provisions and file covered claims only in Delaware. To the contrary, plaintiffs' lawyers will often file outside of Delaware even when faced with a valid Delaware exclusive forum selection clause.

Vice Chancellor Laster expressed extreme reluctance to enforce such a forum selection clause through an anti-suit injunction.

In such cases, Delaware exclusive forum selection clauses are of little value unless they are enforced by non-Delaware courts, and a number of state and federal courts expressly have declined to enforce Delaware exclusive forum selection clauses. The most well-known of those decisions is the Northern District of California's 2011 opinion in *Galaviz v. Berg*, in which that court declined to enforce a Delaware forum selection clause in Oracle's bylaws, and held that interpreting such a bylaw was a matter of "federal common law" not controlled by Delaware corporate law.[6] But other courts, including Texas state courts and the United States District Court for the Southern District of New York, also have declined to enforce Delaware exclusive forum selection clauses.[7]

Vice Chancellor Laster's recent transcript ruling in the *Edgen Group v. Genoud* litigation reinforced the propriety of Delaware exclusive forum selection clauses in corporate organizational documents, but also highlighted the practical realities of enforcing such provisions. Although Vice Chancellor Laster stated that "forum selection clauses that appear in the charter or bylaws [of a Delaware corporation] are [] presumptively valid and handled the same way as clauses in other contracts,"[8] he denied Edgen's request for a TRO barring an Edgen stockholder from further prosecuting an action filed in Louisiana state court seeking to enjoin Edgen's proposed acquisition by Sumitomo Corp. (Louisiana Action), despite the fact that the Louisiana Action plainly violated the Delaware forum selection clause in Edgen's charter. Concluding that such an anti-suit injunction was the most "aggressive" method for enforcing a Delaware forum selection clause and that forum selection clauses in corporate organizational documents are not yet "sufficiently understood and accepted" as similar clauses in contracts between private parties,[9] Vice Chancellor Laster indicated a clear discomfort with issuing an anti-suit injunction. He stated that Edgen should seek to enforce its forum selection clause directly in the Louisiana Action.[10]

The Edgen Group Transaction and Related Litigation

Edgen Group Inc. is a Delaware corporation with its principal place of business in Baton Rouge, Louisiana. Edgen filed for an initial public offering in 2012. In connection with that IPO, Edgen adopted its corporate charter, which included a provision designating Delaware as the exclusive forum for all stockholder actions against Edgen or its directors and officers asserting breach of fiduciary duty claims or otherwise relating to Edgen's internal affairs, as well as for any derivative claims brought by Edgen stockholders on the Company's behalf. On October 17, 2013, Edgen announced publicly that it had filed a preliminary written consent notice for its $1.2 billion merger into a subsidiary of Sumitomo Corp. (Transaction). Because Jeffries Capital Partners, Inc. (Jeffries) controlled a majority of Edgen's shares, the Transaction was executed by written consent of Jeffries and certain affiliated entities, and was not subject to a stockholder vote.

Unsurprisingly, multiple stockholders filed suit challenging the Transaction in the days

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following its public announcement. Stockholders sued in the Court of Chancery, although those claims were dismissed voluntarily.[11] A purported Edgen stockholder domiciled in Canada also filed suit, although he (and his lawyers) elected to sue Genoud in Louisiana state court.[12] It is unclear whether Genoud was aware of the Delaware exclusive forum selection clause in Edgen's charter when he filed the Louisiana Action, but Genoud refused to voluntarily dismiss their claims once he learned of the Delaware forum selection clause. Instead, he pressed forward with the Louisiana case, ignoring the Court of Chancery's *Chevron* ruling and arguing that the Delaware forum selection clause was invalid because it had been unilaterally enacted by the Company's directors without the consent of Edgen's stockholders.[13] That argument tracked the Northern District of California's *Galaviz* holding that stockholders are not bound by forum selection clauses that are unilaterally implemented by a corporation's board, which was directly rebuked by then-Chancellor Strine in *Chevron*.

The Louisiana court granted the defendants' motion to dismiss the Louisiana Action for "improper venue" because of Edgen's Delaware forum selection clause.

