

Seventh and Ninth Circuits Split Over the Scope of Exclusive Forum Provisions

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Earlier this year the United States Courts of Appeals for the Seventh and Ninth Circuits each addressed the question of whether an exclusive forum provision adopted by a Delaware company and requiring derivative litigation brought on behalf of the corporation to be filed in the Delaware Court of Chancery could foreclose a derivative suit alleging a violation of the Securities Exchange Act of 1934 (the “Exchange Act”) brought in federal court. In *Seafarers Pension Plan v. Bradway*,¹ the Seventh Circuit declined to apply the forum selection provision, concluding that the Exchange Act gives federal courts exclusive jurisdiction over actions under it. In *Lee v. Fisher*,² the Ninth Circuit applied the forum selection provision and dismissed the Exchange Act claim based on the doctrine of *forum non conveniens*.

Exclusive Forum Provisions Widely Adopted To Address ‘Multi-Forum Litigation’

In 2010, Vice Chancellor Laster suggested in *In re Revlon, Inc. Shareholders Litigation* that “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution,” they might decide to select “an exclusive forum for intra-entity disputes.”³ At the time, only a handful of public companies had enacted exclusive forum provisions in their charters or bylaws.

A few years later, in the 2013 case *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, then-Chancellor Strine addressed the validity of such a provision under Delaware law.⁴ That suit presented a facial challenge to bylaws adopted by two public company boards designating Delaware as the exclusive forum for disputes related to “internal affairs” — those “matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.”⁵

In holding that the bylaws were valid, Chancellor Strine explained that 8 *Del. C.* §109(b) “has long been understood to allow the corporation to set ‘self-imposed rules and regulations [that are] deemed expedient for its convenient functioning.’”⁶ Forum selection bylaws, which “regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation,” govern disputes related to the “internal affairs” of the corporation, which is a proper subject matter under Section 109(b).⁷

By August 2014, more than 700 publicly traded corporations had adopted an exclusive forum provision,⁸ and state and federal courts around the country regularly enforced the provisions, dismissing cases not brought in the specified jurisdiction.

Lead-Up to *Seafarers* and *Lee*

In 2015, the Delaware General Assembly enacted 8 *Del. C.* §115. The statute codifies the holding of *Boilermakers* and provides that a certificate of incorporation or bylaws “may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this

¹ 23 F.4th 714 (7th Cir. 2022).

² --- F.4th ---, 2022 WL 1511322 (9th Cir. May 13, 2022).

³ 990 A.2d 940, 960 (Del. Ch. 2010).

⁴ 73 A.3d 934 (Del. Ch. 2013).

⁵ *Id.* at 934 n.85 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)).

⁶ *Id.* at 951 (alteration in original) (quoting *Gow v. Consol. Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933)).

⁷ *Id.* at 952 (emphasis in original).

⁸ *Sciabacucchi v. Salzberg*, 2018 WL 6719718, at *9 (Del. Ch. Dec. 19, 2018), *rev'd on other grounds*, 227 A.3d 102 (Del. 2020).

State.” In other words, a corporation may adopt an exclusive forum provision for “internal corporate claims,” provided that Delaware is, or is among, the designated forum(s).

An interesting question that *Boilermakers* and the Delaware General Assembly anticipated is whether an exclusive forum provision could be used to deprive federal courts of jurisdiction over claims brought under the Exchange Act. *Boilermakers* stated that an exclusive forum provision would likely not apply to claims arising under the Exchange Act because (i) forum selection “provisions do not purport to regulate a stockholder’s ability to bring a securities fraud claim or any other claim that is not an intra-corporate matter”; and (ii) if a forum selection provision “waive[s] the stockholder’s rights under the Securities Exchange Act, such a waiver would be inconsistent with the antiwaiver provisions of that Act.”⁹

The Delaware General Assembly appeared to agree. Although not controlling authority, the synopsis of Senate Bill 75 enacting Section 115 states that “Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.”¹⁰

Seafarers and Lee

The question of whether an exclusive forum provision could foreclose suit in a federal court based on federal jurisdiction anticipated in *Boilermakers* and Section 115 was presented in *Seafarers* and *Lee*. The issue in both disputes was the apparent conflict between a plaintiff’s derivative suit asserting claims under Section 14(a) of the Exchange Act and the respective forum selection bylaws of Boeing Company and The Gap, Inc., which required that any derivative action or proceeding brought on behalf of the corporation be adjudicated in the Delaware Court of Chancery.

The bylaw notwithstanding, in *Seafarers*, a Boeing stockholder filed a derivative suit in the Northern District of Illinois alleging that Boeing directors and officers made materially false and misleading public statements about the 737 MAX in Boeing’s proxy materials, in violation of the Exchange Act.

Similarly, in *Lee*, a Gap stockholder filed a derivative suit in the Northern District of California alleging that Gap and its directors made false statements to stockholders in its proxy statements about the level of diversity the company had achieved, in violation of the Exchange Act.¹¹

In both cases, the defendants moved to dismiss the suits, relying on the respective forum selection bylaw. In both cases, the district courts applied the bylaws and dismissed the suits.

