

# Seventh Circuit Reverses Dismissal of Derivative Action Based on Forum Clause as Applied to Federal Claim

**Corporate Defense and Disputes Blog** on **January 21, 2022**

A recent [Seventh Circuit decision](#) in *Seafarers Pension Plan v. Bradway* may complicate defendants' [ability](#) to [use](#) forum-selection bylaws as a basis for dismissal of derivative suits pleading claims under the Securities Exchange Act of 1934.

In a split decision, the court held that—as a matter of Delaware state law—a forum-selection clause adopted by the Boeing Corporation was unenforceable because Section 115 of Delaware General Corporation Law prohibits any bylaw that is inconsistent with “applicable jurisdictional requirements.” While the federal Exchange Act allows only federal courts to exercise jurisdiction over Exchange Act claims and contains a non-waiver provision, the Boeing bylaw at issue stated that “the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for any derivative action or proceeding brought on behalf of the Corporation.” An Illinois district court had found that this provision was enforceable and warranted a *forum non conveniens* dismissal of a derivative suit that was premised in part on alleged violations of the Exchange Act. But the Seventh Circuit reversed, holding that the bylaw would entirely foreclose plaintiff’s federal derivative suit, “contrary to Delaware corporation law, which respects the non-waiver provision in Section 29(a) of the federal Exchange Act.”

Notably, the court did not specifically hold that the bylaw was unenforceable as a matter of *federal* law. Instead, it ruled that Delaware law respected the federal non-waiver provision and that Boeing’s forum bylaw therefore ran afoul of Delaware law. The court thus had no cause to address a situation in which state law would permit a waiver of rights that might appear to be non-waivable under federal law.

The court began its analysis with Section 115 of the Delaware General Corporation Law, which authorizes forum clauses that are “consistent with applicable jurisdictional requirements” and that require internal corporate claims to be brought in “the courts in this State.” The court read the phrase “applicable jurisdictional requirements” to include those of *federal* law—and thus not to authorize a forum clause that would foreclose suit in federal court based on exclusive federal jurisdiction. “By eliminating federal jurisdiction over [plaintiff’s] exclusively federal derivative claims, Boeing’s forum bylaw forecloses suit in a federal court based on federal jurisdiction. That’s exactly what Section 115 was ‘not intended to authorize.’”

As for Section 115’s language about “the courts in this State,” the Seventh Circuit “hesitate[d] to place decisive weight solely on a choice of preposition in the statute,” but noted that the federal courts in Delaware are courts “in this State” even though they are not courts “of this State.” “If the statute had said ‘courts *of* this State,’ the statutory language might have given defendants a better toehold.”

The Seventh Circuit went on to differentiate three circumstances where a forum-restricting bylaw might still be enforceable:

- When the federal claim brought is under the Securities Act of 1933, rather than the Exchange Act. The Securities Act, unlike the Exchange Act, allows plaintiffs to file suit in state or federal court. Thus, enforcing a forum clause against plaintiffs asserting Securities Act violations would not foreclose their federal-law claims because the clause would not require a waiver of those claims. Here, however, the federal claim was an alleged violation of the Exchange Act, a claim that (at least according to the majority) could not be asserted in state court.
- When a plaintiff raises a facial challenge to a forum clause. In those situations, the plaintiff must show that the bylaw cannot operate lawfully or equitably under any circumstances. Here, however, the plaintiffs argued only that the bylaw was unenforceable *as applied* to their Exchange Act claim.
- When a plaintiff’s claim implicates international comity issues. The Seventh Circuit distinguished its prior decision in *Bonny v. Society of Lloyd’s*, a 1993 ruling that dismissed an Exchange Act claim based on a forum-selection clause because English law provided sufficient remedies for the plaintiffs’ claims. Here, however, the plaintiffs’ claims did not raise any issues of international comity.

A notable feature of the decision is the court's choice not to rule on issues of federal law even though the Exchange Act's exclusive-jurisdiction and non-waiver provisions underlay the court's analysis. Instead, the court based its decision on state-law grounds and used the federal-law issues only to determine how Delaware law should be interpreted. This approach avoided the possibility of any tension between federal and Delaware law. But the approach leaves open the possibility that the Delaware state courts could ultimately disagree with the Seventh Circuit's reading of Delaware law. At that point, federal courts would need to confront the federal issue that the Seventh Circuit sidestepped: whether state law can authorize an exclusive-forum provision that forecloses assertion of a federal claim that is subject to exclusive federal jurisdiction and a federal anti-waiver provision.

Plaintiffs across the country will likely take notice of this decision and attempt to append Exchange Act claims to derivative suits filed in federal court. Courts in other circuits, however, have held that attempts to plead around a forum provision should be subject to significant scrutiny, and have sometimes severed state-law claims subject to forum provisions and then dismissed the federal claims on the merits. In all events, defendants should be prepared to litigate the merits of any federal claims included in a derivative suit, as an exclusive-forum clause might not be sufficient post-*Seafarers*.

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