The plaintiff's intransigence in the face of a clear Delaware forum selection clause left the *Edgen* defendants with few attractive options. They could litigate the validity of the forum selection clause in Louisiana, thereby losing a significant benefit of the clause and running the risk that the Louisiana court would refuse to enforce the clause and potentially enjoin the Transaction, or they could initiate a parallel action in Delaware against the stockholder plaintiff in order to obtain a Delaware court order enforcing the forum selection clause. The *Edgen* defendants chose to pursue both paths—moving to dismiss the Louisiana Action on *forum non conveniens* grounds and for violating Edgen's forum selection clause, while simultaneously filing suit against Genoud in the Court of Chancery and seeking a TRO enjoining him from prosecuting the Louisiana Action.

Illustrating the speed and care with which the Court of Chancery addresses complex issues of Delaware law, Vice Chancellor Laster quickly scheduled briefing and oral argument on Edgen's motion for a TRO barring further prosecution of the Louisiana Action before the Louisiana court had even convened an initial status conference. Following oral argument, Vice Chancellor Laster issued his ruling from the bench, holding that while Edgen had demonstrated a likelihood of success on the merits and irreparable harm, he would not issue the requested TRO (or Edgen's related request for expedited proceedings), which would operate as an anti-suit injunction barring further prosecution of the Louisiana Action.[14] Although Vice Chancellor Laster reaffirmed that exclusive forum selection clauses in the bylaws or charters of Delaware corporations are presumptively valid, he expressed extreme reluctance to enforce such a forum selection clause through an anti-suit injunction, at least in the first instance.

In refusing to issue a TRO enjoining the prosecution of the Louisiana Action, Vice Chancellor Laster emphasized a few key points. First, he stressed the importance of inter-jurisdictional comity, and the general reluctance of the Court of Chancery to issue anti-suit injunctions that might cause a non-Delaware jurisdiction to feel "slighted."[15] Second, he contrasted the "aggressiveness" of the anti-suit injunction method of enforcing a forum selection clause with the fact that the Delaware Supreme Court had only recently approved the use of anti-suit injunctions to enforce forum selection clauses in contracts between private parties.[16] Surprisingly, and despite the *Chevron* ruling clearly upholding the validity of properly enacted exclusive forum selection clauses in bylaws and charters

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of Delaware corporation, and then-Chancellor Strine's accompanying statement that "a forum selection clause adopted by a board with the authority to adopt bylaws is valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses,"[17] Vice Chancellor Laster stated that "it's not at all clear to me that forum selection provisions are as yet sufficiently understood and accepted that the Delaware Supreme Court would want the same approach taken for a forum selection clause that appears in the charter and bylaws [as with a contract between two private parties]."[18] Thus, he concluded that "it is not clear to me that it is appropriate at this time to be making anti-suit injunctions the initial tool of first resort" in enforcing exclusive forum selection clauses in corporate organizational documents.[19]

Vice Chancellor Laster's ruling left the *Edgen* defendants with limited options—none of which were particularly appealing given the high stakes and quick moving nature of litigation challenging a $1.2 billion transaction. He stated that Edgen and the other defendants could pursue their motion to dismiss the Louisiana Action based on the exclusive forum selection clause.[20] In so doing, Vice Chancellor Laster appeared to make an effort to assist such a motion to dismiss by stating explicitly that Genoud's claims were baseless under Delaware law (likely knowing that his transcript ruling would be shared with the Louisiana court), and would not survive a motion to dismiss had Genoud filed his case in Delaware.[21] Alternately, he concluded that Edgen could maintain the Delaware action and seek a default judgment against Genoud if he failed to appear in that action or otherwise respond to Edgen's complaint. He also excoriated Genoud's counsel at Robbins Geller for failing to appear in the Delaware action on Genoud's behalf even though they represented him in the Louisiana Action.[22] Vice Chancellor Laster went on to acknowledge the obvious economic realities of multi-forum M&A litigation, stating that "[t]his case really exemplifies the interforum dynamics that have allowed plaintiffs' counsel to extract settlements in M&A litigation."[23]

