

Allowing Firms to Restrict Suits to Delaware to Change Legal Landscape

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A recent ruling in Delaware is poised to change the landscape in big-ticket corporate litigation—to the delight of many companies and the likely chagrin of some shareholders.

Chancellor Leo Strine of the Delaware Court of Chancery late last month ruled that corporate boards may adopt bylaws requiring that most shareholder lawsuits against the companies be filed in Delaware.

The ruling effectively gives the thousands of businesses incorporated in Delaware home-field advantage in shareholder suits. The Delaware Chancery Court, one of the country's most influential business courts, doesn't use juries and is regarded as relatively business friendly compared with other courts. Forcing shareholders to sue in Delaware—and only Delaware—is a way to forestall a wave of lawsuits getting filed in several courts every time a merger or other major corporate action is announced.

"This is an important development," said E. Norman Veasey, a partner at Weil Gotshal & Manges LLP and former chief justice of the Delaware Supreme Court who now represents corporations. "One of the real problems...plaguing corporations and boards of directors is multiforum litigation."

Roughly 300 corporations have adopted Delaware-only provisions in recent years to stem a rising tide of multicourt shareholder litigation. Mergers and acquisitions, in particular, have provided fodder for suits outside of Delaware, with shareholder plaintiffs demanding jury trials in a variety of states to challenge deals.

Corporations typically try to steer such actions to Delaware, which is known for its high-velocity litigation schedules and stingy fee awards.

Delaware-only bylaws have provoked opposition—from plaintiffs' law firms irked at the loss of leverage, and from shareholder-advisory firms, which say that such provisions remove a crucial decision from the hands of shareholders.

Early last year shareholders sued a dozen companies, complaining that their Delaware-only bylaws stripped investors of the right to choose where to file suit.

Most of the defendant companies retreated, eliminating the bylaws while leaving open the possibility of reinstating them later.

But [Chevron Corp. CVX +0.56%](#) and [FedEx Corp. FDX -0.09%](#) fought the lawsuit, arguing that they had the right to choose where their shareholders could sue.

Ultimately, Chancellor Strine agreed. "A corporation's bylaws are part of an inherently flexible contract between the stockholders and the corporation, under which the stockholders have powerful rights they can use to protect themselves," he wrote in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* Chancellor Strine noted that it takes just a majority vote by shareholders to repeal forum-selection provisions.

Paul Fioravanti, the Delaware attorney who filed the suits, declined to comment or to say whether his clients will appeal.

FedEx declined to comment, and Chevron didn't respond to requests for comment.

The ruling means that no longer will companies have to defend essentially the same lawsuit in, say, New York, California and Delaware, while trying to complete a multi-billion-dollar merger.

"Forum-selection bylaws are potentially powerful tools that a board can employ to protect stockholders and the corporation itself from the abuses posed by such lawsuits," FedEx counsel Morris, Nichols, Arshnt & Tunnell LLP wrote in a note to clients, just hours after the Strine ruling.

Critics said the bylaws are unfair because they can be put in place without consulting shareholders. They said the choice of forum belongs to plaintiffs and that often they have valid reasons for asking, for example, a New York court to rein in the leaders of a business that is based in the state.

"It is undesirable for boards to have the power to adopt such limitations unilaterally without shareholder approval," said Lucian A. Bebchuk, a law professor at Harvard University and an expert on corporate governance. "Directors should not be setting the rules governing how they themselves may be sued."

Engine-manufacturer [Navistar International](#) Corp., [NAV +0.69%](#) one of the companies that yanked its forum bylaw to settle the lawsuit, said it was studying the Strine ruling and hadn't decided whether to revive its bylaw. "I do think that a lot of companies, companies like ours and FedEx, adopted the bylaw because they believed the board of directors had the right to do that," said Navistar Secretary Curt Kramer.

Stanford Law School Prof. Joseph Grundfest predicted that the ruling would spark a resurgence in Delaware-only bylaws. "It might take a bit of time for boards and counsel to get their arms around this new reality. But I would expect that the adoption rate will pick up sharply as soon as counsel become comfortable that the uncertainties are resolved," he said.

The \$160.4 billion New York State Common Retirement Fund, which wasn't involved in the litigation, believes that forum-selection bylaws restrict shareholder rights, spokesman Eric Sumberg said. "The fund generally votes against exclusive-forum proposals because it limits shareholders' ability to hold corporations accountable for their actions," he said.

Other big institutional shareholders that have filed class-action litigation either declined to comment or didn't respond to requests for comment on the Strine ruling.