SEVENTH CIRCUIT STRIKES DOWN DELAWARE FORUM SELECTION CLAUSE AND CLEARS PATH TO FEDERAL COURT FOR SECURITIES EXCHANGE ACT CLAIMS

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U.S. Corporate and Litigation and Dispute Resolution Alert

The Seventh Circuit issued a resounding message: Delaware forum selection clauses in corporate bylaws cannot lawfully prevent a plaintiff from bringing claims under the Securities Exchange Act of 1934 (the Exchange Act or the Act) in federal court. The Court, in its decision in *Seafarers Pension Plan v. Bradway*,[1] chose not to follow other federal courts that have enforced Delaware forum selection clauses in corporate bylaws to effectively bar shareholders from bringing Exchange Act claims.[2]

Although Section 115 of the General Corporation Law of the State of Delaware (Section 115) authorizes the adoption of forum selection bylaw (and charter) provisions that "require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all courts in this State," the Seventh Circuit's decision is not inconsistent with the statute. Notably, while the Court did not look to the legislative history of Section 115, the synopsis for Senate Bill No. 75, the legislation that enacted the 2015 amendments to the General Corporation Law of the State of Delaware (the DGCL), including Section 115, states in pertinent part: "Section 115 also is not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction."[3]

OVERVIEW OF THE DECISION

The *Seafarers* dispute arose from the temporary grounding of all 737 MAX airliners following two airplane crashes in 2018 and 2019 that killed 346 people. Seafarers Pension Plan brought a derivative action in the Northern District of Illinois on behalf of Boeing under Section 14(a) of the Exchange Act of 1934,[4] alleging that officers and directors of Boeing made materially false and misleading public statements in proxy materials related to the development and operation of the 737 MAX airliner. The defendants moved to dismiss the action based on a forum selection clause in the Boeing bylaws, which provided that "the Court of Chancery of the State of Delaware shall be the sole and exclusive forum . . . for any derivative action . . . ." The district court agreed with the defendants and dismissed the case.

The Seventh Circuit reversed the district court in a 2-1 decision. The Court began by recognizing that the Exchange Act gives federal courts exclusive jurisdiction over claims brought under the Exchange Act.[5] Furthermore, the Exchange Act contains an anti-waiver provision that prohibits contractual waivers of compliance with the requirements of the Act.[6] Against this backdrop, the Court considered whether Boeing's forum selection clause, as applied to the plaintiff's §14(a) claim, complied with Delaware statutory law and concluded that it did not.

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The Court first turned to Section 115, which provides that a corporation's bylaws, "consistent with applicable jurisdictional requirements," may require that internal corporate claims be brought "in any or all of the courts in this State."[7] The Court focused on two aspects of Section 115: the requirement that a forum selection clause be "consistent with applicable jurisdictional requirements" and the reference to "the courts *in* this State" (emphasis supplied). The Court determined that Boeing's forum selection clause was inconsistent with exclusive federal jurisdiction for claims brought under the Exchange Act. As the Court explained, by requiring that such actions must be brought in the Court of Chancery of the State of Delaware, the Boeing forum selection clause effectively barred plaintiffs from bringing a derivative claim under Section 14(a). Additionally, the Court emphasized that Section 115 refers to "the courts *in* this State," rather than "the courts *of* this State," which indicates that Section 115 contemplates forum selection clauses encompassing both federal and state courts located in Delaware.

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In a dissenting opinion, Judge Easterbrook questioned whether a federal right to pursue a *derivative* claim under §14(a) exists, noting that the U.S. Supreme Court "has never held or even intimated" that there is such a right.[9] Judge Easterbrook also questioned the notion of exclusive federal jurisdiction in the context of a derivative action, since state law defines how and when such actions can be brought.

IMPACT OF DECISION

Given the Court's reliance on Delaware law to provide a rationale for its holding, the most obvious question arising from this decision is whether Delaware courts will agree with the Seventh Circuit's interpretation of Section 115. Considering the legislative history of Section 115, which neither the majority – nor Judge Easterbrook's dissent – mentioned, it is likely that the Delaware courts will conclude that Section 115 cannot be used to deprive shareholders of the ability to bring claims arising under federal law in Delaware federal courts. The Delaware Chancery Court will have an opportunity to address this very question in a class action brought by Seafarers in Delaware under the same facts. In the Chancery Court action, stayed pending the outcome of the Seventh Circuit appeal, Seafarers challenges the legality of the forum-selection clause under Sections 115 and 109(b) of the Delaware General Corporation Law.

The Ninth Circuit also will have a chance to weigh in on this issue, where a decision of the district court for the Northern District of California in *Lee v. Fisher* is currently under appeal. The forum-selection clause in *Fisher* is identical to the one at issue in *Seafarers*: it requires that actions be brought in the Delaware Chancery Court. Similar to the district court in *Seafarers*, the *Fisher* Court enforced the forum-selection clause and dismissed the action. Notably, the *Fisher* Court explained that, under Ninth Circuit precedent, strong federal policy favors enforcing forum-selection clauses over anti-waiver provisions in state or federal statutes.[10] If the Ninth Circuit agrees, a Circuit split would exist, ripe for resolution by the U.S. Supreme Court.

FOOTNOTES

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[1] Seafarers Pension Plan v. Bradway, 23 F.4th 714 (7th Cir. 2022)

[2] *See*, e.g., Ocegueda on behalf of Facebook v. Zuckerberg, 526 F. Supp. 3d 637 (N.D. Cal. 2021); Lee v. Fisher, No. 20-cv-06163-SK, 2021 WL 1659842 (N.D. Cal. Apr. 27, 2021), appeal filed, No. 21-15923 (May 27, 2021).

[3] *See* https://legis.delaware.gov/json/BillDetail/GetHtmlDocument?fileAttachmentId=49812.

[4] 15 U.S.C. § 78n(a)(1).

[5] 15 U.S.C. § 78aa.

[6] 15 U.S.C. § 78cc(a).

[7] Seafarers Pension Plan, 23 F.4th at 720 (quoting 8 Del. C. § 115).

[8] *See* https://legis.delaware.gov/json/BillDetail/GetHtmlDocument?fileAttachmentId=49812.

[9] Seafarers Pension Plan, 23 F.4th at 729.

[10] *See*, e.g., Yei A. Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1090 (9th Cir. 2018).

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