Oregon Court Calls Delaware By-Law Forum Selection Provisions Into Question

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This past summer, an Oregon state court held that a Delaware "bylaw forum selection provision" was unenforceable. In its decision, *Roberts v. TriQuint Semiconductor, Inc., [1]* the Court considered relevant that the provision was adopted by the company's board of directors, without shareholder approval, after the board's alleged wrongdoing — and indeed in anticipation of the specific lawsuit before the Court. This ruling by the Oregon court is arguably at odds with decisions of courts in other states which have generally upheld the validity of such bylaw provisions.

In the Oregon case:

- A group of activist shareholders of TriQuint had announced their plans to attempt to oust the company's board of directors at the next shareholder meeting;
- the TriQuint board then agreed to merge with RF Micro Devices, in a deal that included the placement of several of the existing TriQuint directors on the board of the resulting corporation;
- the shareholders asserted that the proposed merger agreement constituted a breach of the directors' fiduciary duties, as well as self-serving of the directors at the expense of the shareholders, by arranging to retain their positions as board members post-merger;
- other offers had been tendered to TriQuint at higher prices than the proposed merger with RF, and where no current director would remain as a director following the transaction;
- the TriQuint board adopted bylaws designating Delaware as the forum for derivative lawsuits, at the same meeting that it recommended the merger; and
- the board adopted the by-laws anticipating shareholder litigation challenging the merger. [2]

This was not an issue of first impression for state courts. In 2013, the Delaware Chancery Court, in Boilermakers v. Chevron, [3] upheld the general enforceability of forum selection bylaw provisions. In addition, courts in other states (California, Illinois, New York and Texas) have ruled against claims challenging Delaware forum selection provisions.

However, a federal court decision in 2011, *Galaviz v. Berg*, [4] rejected a motion to dismiss a derivative action based on an exclusive forum bylaw, where "the bylaw was adopted by the very individuals who are named as defendants, and after the alleged wrongdoing took place, there is no mutual consent to the forum choice at all, at least with respect to shareholders who purchased their shares prior to the time the bylaw was adopted." [5]

In addition to Galaviz, the Oregon court found instructive a 1971 Delaware case, involving a by-laws amendment which moved up the date of the company's annual meeting and selected an inconvenient location for the meeting. [6] The Oregon court claimed that this case "suggests that if it is alleged a board of directors is attempting to infringe upon the shareholder's right to amend or repeal unilaterally enacted bylaws, then that same action infringes upon the public policy of both Oregon and Delaware." [7]

In deciding that the bylaw forum selection provision was unenforceable, the Oregon court reasoned that:

Ultimately, the closeness of the timing of the bylaw amendment to the board's alleged wrongdoing, coupled with the fact that the board enacted the bylaw in anticipation of this exact lawsuit, and keeping in mind that its enforcement will have the effect - and Defendants knew it would have the effect--of forcing the shareholders to accept the bylaw, this court finds that enforcing the unilaterally enacted bylaw by dismissing this case would be unfair and unjust. Enforcement would violate the public policy supporting contract formation and would allow a potential defendant anticipating imminent litigation to, also unilaterally, restrict the plaintiffs choice of forum. [8]

The Oregon court's decision in *Roberts* is arguably at odds with established state court precedent (particularly "post-*Chevron*") giving latitude to Delaware directors' ability to amend corporate by-laws. At the same time, the decision is highly fact specific and may be viewed in that context (i.e., considering the by-law provision invalid "as applied," as opposed to being "facially" invalid). While the case should not in and of itself be considered a serious blow to the enforceability of Delaware bylaw forum selection provisions, the case does suggest that courts may consider the timing of the enactment of the bylaw in assessing its enforceability. Accordingly, companies and counsel may be best served considering such provisions prior to facing claims or issues which would be governed by the new bylaws.

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[1] *Roberts v. TriQuint Semiconductor, Inc.,* No. 1402-02441 (Cir. Ct. Or. Aug 14, 2014) (*"Roberts").*

[2] *Roberts* at 8-9.

[3] *Boilermakers v. Chevron,* 73 A.3d 934 (Del. Ch. 2013).

[4] *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

[5] *Id.* at 1171.

[6] *Roberts at* 7 (citing and discussing *Schnell v. Chris-Craft Indus. Inc.,* 285 A2d 430, 432 (Del Ch 1971), *rev 'd on other grounds by Schnell v. Chris-Craft Indus.,* 285 A2d 437.)

[7] *Id.* at 7-8.

[8] *Id.* at 9-10.