

## **Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE— 9th Cir.: Court did not abuse its discretion in enforcing forum selection clause, (May 16, 2022)**

Securities Regulation Daily Wrap Up

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By Jeffrey H. Brochin, J.D.

The appropriate way to enforce a forum-selection clause is through the doctrine of forum non conveniens, and the shareholder here did not meet her burden of showing that enforcement was against public policy.

A federal appeals court in California has affirmed the district court's dismissal of a shareholder's derivative lawsuit based on the doctrine of forum non conveniens. The by-laws of The Gap, Inc. provided that any derivative action be adjudicated in the Delaware Court of Chancery and, although the shareholder conceded that the forum-selection clause was valid, and, by its terms, applied to her lawsuit, the issue before the court was whether the clause was enforceable, and the shareholder failed to meet her burden of showing that it was not (*Lee v. Fisher*, May 13, 2022, Smith, M.).

**Lack of board diversity alleged.** The shareholder brought a shareholder derivative action alleging that The Gap and its directors failed to create meaningful diversity within company leadership roles and that The Gap made false statements to shareholders in its proxy statements about the level of diversity it had achieved. The Gap's bylaws contained a forum-selection clause that required "any derivative action or proceeding brought on behalf of the Corporation" to be adjudicated in the Delaware Court of Chancery. Notwithstanding the forum-selection clause, the shareholder brought her derivative lawsuit in a federal district court in California.

Her complaint alleged a violation of Exchange Act Section 14(a), along with various state law claims based on alleged material misstatements or omissions. The district court dismissed her complaint based on the court's application of the doctrine of forum non conveniens, holding that she was bound by the forum-selection clause. For the reasons cited below, the appeals court affirmed the dismissal.

**Presumption in favor of transfer.** The court noted that a forum-selection clause creates a strong presumption in favor of transferring a case, and the shareholder bears the burden to establish that transfer is unwarranted. The court cited the general rule established by the Supreme Court that under the doctrine of forum non conveniens, a district court should transfer a case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer. The Supreme Court did not define the term "extraordinary circumstances," but an earlier decision identified three general principles that establish extraordinary circumstances: (1) when the forum-selection clause is invalid because of "fraud or overreaching;" (2) 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;" or (3) when the forum would be "so gravely difficult and inconvenient" that the plaintiff "will for all practical purposes be deprived of his day in court" (internal quotations omitted).

On appeal, the shareholder did not contend that the forum-selection clause was invalid due to fraud or that litigating her derivative claim in the Delaware forum would be gravely difficult. Therefore, the appeals court considered only the second factor, inquiring whether enforcement of the clause would contravene strong public policy.

**Test of contravention of public policy.** The court referenced a "straightforward" test to decide whether a forum-selection clause contravenes public policy, under which the court looks to the forum in which suit was brought to determine whether the shareholder has identified "a statute or judicial decision" that clearly states strong public policy rendering the clause unenforceable.

Because the shareholder brought her lawsuit in a federal forum, she identified the following as evidence of clear public policy supporting her position: (1) the Exchange Act's anti-waiver provision; (2) the Exchange Act's exclusive federal jurisdiction provision; (3) Delaware state case law; and (4) a federal court's obligation to hear cases within its jurisdiction.

**Shareholder's burden not met.** The court found that the shareholder had not met her burden of showing that the forum-selection clause was unenforceable. Her argument as to the Exchange Act's anti-waiver provision was unavailing because the strong federal policy in favor of enforcing forum-selection clauses supersedes anti-waiver provisions in state statutes as well as federal statutes, regardless of whether the clause points to a state court, a foreign court, or another federal court.

The Gap argued that her reliance upon Delaware case law in support of her public policy argument was irrelevant because it was not federal law, i.e., the forum in which she brought her lawsuit. The appeals court did not totally dismiss her pointing to Delaware law because the law of the forum identified in the forum selection clause was not totally irrelevant. However, the court noted that if she had identified Delaware law clearly stating that she could not get any relief in the Delaware Court of Chancery, the court would have little trouble considering the effect of that law as part of their public policy analysis. However, she did not do so, and therefore Delaware law was not considered.

Lastly, the shareholder argued that federal courts have a "virtually unflagging obligation" to hear cases within their exclusive jurisdiction, citing abstention doctrine cases. The court rejected that argument, referencing their earlier statement that there is a strong presumption in favor of enforcing forum-selection clauses "regardless [of] whether the clause points to a state court, a foreign court, or another federal court."

For the foregoing reasons, the appeals court concluded that the shareholder had not met her burden of showing that the forum selection clause was against public policy, and, thus, affirmed the district court's dismissal of her claims.

The case is [No. 21-15923](#).

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Companies: The Gap, Inc.

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