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COURT HOLDS THAT FEDERAL SECURITIES LAW CLAIMS ARE SUBJECT TO DELAWARE EXCLUSIVE FORUM BYLAW

To Our Clients and Friends:

On April 27, 2021, a federal court in the Northern District of California dismissed federal and state law claims brought derivatively on behalf of The Gap, Inc., holding that the California proceedings were foreclosed by a forum selection bylaw designating the Delaware Court of Chancery as the exclusive forum for derivative suits (the “Forum Bylaw”). *See Lee v. Fisher*, Case No. 20-cv-06163-SK, ECF No. 59. This decision strikes a blow against what has become a new tactic of the plaintiff’s bar: asserting violations of the federal securities laws in the guise of shareholder derivative claims. This ruling furthers the purpose of exclusive forum bylaws to prevent duplicative litigation in multiple forums, and highlights the benefits these bylaws may achieve for companies.

The plaintiff in *Fisher* brought derivative claims purportedly on behalf of Gap against certain directors and officers based on their alleged failure to promote diversity at Gap and for allegedly making misleading statements about Gap’s commitment to diversity. The plaintiff asserted both state law claims (like breach of fiduciary duty) and a federal securities law claim for violation of Section 14(a) of the Securities Exchange Act.

Defendants moved to dismiss on *forum non conveniens* grounds pursuant to the Forum Bylaw. Plaintiff argued that the court could not enforce the Forum Bylaw as to the federal Section 14(a) claim because (1) that claim was subject to exclusive federal jurisdiction and could not be asserted in the Delaware Court of Chancery, and (2) enforcing the Forum Bylaw would violate the Exchange Act provision that prohibits waiving compliance with the Exchange Act (the “anti-waiver” provision).

The court rejected plaintiff’s arguments and enforced the Forum Bylaw, effectively precluding the plaintiff from asserting a Section 14(a) claim in any forum. First, the court noted the strong policy in favor of enforcing forum selection clauses, which the Ninth Circuit has held supersedes anti-waiver provisions like those in the Exchange Act. *See Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018). Second, relying on the Ninth Circuit’s holding in *Sun* that a forum selection clause should be enforced unless the forum “affords the plaintiffs *no remedies whatsoever*,” the court held that the Forum Bylaw was enforceable because the plaintiff could file a separate state law derivative action in Delaware, even if that action could not include federal securities law claims.

This ruling is notable because other federal courts confronted with a similar argument have decided to enforce these bylaws only as to state law claims, and to keep the federal claims in federal court. The result of those rulings, though, is that derivative actions involving the same alleged misconduct could proceed in two forums—actions in federal court involving federal law claims, and actions in state court

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involving state law claims. This result undermines the purpose of exclusive forum bylaws to prevent duplicative litigation in multiple forums.

The *Fisher* decision, as well as a similar ruling reached in *Seafarers Pension Plan v. Bradway*, 2020 WL 3246326 (N.D. Ill. June 8, 2020), should help establish that exclusive forum bylaws require *all* derivative actions to proceed in a single forum. When drafting and (later) enforcing exclusive forum bylaws, companies should have these recent decisions top of mind to make sure that these bylaws achieve their goal of efficiently litigating disputes in one forum only.



Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the Securities Litigation or Securities Regulation and Corporate Governance practice groups, or the following authors:

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