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CORPORATE LAW — EXCLUSIVE FORUM BYLAWS — DELAWARE CHANCERY COURT UPHOLDS DELAWARE CORPORATION'S BY-LAW DESIGNATING NON-DELAWARE EXCLUSIVE FORUM. — *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229 (Del. Ch. 2014).

Over the past several years, mergers and acquisitions have increasingly been subject to legal challenges by shareholders, with many near-identical lawsuits brought in multiple forums.<sup>1</sup> Widely attributed to “entrepreneurial plaintiffs’ attorneys,”<sup>2</sup> multiforum lawsuits impose significant costs on the judicial system,<sup>3</sup> but deliver doubtful benefits to shareholders.<sup>4</sup> To avoid multiforum litigation, many corporations have adopted exclusive forum provisions in their charters or bylaws.<sup>5</sup> In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,<sup>6</sup> then-Chancellor Strine upheld board-adopted forum selection bylaws<sup>7</sup> as statutorily and contractually valid.<sup>8</sup> The contemplated bylaws of the two defendant Delaware corporations had named Delaware as the ex-

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<sup>1</sup> See Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 468–69, 475–76 (2015). In 2011, 53% of the authors’ sample of litigated transactions were challenged in more than one state, with an average of five suits per transaction. *Id.* at 476.

<sup>2</sup> See, e.g., Browning Jeffries, *The Plaintiffs’ Lawyer’s Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 56–58 (2014) (explaining that while merger litigation can police management and protect shareholders from harm in a deal, “in this new rash of suits, frequently entrepreneurial plaintiffs’ attorneys are filing boilerplate complaints . . . to hold up the transaction and . . . force a quick settlement,” *id.* at 57–58).

<sup>3</sup> See, e.g., Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 345 (2013) (“Defense counsel is forced to litigate the same case . . . in multiple courts. Judicial resources are wasted . . . . Worse[,] . . . two judges [might] . . . reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems . . . .” (quoting *In re Allion Healthcare Inc. S’holders Litig.*, No. 5022-CC, 2011 WL 1135016, at \*4 (Del. Ch. Mar. 29, 2011) (internal quotation marks omitted))).

<sup>4</sup> A survey of recent lawsuits found that most resulted in a settlement “for the payment of attorneys’ fees and additional disclosure, . . . but no increase in purchase consideration for stockholders.” CLAUDIA H. ALLEN, CONFERENCE BD. GOVERNANCE CTR., TRENDS IN EXCLUSIVE FORUM BYLAWS 2 (2014), [http://www.conference-board.org/retrievefile.cfm?filename=TCB\\_DN-V6N2-141.pdf&type=subtitle](http://www.conference-board.org/retrievefile.cfm?filename=TCB_DN-V6N2-141.pdf&type=subtitle) [<http://perma.cc/5S4D-KZSW>].

<sup>5</sup> See, e.g., *id.* Indeed, the Delaware Chancery Court encouraged this trend: in *In re Revlon, Inc. Shareholders Litigation*, 990 A.2d 940 (Del. Ch. 2010), Vice Chancellor Laster noted that corporations were “free to respond” to the problem of multiforum litigation “with charter provisions selecting an exclusive forum for intra-entity disputes.” *Id.* at 960. Under Delaware law, a board of directors generally cannot amend a corporate charter without a shareholder vote. DEL. CODE ANN. tit. 8, § 242(b)(1) (2015). However, a board *can* amend corporate bylaws without a shareholder vote if the charter grants the board such authority, *id.* § 109(a), which charters often do, see ALLEN, *supra* note 4, at 2.

<sup>6</sup> 73 A.3d 934 (Del. Ch. 2013).

<sup>7</sup> “[A] forum selection bylaw is a provision in a corporation’s bylaws that designates a forum as the exclusive venue for certain stockholder suits against the corporation . . . .” *Id.* at 941–42.