In *Seafarers*, the Seventh Circuit reversed the dismissal on appeal. The majority opinion held that the Boeing bylaw could not apply to derivative claims brought under the Exchange Act because “Delaware corporation law ... reject[s] Boeing’s use of its forum bylaw to foreclose entirely plaintiff’s derivative action under Section 14(a).”¹²

It explained that, if the bylaw were applicable, it would “force plaintiff to raise its claims in a Delaware state court, which is not authorized to exercise jurisdiction over Exchange Act claims.”¹³ And, “[b]ecause the federal Exchange Act gives federal courts exclusive jurisdiction over actions under it, applying the bylaw to this case would mean that plaintiff’s derivative Section 14(a) action may not be heard in any forum.”¹⁴ Pointing to Section 115 and *Boilermakers*, the majority explained that such an outcome “would be contrary to Delaware corporation law, which respects the non-waiver provision in Section 29(a) of the federal Exchange Act.”¹⁵ The majority also reasoned that *Boilermakers* “does not authorize application

⁹ 73 A.3d at 962.

¹⁰ S.B. 75, 148th Gen. Assemb., 2015-2016 (Del. 2015).

¹¹ *Lee*, 2022 WL 1511322, at *1.

¹² *Seafarers*, 23 F.4th at 720.

¹³ *Id.*

¹⁴ *Id.* at 717.

¹⁵ *Id.*

of the Boeing forum bylaw to this case, where it would effectively foreclose a claim under federal securities law.”¹⁶

The majority concluded that Section 115 and *Boilermakers* “signal clearly that Delaware is not inclined to enable corporations to close the courthouse doors entirely on derivative actions asserting federal claims subject to exclusive federal jurisdiction.”¹⁷

Judge Easterbrook dissented. His analysis focused on the nature of the claim, asserting that derivative claims are a matter of state law and, for that reason, there is nothing problematic about a bylaw directing derivative claims to state court. According to Judge Easterbrook, “[i]t is state law ... that determines both when demand is required [for derivative actions] and when investors can step into a corporation’s shoes.”¹⁸ He reasoned that “Section 14(a) plays a role in such litigation, to be sure, but does not create the claim.”¹⁹

Judge Easterbrook further noted that a derivative claim is not necessary to enforce Section 14(a) because enforcement can be “done through investors’ or the SEC’s direct suits.”²⁰ Indeed, he observed that “[m]any investors *have* sued Boeing directly about the 737 MAX debacle.”²¹ See our January 11, 2022, client alert, “[Seventh Circuit Holds That Delaware Forum Bylaw Cannot Force Litigation of Securities Exchange Act Claims in Delaware State Court.](#)”

In *Lee*, the Ninth Circuit affirmed the district court’s dismissal on appeal. The Ninth Circuit determined that “the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*.”²² A forum selection provision “creates a strong presumption in favor of transferring a case” and “a

district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer.”²³

The Ninth Circuit determined that the only extraordinary circumstance warranting consideration was “when enforcement of the clause ‘would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.’”²⁴ The Court found unavailing the stockholder’s argument that the Exchange Act’s antiwaiver provision is proof of strong public policy in favor of rejecting the Gap bylaw because “the strong federal policy in favor of enforcing forum-selection clauses ... supersede[s] antiwaiver provisions in state statutes as well as federal statutes, regardless whether the clause points to a state court, a foreign court, or another federal court.”²⁵

The Ninth Circuit further noted neither the Exchange Act’s antiwaiver provision nor the exclusive federal jurisdiction provision “contain[s] a clear declaration of federal policy.”²⁶ With respect to the Exchange Act’s exclusive federal jurisdiction provision, the Ninth Circuit explained that “section forbids non-federal courts from adjudicating Section 14(a) claims. Gap’s bylaws do not force the Delaware Court of Chancery to adjudicate Lee’s derivative Section 14(a) claim. Rather, the bylaws result in this claim being dismissed in federal court. Therefore, enforcement of the forum-selection clause does not violate any express statutory policy of the Exchange Act’s exclusive federal jurisdiction provision.”²⁷ As did Judge Easterbrook, the Ninth Circuit observed that “the Supreme Court has held that the Exchange Act’s exclusivity provision is waivable.”²⁸

¹⁶ *Id.* at 724.

¹⁷ *Id.*

¹⁸ *Id.* at 729.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (emphasis in original).

²² *Lee*, 2022 WL 1511322, at *2 (quoting *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 60 (2013)).

²³ *Id.* (citation omitted).

²⁴ *Id.* at *3 (quoting *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1090 (9th Cir. 2018)).

²⁵ *Id.* at *3 (alterations in original) (quoting *Yei*, 901 F.3d at 1090).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (citing *Shearson/Am. Express, Inc. v. McMahan*, 482 U.S. 220, 228 (1987)).

Notably, the Ninth Circuit did not consider the effect of Delaware law “as part of [its] public policy analysis” because the stockholder had not “identified Delaware law clearly stating that she could not get any relief in the Delaware Court of Chancery.”²⁹ The Ninth Circuit explained that the stockholder did not identify Section 115 in the district court or in her opening brief on appeal, and so waived reliance on that provision.³⁰ See our May 19, 2022, client alert “[Ninth Circuit Enforces Exclusive Forum Bylaw in Derivative Suit Asserting a Section 14\(a\) Claim, Creating Split With Seventh Circuit.](#)”

²⁹ *Id.*

³⁰ *Id.* at *4.

Conclusion

Exclusive forum selection provisions have become commonplace and serve as an effective tool to manage litigation for Delaware corporations. However, as *Seafarers* and *Lee* illustrate, certain claims may lie beyond their reach. For now, it appears that forum selection provisions may be applied to derivative suits alleging violations of the Exchange Act in the Ninth Circuit but not the Seventh Circuit. The uncertainty resulting from these differing outcomes may persist until the circuit split is resolved.

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