

9th Circ. Gap ruling creates split on forum selection clause

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Davis Polk partners Brian Burnovski, Michael Flynn and Neal Potischman authored “9th Circ. Gap ruling creates split on forum selection clause” in *Law360*. In the article, they discuss the U.S. Court of Appeals for the Ninth Circuit’s June 1, 2023, ruling in *Lee v. Fisher*.

In an *en banc* 6-5 decision, the Ninth Circuit upheld a forum selection clause in Gap’s bylaws that requires all claims brought on behalf of the company to be filed in Delaware state court. The court ruled that even though the provision effectively bars *any* derivative claim under the Securities Exchange Act of 1934, it is enforceable. The decision creates a circuit split with the Seventh Circuit, which reached the opposite conclusion in considering a similar forum selection clause in *Seafarers Pension Plan v. Bradway*. The circuit split now created between the Ninth and Seventh Circuits increases the likelihood of Supreme Court review.

Lee might further encourage Delaware-incorporated companies to adopt bylaws requiring derivative claims to be brought in Delaware state court. Such clauses have the potential to preclude plaintiff forum shopping and satellite litigation in multiple forums. Separately, the decision could incentivize shareholders to attempt to repackage derivative claims as direct ones, notwithstanding the fact that the nature of such claims may make it difficult for shareholders to succeed in alleging direct injury to shareholders (as opposed to generalized harm to the corporate entity).

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