<sup>8</sup> *Id.* at 939.

clusive forum for intracorporate disputes.<sup>9</sup> Recently, in *City of Providence v. First Citizens BancShares, Inc.*,<sup>10</sup> the Delaware Chancery Court upheld the validity of a Delaware corporation's board-enacted forum selection bylaw designating North Carolina as its exclusive forum for intracorporate disputes.<sup>11</sup> *First Citizens* serves as an important model of how courts should employ *Chevron*'s reasoning when considering as-applied challenges to forum selection bylaws and reinforces the Chancery Court's acceptance of corporations' efforts to respond to multiforum litigation. However, the decision does not define the limits on selecting non-Delaware forums, which creates the possibility of risks that could result if fewer corporate law cases are decided in Delaware.

On June 10, 2014, the board of First Citizens BancShares, Inc. (FC North),<sup>12</sup> a company incorporated in Delaware and headquartered in North Carolina, adopted and approved revised bylaws,<sup>13</sup> adding the Forum Selection Bylaw in question.<sup>14</sup> FC North also announced its acquisition of First Citizens Bancorporation, Inc. (FC South) that day.<sup>15</sup>

The City of Providence, a minority shareholder of FC North,<sup>16</sup> filed two complaints in the Delaware Chancery Court against FC North and its board.<sup>17</sup> The first complaint (Bylaw Complaint) alleged that the Forum Selection Bylaw was invalid (1) facially under Delaware law or public policy and (2) as applied because the board

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<sup>9</sup> *Id.* at 937. Intracorporate disputes, such as shareholder direct and derivative claims or claims arising under any provision of the Delaware General Corporation Law (DGCL), are those that relate to the internal affairs of a corporation. See *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 234 (Del. Ch. 2014).

<sup>10</sup> 99 A.3d 229.

<sup>11</sup> *Id.* at 230–31.

<sup>12</sup> “FC North is a holding company for First-Citizens Bank & Trust Company, which operates in seventeen states but [mostly] . . . in North Carolina.” *Id.* at 231 (footnote omitted).

<sup>13</sup> *Id.* “FC North’s charter grants the power to amend the bylaws to the Board.” *Id.* at 233. A corporation’s bylaws “may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.” *Id.* (quoting DEL. CODE ANN. tit. 8, § 109(b) (2014)) (internal quotation marks omitted).

<sup>14</sup> The Forum Selection Bylaw is effectively the same as the bylaws that were upheld as facially valid in *Chevron*, with two exceptions: First, the board of FC North selected North Carolina as its exclusive forum. *Id.* at 234. “[S]econd, FC North’s Forum Selection Bylaw . . . is applicable only ‘to the fullest extent permitted by law.’” *Id.*

<sup>15</sup> *Id.* at 231–32. “FC South is a bank holding company incorporated and based in South Carolina.” *Id.* at 231. “Both FC North and FC South are allegedly controlled by the members and affiliates of the Holding family (the ‘Holding Group’),” which beneficially owns approximately 52.2% and 48.5% of the votes of FC North and FC South, respectively. *Id.* The transaction consisted of a mix of stock and cash for an aggregate value of between \$636.9 million and \$676.4 million. *Id.* at 232.

<sup>16</sup> See *id.* at 232.

<sup>17</sup> The two cases were consolidated. *Id.*

breached its fiduciary duty in adopting it.<sup>18</sup> The second complaint (“Merger Complaint”) asserted various claims against the board and the controlling shareholder relating to their approval of the merger.<sup>19</sup> Defendants subsequently filed motions to dismiss for failure to state a claim and for improper venue.<sup>20</sup>

Writing for the Delaware Chancery Court, Chancellor Bouchard found the Forum Selection Bylaw facially valid, a conclusion “compelled by the logic and reasoning” of then-Chancellor Strine’s *Chevron* decision.<sup>21</sup> “Under [Delaware’s] clear contractual framework, the stockholders assent to not having to assent to board-adopted by-laws.”<sup>22</sup> While *Chevron* easily found that Delaware, as “the state of incorporation, ‘was the most obviously reasonable forum’ for internal affairs cases,”<sup>23</sup> “nothing in the text or reasoning of *Chevron* can be said to prohibit directors of a Delaware corporation from designating an exclusive forum other than Delaware.”<sup>24</sup> Therefore, the board’s decision to choose North Carolina, “the second most obviously reasonable forum,” did not upset the facial validity of the Forum Selection Bylaw.<sup>25</sup> The court also found that Providence failed to allege facts sufficient to support an inference that the board’s adoption of the Forum Selection Bylaw was self-interested and in violation of its fiduciary duty.<sup>26</sup> Thus, the court dismissed the Bylaw Complaint for failure to state a claim.<sup>27</sup>

