

Ninth Circuit Upholds Delaware-Forum Bylaw That Precludes Assertion of Federal Proxy Claim

Corporate Defense and Disputes Blog on May 13, 2022

The Court of Appeals for the Ninth Circuit affirmed the dismissal of a shareholder derivative action in light of an exclusive-forum bylaw requiring assertion of derivative claims in the Delaware Court of Chancery, even though the case included a federal claim that was subject to exclusive federal jurisdiction and could not have been litigated in the Delaware court. The May 13, 2022 ruling in *Lee ex rel. The Gap, Inc. v. Fisher* could encourage the adoption of similar forum-selection provisions and appears to create a partial split with the Seventh Circuit's recent ruling in another derivative action challenging an "identical" forum-selection clause.

Factual Background

The *Lee* case alleges that The Gap and its directors "failed to create meaningful diversity within company leadership" and that the company made misstatements in its proxy statements about its diversity achievements. A shareholder of The Gap, which is a Delaware corporation, brought a derivative action in federal court asserting a proxy-law violation under § 14(a) of the Securities Exchange Act as well as violations of state law.

The Gap had previously adopted a forum-selection bylaw requiring that "any derivative action or proceeding brought on behalf of the Corporation" be adjudicated only in the Delaware Court of Chancery. The plaintiff conceded that the forum-selection clause was valid, but insisted that it nevertheless was unenforceable because it violates the Exchange Act's anti-waiver provision (§ 29) and would prevent her from asserting her § 14(a) proxy claim at all, inasmuch as such claims can be litigated only in federal court.

The district court dismissed the case based on the forum clause, and the Ninth Circuit affirmed.

The Court's Decision

The Ninth Circuit framed its analysis under Supreme Court precedent holding that forum-selection clauses must be enforced except in “extraordinary circumstances”: (i) if the forum provision was “invalid because of fraud or overreaching,” (ii) if “enforcement of the clause would contravene a strong public policy of the forum in which suit is brought,” or (iii) if the pre-selected forum “would be so gravely difficult and inconvenient that the plaintiff will for all practical purposes be deprived of his day in court.” The plaintiff focused only on the second of those circumstances, but the Ninth Circuit rejected it.

First, the court held that the Exchange Act’s anti-waiver provision did not contravene any “strong federal public policy” because “the strong federal policy in favor of enforcing forum-selection clauses . . . supersede[s] anti-waiver provisions in state statutes as well as federal statutes.” The court did not read the Exchange Act’s anti-waiver provision as containing “a clear declaration of federal policy.”

Second, the court concluded that the Exchange Act’s exclusive-jurisdiction provision (§ 27) also did not provide “a clear statutory declaration” against the forum-selection provision. According to the Ninth Circuit, § 27 simply “forbids non-federal courts from adjudicating Section 14(a) claims,” but The Gap’s bylaws “do not force the Delaware Court of Chancery to adjudicate” such claims. Instead, the § 14(a) claim would be dismissed. The court also observed that the Supreme Court has held that the Exchange Act’s forum-exclusivity is waivable.

Third, the court held that the plaintiff had not “identified any Delaware law clearly stating that she could not get any relief in the Delaware Court of Chancery.” The plaintiff’s reply brief had cited the Seventh Circuit’s recent decision in *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, in which a divided panel had held an “identical Boeing forum-selection clause” unenforceable as contrary to Delaware and federal law. (We blogged about the Boeing case [here](#).) But unlike the Seventh Circuit plaintiff, the plaintiff here had not raised Delaware-law issues in the district court or in her opening brief on appeal, so she was deemed to have waived them.

As the Ninth Circuit noted, however, the Seventh Circuit had based its decision on federal law as well as Delaware law. Thus, even though the Ninth Circuit did not rule on Delaware-law issues, it appears to have disagreed with the Seventh Circuit's analysis of federal law. The Ninth Circuit's decision thus might set up a circuit split on the federal issue, although the clarity of the split might be clouded by the importance of the Delaware-law analysis in the Seventh Circuit's decision.

Implications

The Ninth Circuit's ruling might spur a move to draft broad exclusive-forum provisions that cover even claims that are subject to exclusive federal jurisdiction. The Seventh Circuit's decision might have dampened those efforts, but the Ninth Circuit's decision could reignite enthusiasm. The issue probably will need to go to the Supreme Court, but it is unclear whether the current Seventh-vs.-Ninth-Circuit dichotomy provides the best vehicle for the Court to consider a circuit split.

[View Original](#)