



## **DELAWARE FORUM SELECTION CLAUSES: A FAVORABLE RULING FOR CORPORATIONS**

The California Supreme Court's recent decision in *EpicentRX v. Superior Court* significantly strengthens the enforceability of Delaware forum selection clauses in California. The Court held that a party's loss of jury trial rights does not, by itself, provide grounds to invalidate a forum selection clause based on public policy. This ruling is favorable news for California corporations seeking to protect their management and control their litigation exposure.

Delaware's Court of Chancery is widely recognized as the most sophisticated and efficient venue for corporate dispute resolution. Delaware judges are experienced in complex corporate matters, apply predictable legal standards, and have developed extensive case law addressing shareholder disputes, fiduciary duty claims, and corporate governance issues. Delaware courts are generally supportive of management discretion and less receptive to plaintiff-friendly arguments than California courts. For corporations facing shareholder litigation or fiduciary duty claims, Delaware provides a substantially more favorable forum than California.

Prior to *EpicentRX*, California courts would sometimes decline to enforce Delaware forum selection clauses on the ground that they deprived California parties of jury trial rights. This gave plaintiffs a powerful argument to challenge such clauses and force disputes back into California courts. The California Supreme Court has now eliminated this argument. Forum selection clauses that direct disputes to Delaware are now reliably enforceable, even when those disputes involve California parties and even though Delaware does not guarantee jury trials.

### **Why Your Corporation Should Adopt a Forum Selection Clause**

**1. Predictability and Control.** A Delaware forum selection clause ensures that shareholder disputes, derivative actions, and fiduciary duty claims will be resolved in Delaware, where the law is well-developed and predictable. You know in advance where disputes will be litigated and what legal standards will apply.

**2. Management Protection.** Delaware courts are more receptive to business judgment rule protections for directors and officers. A Delaware forum provides substantially greater protection for your board and management than California courts would offer.



## BUYNAK LAW FIRM

**3. Litigation Efficiency:** Concentrating all corporate disputes in a single, specialized forum reduces multi-jurisdictional complexity and often shortens litigation timelines. Delaware's Chancery Court moves cases quickly.

**4. Plaintiff Deterrence:** The burden of Delaware litigation (including, but not limited to, travel costs, unfamiliar procedures, need to retain Delaware counsel) deters frivolous or marginal shareholder claims and encourages reasonable settlement discussions.

**5. Enforceability:** The EpicentRX ruling means your forum selection clause will now be enforced. The primary argument plaintiffs used to challenge such clauses has been eliminated.

If your corporation does not currently have a Delaware forum selection clause, consider adopting one. The clause should be included in your certificate of incorporation and should use clear, mandatory language specifying which types of disputes fall within its scope (e.g., derivative actions, breach of fiduciary duty claims, claims under the Delaware General Corporation Law or your governing documents, and claims governed by the internal affairs doctrine).

Before adopting a forum selection clause, verify that your Directors and Officers (D&O) liability insurance covers litigation in Delaware. Most policies do, but gaps can exist. This is an important conversation to have with your insurance broker.

The clause should be adopted through proper corporate procedures (board approval, shareholder approval if required) and the adoption should be carefully documented. This ensures maximum enforceability.

The EpicentRX ruling removes a significant obstacle to Delaware forum selection clauses and makes this an opportune time to evaluate whether your corporation should adopt one. For most corporations, a Delaware forum selection clause provides substantial protective benefits and is well worth the minimal administrative cost of adoption. We recommend discussing this option with your legal counsel and considering implementation in your next certificate of incorporation amendment or governance update.