The court then turned to the question of whether to dismiss the Merger Complaint for improper venue, which would be required if it found the Forum Selection Bylaw to be valid as applied in this case.<sup>28</sup> Though *Chevron* did not reach this as-applied question,<sup>29</sup> Chancellor Bouchard noted that it was “nonetheless instructive on the proper framework” for analyzing Providence’s three challenges to the Forum Selection Bylaw.<sup>30</sup> First, applying the legal test for forum selection

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (“Providence contends that the Holding Group, through its controlling interest, unfairly forced FC North to overpay for FC South to its own benefit and to the dilution of FC North’s minority stockholders.”).

<sup>20</sup> *Id.* The parties “stipulated . . . that the validity of the Forum Selection Bylaw . . . should be resolved before any other substantive issues.” *Id.* at 233.

<sup>21</sup> *Id.* at 231.

<sup>22</sup> *Id.* at 235 (quoting *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (2013)) (internal quotation marks omitted).

<sup>23</sup> *Id.* (quoting *Chevron*, 73 A.3d at 953).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 236–37.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 232–33.

<sup>29</sup> *Id.* at 237–38.

<sup>30</sup> *Id.* at 238. Providence argued that Delaware had a policy interest in resolving the issues in the case, that the timing of the board’s adoption of the bylaw rendered it unreasonable, and that

provisions set forth by the U.S. Supreme Court in *Bremen v. Zapata Off-Shore Co.*,<sup>31</sup> Chancellor Bouchard found that Delaware has no public policy interest that prevents a Delaware corporation's board "from adopting bylaws to require stockholders to litigate intra-corporate disputes in a foreign jurisdiction."<sup>32</sup>

Second, the court reviewed whether the bylaw was inequitable under *Schnell v. Chris-Craft Industries, Inc.*<sup>33</sup> It concluded that the board's adoption of the Forum Selection Bylaw on the same day as the merger announcement did not upset the reasonable expectations of a stockholder.<sup>34</sup> Referencing *Chevron's* articulation of the contractual framework for bylaws, Chancellor Bouchard held that the reasonable expectation of a stockholder should be that its board, "subject to challenge on an as-applied basis," may "designate[] a court outside Delaware as the exclusive forum for intra-corporate disputes."<sup>35</sup> The court rejected the allegation that this transaction was self-interested, citing a lack of well-pleaded facts.<sup>36</sup> Further, the Forum Selection Bylaw only regulates "where . . . , not whether the stockholder may file suit."<sup>37</sup> Absent any facts calling into question the integrity of the North Carolina courts, the court found that the timing alone did not constitute an inequitable application of the Forum Selection Bylaw.<sup>38</sup>

Finally, the court found that nothing in the Delaware Code or *Chevron* required holding that a board-adopted forum selection bylaw is valid only if stockholders can realistically repeal it.<sup>39</sup> Indeed, for the court to conclude that the existence of a controlling shareholder renders a forum selection bylaw per se unreasonable would "be tantamount to rendering questionable all board-adopted bylaws of con-

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the bylaw was unjust because it could not be repealed without the support of the majority shareholder. *Id.* at 238–39.

<sup>31</sup> 407 U.S. 1 (1972). Under the rule of *Bremen*, forum selection provisions will be upheld if: (1) the forum selection clause was not induced by fraud or undue influence, *see id.* at 12; (2) trial in the selected forum will not "be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court," *id.* at 18; and (3) enforcement of the forum selection provision will not "contravene a strong public policy of the forum in which suit is brought," *id.* at 15.

<sup>32</sup> *First Citizens*, 99 A.3d at 240. While Providence characterized the issues raised in the Merger Complaint as "novel and substantial," *id.* at 238 (internal quotation marks omitted), the court described them as "far from the type of unprecedented claims that might theoretically outweigh Delaware's substantial interest in enforcing a facially valid forum selection bylaw," *id.* at 240 (footnote omitted).