The options left to the *Edgen* defendants after Vice Chancellor Laster's ruling were relatively unappealing. Pursuing a motion to dismiss in the non-Delaware forum forced Edgen to do exactly what it sought to avoid when it enacted an exclusive forum selection clause in its charter—litigate sensitive issues of Delaware corporate law in a non-Delaware forum. Additionally, litigating the validity of a Delaware forum selection clause outside of Delaware runs the risk of having the non-Delaware forum follow the lead of the *Galaviz* court and refuse to enforce the forum selection clause. And litigating the enforcement action in Delaware through to conclusion on a non-expedited basis did not offer the *Edgen* defendants the time sensitive remedy they needed to obtain a preclusive ruling on the forum selection clause before that issue was decided in the Louisiana Action.

Corporations seeking to enforce a Delaware forum selection clause will need to do so outside of Delaware at the first instance.

Ultimately, Vice Chancellor Laster's refusal to issue an anti-suit injunction did not endanger the Transaction, as the Louisiana court granted the defendants' motion to dismiss the Louisiana Action for "improper venue" because of Edgen's Delaware forum selection clause.[24] But by refusing to issue an anti-suit injunction barring the Louisiana Action, the *Edgen* court did not find Edgen's forum selection clause a sufficient justification for deviating from the Court of Chancery's typical practice of not issuing anti-suit injunctions until the party seeking to dismiss the non-Delaware action attempts to do so in the jurisdiction in which it was filed,[25] and also

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indicated that corporations seeking to enforce a Delaware forum selection clause will need to do so outside of Delaware at the first instance. That is plainly a more expensive and risky proposition. This affects the utility of such clauses, which are only useful if they are can be enforced in a reasonably efficient manner.

Delaware corporations seeking to enforce a forum selection clause can file a declaratory judgment action in Delaware.

Key Takeaways

Vice Chancellor Laster's transcript ruling in *Edgen* is a doubled-edged sword for the Delaware corporations that heeded his counsel from *Revlon* and enacted exclusive Delaware forum selection clauses in their corporate organizational documents. While *Edgen* reinforced then-Chancellor Strine's conclusion in *Chevron* that such clauses are appropriate if properly enacted, by denying Edgen's motion for an anti-suit injunction Vice Chancellor Laster left corporate defendants seeking to enforce Delaware exclusive forum selection clauses with a slate of relatively unappealing options. Delaware corporations cannot expect plaintiffs' lawyers to not file actions outside of Delaware simply because the stockholder plaintiff is bound by a forum selection clause. Doing so would remove an opportunity to leverage legal uncertainty into a settlement—the very reason why many plaintiffs' lawyers file such actions outside of the Court of Chancery.

So, absent a ruling from the Delaware Supreme Court permitting enforcement of exclusive forum selection clauses in corporate organizational documents by anti-suit injunction, or the expiration of time sufficient to show that such clauses are as generally accepted as forum selection clauses in private contracts, Delaware corporate defendants are left with limited options. However, there are still viable paths forward for defendants who do not wish to pursue an early settlement. Delaware corporations seeking to enforce a forum selection clause can file a declaratory judgment action in Delaware (as Edgen did) and seek a permanent injunction via expedited proceedings. Doing so forces the stockholder plaintiff to be a defendant—something that is anathema to most stockholder plaintiffs, including many municipal pension funds—and forces the plaintiff and its lawyer to spend time and money defending the declaratory judgment action.

Additionally, if the Delaware corporation can obtain a final judgment quickly—either by default judgment or through expedited proceedings on a showing that the non-Delaware action is proceeding quickly—then that final judgment will be entitled to full faith and credit in the non-Delaware jurisdiction. Combining this approach with quickly moving to dismiss the non-Delaware case based on the forum selection clause is the most aggressive (and perhaps effective) available tactic.

