



Ninth Circuit Enforces Exclusive Forum Bylaw, Creating Split with Seventh Circuit

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On May 13, 2022, the U.S. Court of Appeals for the Ninth Circuit held that a corporate bylaw requiring stockholders to bring derivative claims in the Delaware Court of Chancery could be applied to claims brought derivatively under Section 14(a) of the Securities Exchange Act of 1934 (Exchange Act). The Ninth Circuit's decision creates a split with the U.S. Court of Appeals for the Seventh Circuit on the issue. *Lee v. Fisher*, No. 21-15923 (9th Cir. May 13, 2022).

The Gap, Inc.'s bylaws contain a forum selection clause requiring stockholders to bring "any derivative action or proceeding brought on behalf of the Corporation" in the Delaware Court of Chancery. Notwithstanding this forum bylaw, Gap stockholder Noelle Lee brought a putative derivative action against the company's directors in the U.S. District Court for the Northern District of California, alleging that the board had permitted the company to violate Section 14(a) of the Exchange Act by making false statements in proxy statements filed with the SEC about the level of diversity the company had achieved.

Ms. Lee argued that the forum bylaw requiring adjudication in Delaware state court could not be enforced against her because federal courts have exclusive jurisdiction over Section 14(a) claims under the Exchange Act. Therefore, enforcing the bylaw would prevent her from bringing a derivative Section 14(a) claim in any court. The district court rejected this argument and dismissed Ms. Lee's suit.

The Ninth Circuit affirmed. The court held that no provision in the Exchange Act—including its provisions prohibiting contracts that waive compliance with the Exchange Act, and giving federal district courts exclusive jurisdiction over Exchange Act claims—articulates a federal policy against enforcing forum selection clauses because such enforcement might leave stockholder plaintiffs with no forum to bring derivative Section 14(a) claims. The court reasoned that Ms. Lee could bring other derivative claims based on the same theory in the Delaware Court of Chancery, even if she could not bring a derivative Section 14(a) claim. Therefore, enforcing the forum bylaw would not deprive her of any relief.

The court acknowledged that its conclusion was contrary to the Seventh Circuit's recent 2-1 decision in *Seafarers Pension Plan ex rel. Boeing Corp. v. Bradway*, 23 F.4th 714 (7th Cir. 2022),

which held that an identical forum bylaw could not be enforced in the context of a derivative Section 14(a) claim because it was contrary to both Delaware and federal securities law. See our January 11, 2022, alert, "[Seventh Circuit Holds That Delaware Forum Bylaw Cannot Force Litigation of Securities Exchange Act Claims in Delaware State Court.](#)"

Lee is significant, as it is the first appellate decision to enforce a forum selection bylaw requiring stockholders to bring derivative claims in the Delaware Court of Chancery where the stockholders alleged a derivative Section 14(a) claim. The Ninth Circuit's approach gives forum selection bylaws their intended effect by concentrating derivative litigation in a single forum, which eliminates the waste associated with duplicative multi-forum litigation. Moreover, contrary to the *Lee* plaintiff's arguments, the Ninth Circuit's approach does not meaningfully curtail stockholder rights since stockholders may still be able to bring state law fiduciary duty claims asserting the same theory as the stockholder would pursue in bringing a derivative Section 14(a) claim.

In the short term, the conflict between the Seventh and Ninth Circuits creates uncertainty about whether Exchange Act claims can be subject to forum selection bylaws requiring derivative litigation to be brought in the Delaware Court of Chancery. That uncertainty could persist until the split is resolved.