<sup>33</sup> 285 A.2d 437 (Del. 1971). *Schnell* instructs that "inequitable action does not become permissible simply because it is legally possible." *Id.* at 439.

<sup>34</sup> *First Citizens*, 99 A.3d at 240.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 241.

<sup>37</sup> *Id.* (internal quotation mark omitted).

<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

trolled corporations.”<sup>40</sup> Ultimately, the court found the bylaw valid and so dismissed the Merger Complaint.<sup>41</sup>

By upholding a board-adopted bylaw that selected a non-Delaware forum for intracorporate disputes, the court in *First Citizens* took an important step toward enabling corporations to restrict multiforum litigation. In so doing, the court set forth a model of how to extend *Chevron*'s reasoning to an as-applied challenge to board-adopted forum selection bylaws. By emphasizing deference to the board, minimizing state policy interests in maintaining sole jurisdiction over intracorporate disputes, and accentuating judicial comity, *First Citizens* promoted enforceability of forum selection bylaws. At the same time, *First Citizens* left important questions unanswered, risking problematic consequences stemming from an increased prevalence of bylaws selecting non-Delaware forums for intracorporate disputes.

Multiforum lawsuits impose significant costs on corporations and the judicial system without providing meaningful benefits to shareholders.<sup>42</sup> By upholding a board-adopted forum selection bylaw against a facial attack, *Chevron* allowed corporations to adopt measures to mitigate these problems. The ruling was a strong step toward lessening the problem of multiforum lawsuits. Yet the *Chevron* court's decision not to speculate about any “hypothetical” as-applied challenges to a forum selection bylaw<sup>43</sup> left questions unanswered: How should a state court consider whether a forum selection bylaw violates a strong public policy of its state under *Bremen*?<sup>44</sup> And at what point should a court find that a board of directors used a forum selection bylaw in a manner inconsistent with its fiduciary duties according to *Schnell*?<sup>45</sup>

After *Chevron*, state courts still retained considerable flexibility in reviewing as-applied challenges to forum selection bylaws. A recent Oregon state court case, *Roberts v. Triquint Semiconductor, Inc.*,<sup>46</sup> considered an as-applied challenge to a Delaware corporation's forum selection bylaw designating Delaware as its exclusive forum. Under *Bremen*, the court determined that Oregon's policy interest required shareholders to have “ample time” to accept or reject the bylaw before

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<sup>40</sup> *Id.* at 241–42 (quoting Defendants' Reply Brief in Support of Their Motions to Dismiss at 21, *First Citizens*, 99 A.3d 229 (No. 9795-CB), 2014 WL 4447125) (internal quotation marks omitted).

<sup>41</sup> *Id.* at 242.

<sup>42</sup> See sources cited *supra* notes 3–4.

<sup>43</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013). Indeed, a challenge of facial validity is a relatively undemanding inquiry that merely asks if the bylaw “can[] operate validly in any [one] conceivable circumstance.” *Id.*

<sup>44</sup> See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

<sup>45</sup> See *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

<sup>46</sup> No. 1402-02441, 2014 WL 4147465 (Or. Cir. Ct. Aug. 14, 2014).

the company announced a merger<sup>47</sup> — a vague timing standard without precedent or support in Delaware law.<sup>48</sup> *Triquint* exemplified the need to clarify the application of *Chevron*'s reasoning to an as-applied challenge.

*First Citizens* did just that. Three aspects of its reasoning in particular will help guide future courts faced with as-applied challenges to forum selection bylaws. First, *First Citizens* illustrated how deference to a board of directors should inform a court's review of an as-applied challenge. Indeed, in his analysis of the as-applied challenge to the board's timing in adopting the Forum Selection Bylaw on the same day as it announced a merger, Chancellor Bouchard interpreted section 109 of the Delaware General Corporation Law<sup>49</sup> broadly to give the board authority to unilaterally adopt bylaw provisions at any time.<sup>50</sup> Moreover, without any well-pleaded facts alleging impropriety regarding the timing of the bylaw adoption, Chancellor Bouchard refused to find that the timing rendered the bylaw inequitable under *Schnell*.<sup>51</sup> Though *First Citizens* is the first case "to uphold a forum selection bylaw adopted in connection with a merger,"<sup>52</sup> the case is consistent with *Chevron*'s principle that a board action will not be invalidated "simply because it involves a novel use of statutory authority."<sup>53</sup>

