

THE
NATIONAL LAW REVIEW

California Court of Appeal Enforces Delaware Forum Selection Clause Contained in Certificate of Incorporation

Tuesday, June 5, 2018

In [Bushansky v. Soon-Shiong](#), 2018 Cal. App. LEXIS 493 (Cal. App. May 25, 2018), the [California Court of Appeal, Fourth Appellate District](#), affirmed the dismissal of a shareholder derivative action brought in the [Superior Court of California, San Diego County](#), on *forum non conveniens* grounds based upon an exclusive Delaware forum selection clause in the corporation's certificate of incorporation. This decision interpreted for the first time a condition in a forum selection clause requiring that the Delaware courts have personal jurisdiction over all indispensable parties in order to trigger exclusive forum selection. The Court rejected plaintiff's assertion that Delaware personal jurisdiction must exist at the time of the filing of the suit, and instead held that post-filing conduct by a defendant voluntarily accepting Delaware personal jurisdiction within a reasonable timeframe thereafter was sufficient. In so doing, the Court disagreed expressly with a decision from the [Washington Court of Appeals](#). This decision reflects continued deference by the California courts to Delaware forum selection clauses in certificates of incorporation.

Plaintiff Steven Bushansky filed a shareholder derivative action purportedly on behalf of nominal defendant NantKwest, Inc., a Delaware corporation headquartered in San Diego County, California, alleging causes of action against its directors for breaches of fiduciary duty. Plaintiff also alleged accounting malpractice and aiding and abetting claims against Mayer Hoffman PC, an accounting firm that served as NantKwest's auditor.

NantKwest moved to dismiss based upon *forum non conveniens*, arguing that the exclusive Delaware forum selection clause in its certificate of incorporation mandated dismissal of the action brought in San Diego. The clause in question designated Delaware as the "sole and exclusive forum" for any action brought, subject to the condition precedent that the Delaware courts have "personal jurisdiction over the indispensable parties named as defendants."

The San Diego Superior Court enforced the forum selection clause and dismissed the case. Plaintiff appealed. Plaintiff argued that the forum selection clause was never triggered because the Delaware courts lacked personal jurisdiction over Mayer Hoffman — allegedly an indispensable party — at the time the action was filed. Although Mayer Hoffman consented to personal jurisdiction in Delaware less than two months after filing, plaintiff argued this was insufficient under a traditional minimum contacts analysis, under which personal jurisdiction is determined at the time of filing.

The Court of Appeal affirmed. First, the Court noted that plaintiff's argument failed to account for a consent analysis, whereby personal jurisdiction could be established post-filing by a defendant's voluntary consent to jurisdiction. The Court held that reading a rigid time limitation into the term "personal jurisdiction" was unreasonable, and declined to do so. Rather, the court held that where, as here, a condition precedent to a forum selection clause in a Delaware corporation's certificate of incorporation was silent as to a timeframe for performance, it would be presumed that it was to be performed within a reasonable time. The two-month time period Mayer Hoffman took to consent was deemed reasonable, the Court held, and thus the condition precedent was thus effectively complied with.



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The Court noted that its decision would not be read as endorsing gamesmanship, whereby parties could strategically delay consent to personal jurisdiction until it became “tactically advantageous” to give it. The Court held that Mayer Hoffman had not engaged in any gamesmanship, but rather specifically requested that its demurrer be heard *after* the motion to dismiss, filed only a few weeks later by NantKwest.

The Court concluded its analysis by elaborating on the shortcomings it saw in the Washington Court of Appeals’ decision in [Shatas v. Synder](#), 2016 Wash. App. LEXIS 2517 (Wash. App. Oct. 17, 2016), a case factually similar to *Bushansky*. There, the Washington court held that post-filing consent was “irrelevant” in determining jurisdiction. The California Court took issue with (1) the fact that *Shatas* was unpublished, and thus questioned its persuasive value and (2) the logic underlying the Washington court’s assertion that post-filing consent was irrelevant, as it could not “invalidate properly invoked jurisdiction” (presumably referring to jurisdiction already invoked in Washington). The California Court held this to be a logical fallacy, reiterating that “parties may not *deprive* courts of their jurisdiction over causes by private jurisdiction.” The Court instead looked to the practicalities inherent in forum selection clauses, classifying them not as a weapon of gamesmanship, but rather, as a tool of efficiency.

The precedent set by *Bushansky* represents a meaningful affirmation of the principles underlying basic contract law between private parties reflected in a certificate of incorporation, as well as continued deference to Delaware exclusive forum selection clauses.

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