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## Talking Points: The Significance Of Exclusive Forum Bylaws

*Steven M. Haas with Hunton & Williams LLP recently spoke with Corporate Board Member's Jamie Reeves about recent litigation challenging exclusive forum bylaws, which he suggests has the potential to be the most significant event in policing class action litigation since Congress passed the Private Securities Litigation Reform Act in 1995.*

**Could you give our readers some background on these exclusive forum bylaws that require shareholder lawsuits be brought exclusively in a Delaware Court? What is the significance to boards of directors?**

Exclusive forum bylaws typically require all shareholder class action and derivative suits to be filed in the Delaware Court of Chancery. Exclusive forum bylaws were adopted to prevent strategic forum shopping by plaintiffs' attorneys, who may seek the jurisdiction which they believe will grant them the highest fee awards. Exclusive forum provisions also were adopted to stop different shareholders from challenging the same action in different courts, which forces a corporation to litigate the same issue on multiple fronts. These can be very abusive tactics that frequently are criticized as only benefitting the lawyers, not the companies or their shareholders. If the Delaware courts uphold these bylaws, boards of directors of countless companies would adopt them almost immediately.

While the idea of exclusive forum provisions has been around for at least eight years, it didn't gain traction until 2010 when a Delaware judge suggested in dicta that these provisions would be enforceable (In re Revlon). After that opinion, exclusive forum provisions suddenly gained a lot of attention, and companies started adopting them in their bylaws. We also saw many companies at the IPO-stage include exclusive forum clauses in their certificates of incorporation. Right now, there are approximately 200 companies across the country that either have adopted or have proposed to adopt exclusive forum provisions in their bylaws or certificates of incorporation.

**Is there a difference between the certificate of incorporation and the bylaws?**

Yes, the difference is that the board of directors typically has the power to amend the bylaws without the need for shareholder approval. Shareholder approval is required, however, to amend the certificate of incorporation. That's why this litigation is particularly important for directors -- because an exclusive forum bylaw can be implemented by the board without shareholder approval. Investors' views on exclusive forum provisions are still mixed, so companies might not be able to get the shareholder support necessary to amend their certificates of incorporation. The current litigation only challenges exclusive forum provisions found in bylaws.

### **What are some key takeaways for boards of directors?**

I think boards of directors at companies that have not adopted exclusive forum provisions should be in a “wait-and-see” mode right now. There are at least three possible outcomes in this litigation. First, the bylaw could be upheld in its entirety or subject to certain technical revisions. In that case, those boards should give serious consideration as to whether they should adopt such a bylaw. Second, the bylaw could be invalidated in its entirety. Third, the court might signal that an exclusive forum requirement will be enforced but only if it has been approved by the shareholders and included in the certificate of incorporation. If that happens, directors will have to decide whether they can get shareholder support to amend their companies’ certificates of incorporation.

### **What is the expected timeline on all of this?**

It’s hard to say, but we know the cases have been consolidated and will be heard by Chancellor Leo E. Strine, Jr., who is a very experienced judge. Typically, this type of litigation would not be expedited because it does not involve an emergency where the shareholders or the company are about to suffer irreparable harm. At the same time, it presents a very narrow issue: this is a facial challenge to a bylaw that involves a rather discrete matter of law. So the Delaware courts could address this quickly, although the losing side can be expected to appeal the case to the Delaware Supreme Court.

### **Is there anything else on this issue that is of particular relevance to boards?**

Exclusive forum provisions thus far have required suits to be brought in Delaware, but in theory a company could choose its state of headquarters or principal place of business as the exclusive forum. If these provisions are upheld, perhaps we will start seeing some exclusive venue provisions placing venue somewhere other than Delaware. But for now, corporations seem to recognize that Delaware is a very good place to litigate complex corporate disputes. The Delaware courts have a great reputation for being very fair and experienced.

Boards should watch this litigation closely because a ruling that upholds exclusive forum bylaws would curb abusive class action lawsuits and better position the Delaware courts to monitor lead plaintiffs and their lawyers. For those reasons, a decision upholding exclusive forum bylaws could be most significant event in reforming shareholder litigation since the Private Securities Litigation Reform Act of 1995.