Second, *First Citizens* suggested that, when applying *Bremen*, courts should downplay the public policy interests of the state in which they sit. Delaware has a clear interest in having other state courts uphold a Delaware corporation's forum selection bylaw that designates Delaware as its exclusive forum. However, other courts might apply *Bremen* in a way that finds such a forum selection bylaw contrary to the public policy interests of their own state. *First Citizens*

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<sup>47</sup> *Id.* at \*5.

<sup>48</sup> See Theodore N. Mirvis, *The Battle Against Multiforum Stockholder Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 15, 2014, 12:17 PM), <http://blogs.law.harvard.edu/corpgov/2014/08/25/the-battle-against-multiforum-stockholder-litigation> [<http://perma.cc/MD5S-6Z76>].

<sup>49</sup> DEL. CODE ANN. tit. 8, § 109 (2015).

<sup>50</sup> *First Citizens*, 99 A.3d at 240.

<sup>51</sup> *Id.* at 240–41. This interpretation is markedly different from that of the recent Oregon state court decision that found a forum selection bylaw invalid in part *because* the board adopted it in connection with a merger. See *Triquint*, 2014 WL 4147465, at \*5.

<sup>52</sup> Alison Frankel, *Delaware Judge OKs Forum Selection Clause Adopted on Same Day as Deal*, REUTERS (Sept. 9, 2014), <http://blogs.reuters.com/alison-frankel/2014/09/09/delaware-judge-oks-forum-selection-clause-adopted-on-same-day-as-deal> [<http://perma.cc/88NQ-GCNL>].

<sup>53</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 953 (Del. Ch. 2013) (noting that *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985), upheld the first "poison pill" regardless of the fact that section 157 of the DGCL had never before been "used to authorize the issuance of rights for the purpose of defeating a hostile takeover"); see also *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985) ("[O]ur corporate law is not static. It must grow and develop . . . . Merely because the General Corporation Law is silent as to a specific matter does not mean that it is prohibited.").

addressed this issue by narrowly defining Delaware's own policy interests.<sup>54</sup>

Third, *First Citizens* respected the authority of other courts in hopes of reciprocal enforcement of bylaws designating Delaware as the exclusive forum. Not only did the court reason that North Carolina was the "second most obviously reasonable forum given that FC North is headquartered and has most of its operations there,"<sup>55</sup> but also the court found nothing in the reasoning of *Chevron* that foreclosed choosing a non-Delaware forum.<sup>56</sup> In addition to explicitly mentioning the important interest of judicial comity,<sup>57</sup> *First Citizens*'s reasoning implicitly confirmed this notion by arguing that a shareholder can receive the same remedy in North Carolina as there is no reason to "question the integrity of the . . . courts of North Carolina."<sup>58</sup>

These three facets of the court's reasoning lead in one direction: increased enforceability of forum selection bylaws. *First Citizens* thus took a major step toward decreasing multiforum litigation. Yet *First Citizens* did not reach the question of how courts will determine what forums are reasonable; rather, it left a large gap between the first and second most obviously reasonable forums — the state of incorporation and the state of headquarters and most major operations<sup>59</sup> — and a forum that is "irrational."<sup>60</sup> What about forums that fall in between? Can a nationally operating Delaware corporation headquartered in Massachusetts choose California as its exclusive forum if ten percent of its stores are located there?

If Delaware corporations' choices of non-Delaware exclusive forums for intracorporate disputes are found enforceable, there is reason to believe that firms will often opt for forums outside Delaware. Such a development could have significant consequences. Scholars have noted that Delaware is already losing its market share of corporate law cases.<sup>61</sup> While selecting any single forum may shield a firm from

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<sup>54</sup> *First Citizens*, 99 A.3d at 239–40. According to Chancellor Bouchard, Delaware has no overarching policy interest in keeping intracorporate disputes in Delaware. *Id.*

<sup>55</sup> *Id.* at 235.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 242 ("If Delaware corporations are to expect, after *Chevron*, that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for intra-corporate disputes, then, as a matter of comity, so too should this Court enforce a Delaware corporation's bylaw that does not designate Delaware as the exclusive forum." (footnote omitted)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 235.