Notes

1. *See* Matthew D. Cain & Samuel M. Davidoff, *Takeover Litigation in 2013* p. 1 (Jan. 9, 2014) (available at SSRN: *http//ssrn.com/abstract=2377001)* (finding that in 2013 stockholder plaintiffs filed suit in connection with over 97 percent of public company transactions valued over $100 million); *see also* Robert M. Daines & Olga Koumrian, *Shareholder Litigation Involving Mergers & Acquisitions*, Cornerstone Research Review of 2012 M&A Litigation, p. 1 (Feb. 2013) (finding that in 2012 stockholder plaintiffs filed suit in connection with 93 percent of public company transactions valued over $100 million).

2. *See* Emily Chasan, *Anxiety Stalks Proxy Season*, Wall St. J., Feb. 5, 2013, available at: *http://blogs.wsj.com/cfo/2013/02/05/anxiety-stalks-proxy-season*.

3. Koumrian, *Shareholder Litigation Involving Mergers & Acquisitions*, p. 1 (finding that, on average, approximately five stockholder lawsuits were filed in connection with each announced transaction valued over $100 million).

4. *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) (stating that "if boards of directors and stockholders believe that a

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particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes).

5. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) (holding that "a forum selection clause adopted by a board with the authority to adopt bylaws is valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses.").

6. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011).

7. *Golovoy v. Deutsche Telekom, et al.*, Case No. CC-12-06144-A (Dallas Cty. Ct. Nov. 16, 2012) (issuing TRO barring MetroPCS Communications' merger with Deutsche Telekom and refusing to consider MetroPCS's Delaware forum selection clause), *rev'd sub nom*. *In re MetroPCS Commc'ns, Inc.*, Case No. 05-12-01577-CV (Tex. App. Jan. 8, 2013); *In re Facebook, Inc., IPO Sec. & Derivatives Litig.*, 922 F. Supp. 2d 445, 460-463 (S.D.N.Y. 2013) (holding that enforceability of Delaware forum selection clause in Facebook's certificate of incorporation was governed by federal common law, and refusing to dismiss stockholder plaintiff's claims because the forum selection clause was not enacted when those claims accrued); *but see HEMG Inc. v. Aspen Univ.*, 2013 N.Y. Misc. LEXIS 5199, at *6-7 (N.Y. Sup. Ct., N.Y. Cty. Nov. 4, 2013) (dismissing stockholder plaintiff's derivative claims against Delaware corporation as barred by exclusive Delaware forum selection clause); *Miller v. Beam, Inc.*, Case No. 2014 CH 00932, tr. at 46-47 (Ill. Ch. Ct. Mar. 5, 2014) (same).

8. *Edgen Group Inc. v. Genoud*, C.A. No. 9055-VCL, tr. at 30:9-11 (Del. Ch. Nov. 5, 2013).

9. *Id.* at 43:1-6.

10. *Id.* at 43:19-21.

11. *Id.* at 9:11-14.

12. *Genoud v. Edgen Group Inc., et al.*, Case No. 625,244 (19th Dist. Ct., Parish of E. Baton Rouge).

13. *See Genoud* (Plaintiffs' Opposition to Defendant's Declinatory Exceptions of Lack of Subject Matter Jurisdiction and Improper Venue and/or Motion to Dismiss Suit Without Prejudice Based on *Forum Non Conveniens*).

14. *Edgen*, tr. at 32:13-16; 34:12-14; 43:19-21.

15. *Id.* at 37:17-23.

16. *Id*. at 42:14-19 (citing *Nat'l Indus. Group (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373 (2013)).

17. *Chevron*, 73 A.3d at 940.

18. *Edgen*, tr. at 43:1-6.

19. *Id.* at 43:19-21.

20. *Id.* at 41:23-42:2.

21. *Id.* at 22:3-7.

22. *Id.* at 27:1-13.

23. *Id.* at 19:16-20.

24. *Genoud* (order granting defendants' declinatory exceptions on subject matter jurisdiction and improper venue grounds, and also granting defendants' motion to dismiss based on *forum non conveniens*).

25. *See Household Int'l, Inc. v. Eljer Indus., Inc.*, C.A. No. 13631, 1994 Del. Ch. LEXIS 135 (Del. Ch. Aug. 12, 1994).

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