<sup>60</sup> *Id.* at 237.

<sup>61</sup> See, e.g., John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1347 (2012); John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 654 (2012). But see, e.g., Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 594 (2003) (describing Delaware's comparative advantages and status as a preferred forum for litigating corporate law disputes).

multiforum litigation, selecting a non-Delaware forum to apply Delaware law to the intracorporate disputes of a Delaware corporation fails to utilize fully the advantages of Delaware.<sup>62</sup> As demonstrated in *Triquint*, non-expert judges might misapply Delaware law and wrongly decide cases. Though this problem is perhaps self-correcting, as corporations could change their exclusive forum after a bad decision, one could also imagine instances where defendant corporations or plaintiff shareholders might *purposely* seek out a non-expert forum. On the one hand, a board might hope that a court lacking corporate expertise will not closely scrutinize a complex transaction for lurking conflicts.<sup>63</sup> On the other hand, rather than a company using the forum selection bylaw as a shield against multiforum litigation, an activist investor might use it as a sword to designate a plaintiff-friendly forum.<sup>64</sup>

Moreover, losing cases that would otherwise determine novel issues could undermine the Delaware judiciary's expertise and inhibit its ability to develop new precedents.<sup>65</sup> A diminished wealth of precedents might not only weaken Delaware's comparative advantage as a forum,<sup>66</sup> but also impair the consistency of American corporate law.<sup>67</sup>

*Chevron* was an important first step toward allowing corporations to react to the problem of multiforum litigation. *First Citizens* continued down that path by broadening *Chevron*'s reasoning to an as-applied challenge to board-adopted forum selection bylaws. At the same time, *First Citizens* did not define the scope of acceptable exclusive forums. If this uncertainty is resolved to permit Delaware corporations great leeway in choosing non-Delaware exclusive forums, the consistency of corporate law could be put at risk.

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<sup>62</sup> See, e.g., Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 1004 (1995) (listing Delaware's comparative advantages as a site of incorporation, including "a responsive legislature, a flexible statute, specialized courts, a wealth of precedents, an efficient Secretary of State's Office, and efficient corporation service companies" (footnotes omitted)).

<sup>63</sup> Cf. LYNN M. LOPUCKI, *COURTING FAILURE* (2005) (arguing that bankruptcy courts compete for cases by developing lenient precedent).

<sup>64</sup> Many assume that Delaware judges favor corporate defendants. See MARK LEBOVITCH ET AL., AM. BAR ASS'N, *IMPROVING MULTI-JURISDICTIONAL, MERGER-RELATED LITIGATION I* (2011), [http://www.blbglaw.com/news/publications/data/00132/\\_res/id=sa\\_File1/Lebovitch\\_Silk\\_Friedman\\_reprint.pdf](http://www.blbglaw.com/news/publications/data/00132/_res/id=sa_File1/Lebovitch_Silk_Friedman_reprint.pdf) [<http://perma.cc/B7FZ-776Z>]. Similar to defendant corporations, plaintiff shareholders might prefer a forum that is less expert and predictable. See Ted Mirvis, *Anywhere but Chancery*, M&A J., May 2007, at 17.

<sup>65</sup> See Armour et al., *Is Delaware Losing Its Cases?*, *supra* note 61, at 652.

<sup>66</sup> See *id.* at 606.

<sup>67</sup> In fact, the Delaware legislature appears to be aware of these risks stemming from *First Citizens*, as evidenced by its recent proposed amendment that would effectively ban forum selection bylaws choosing another state "to the exclusion of Delaware." William Chandler et al., *Wilson Sonsini Discusses Proposed 2015 Amendments to the Delaware General Corporation Law*, CLS BLUE SKY BLOG (Mar. 18, 2015), <http://clsbluesky.law.columbia.edu/2015/03/18/wilson-sonsini-discusses-proposed-2015-amendments-to-the-delaware-general-corporation-law> [<http://perma.cc/C3RF-VT53>].