

CORPORATE AND SECURITIES LAW — SECTION 14(A) VIOLATIONS  
— NINTH CIRCUIT ENFORCES FORUM SELECTION CLAUSE  
BLOCKING DERIVATIVE SUITS. — *Lee ex rel. Gap, Inc. v. Fisher*, 70  
F.4th 1129 (9th Cir. 2023) (en banc).

As it strives to keep up with trends through its retail business, The Gap, Inc. has also found itself at the forefront of the latest trend in shareholder activism: shareholders pushing for corporate governance reform through derivative securities lawsuits. But Gap’s bylaws include a forum selection clause that essentially forces the dismissal of any derivative litigation brought under federal law. Recently, in *Lee ex rel. Gap, Inc. v. Fisher*,<sup>1</sup> the Ninth Circuit split with the Seventh Circuit and held that such clauses are permissible and do not functionally waive compliance with the Securities Exchange Act of 1934.<sup>2</sup> The Ninth Circuit too rigidly deferred to Delaware jurisprudence in distinguishing direct from derivative claims when it should have evaluated whether such deference impedes the federal policy of private enforcement.

Gap, like all listed companies, must comply with the Exchange Act.<sup>3</sup> Section 14 of the Exchange Act describes disclosure requirements for proxy statements, which are distributed to shareholders whenever investor votes are solicited for board elections or other corporate actions.<sup>4</sup> Section 14(a) of the Exchange Act and SEC Rule 14a-9 under the Act prohibit the issuance of proxy statements that contain materially false or misleading information or omissions.<sup>5</sup> In 2019 and 2020 proxy statements, directors of Gap, a Delaware corporation, made several commitments to nominate diverse candidates to Gap’s board and promote diversity through board representation.<sup>6</sup> But since these statements were issued, Gap has not nominated any Black or additional minority candidates to its board,<sup>7</sup> instead defending the suitability of its current board members.<sup>8</sup>

In September 2020, Noelle Lee, a Gap shareholder, filed a derivative suit — a suit where a shareholder acts as a representative of the corporation and brings claims against a third party<sup>9</sup> — against Gap’s management in the United States District Court for the Northern District of California.<sup>10</sup> Lee claimed that Gap’s directors irreparably harmed Gap

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<sup>1</sup> 70 F.4th 1129 (9th Cir. 2023) (en banc).

<sup>2</sup> 15 U.S.C. §§ 78a–78rr; see *Lee*, 70 F.4th at 1135, 1156.

<sup>3</sup> Verified Shareholder Derivative Complaint ¶¶ 85, 98, *Lee v. Fisher*, No. 20-CV-06163 (N.D. Cal. Apr. 27, 2021).

<sup>4</sup> Securities Exchange Act of 1934 § 14, 15 U.S.C. § 78n.

<sup>5</sup> See *id.* § 78n(a); 17 C.F.R. § 240.14a-9 (2023).

<sup>6</sup> Verified Shareholder Derivative Complaint, *supra* note 3, ¶¶ 27, 101–106.

<sup>7</sup> See *id.* ¶¶ 105, 109.

<sup>8</sup> See *id.* ¶ 107.

<sup>9</sup> DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 2:2 (2023), Westlaw SDALP (last visited Mar. 31, 2024).

<sup>10</sup> See Verified Shareholder Derivative Complaint, *supra* note 3, at 1.

by making false and misleading statements about the board's commitment to diversity when, in reality, Gap's directors did not intend to honor any such commitment.<sup>11</sup> Lee brought breach of fiduciary duty and misconduct claims under Delaware law and a federal claim for violation of section 14(a) of the Exchange Act and SEC Rule 14a-9.<sup>12</sup> Lee alleged that Gap suffered financial and reputational harms as a result of the directors' conduct,<sup>13</sup> and requested equitable relief in the form of various corporate governance reforms.<sup>14</sup>

Gap's bylaws contain a forum selection clause that establishes the Delaware Court of Chancery as the exclusive forum for all derivative claims.<sup>15</sup> Because federal courts have exclusive jurisdiction over Exchange Act claims,<sup>16</sup> the Delaware Court of Chancery would have to dismiss a section 14(a) claim for lack of subject matter jurisdiction, effectively precluding Gap shareholders from bringing any federal derivative claims under the Exchange Act. Unlike derivative claims, direct actions — actions where shareholders represent themselves as individuals or as an affected class<sup>17</sup> — are not subject to Gap's forum selection clause.<sup>18</sup> Citing its bylaws, Gap moved to dismiss Lee's federal and state claims pursuant to forum non conveniens.<sup>19</sup> Lee objected, arguing that since it would be impossible to litigate the federal claim in Delaware state court, the forum selection clause should be invalidated for running afoul of the Exchange Act's antiwaiver and exclusive jurisdiction provisions.<sup>20</sup> These provisions dictate that compliance with the Exchange Act cannot be waived and grant federal courts exclusive jurisdiction over claims arising under the Act.<sup>21</sup>

The district court granted the defendants' motion and dismissed the case without prejudice.<sup>22</sup> Lee appealed to the Ninth Circuit.<sup>23</sup>

The Ninth Circuit affirmed.<sup>24</sup> Writing for the panel, Judge Milan Smith found that there was no countervailing federal policy that would

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<sup>11</sup> See *id.* ¶¶ 2, 4–5.

<sup>12</sup> See *id.* ¶¶ 204–227.

<sup>13</sup> See *id.* ¶¶ 173–175.

<sup>14</sup> See *id.* at 84–86.

<sup>15</sup> See Defendants' Notice of Motion and Motion to Dismiss Plaintiff's Verified Shareholder Complaint at 21, *Lee v. Fisher*, No. 20-CV-06163 (N.D. Cal. Apr. 27, 2021) [hereinafter Defendants' Motion to Dismiss].

<sup>16</sup> Securities Exchange Act of 1934 § 27(a), 15 U.S.C. § 78aa(a).

<sup>17</sup> DEMOTT, *supra* note 9, § 2:2; see also *id.* (describing practical consequences of such classifications).

<sup>18</sup> See Defendants' Motion to Dismiss, *supra* note 15, at 22.

<sup>19</sup> See *id.* at 20.

<sup>20</sup> See Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the Complaint at 26–30, *Lee*, No. 20-CV-06163.

<sup>21</sup> See *id.* at 26–27.

<sup>22</sup> See *Lee*, 2021 WL 1659842, at \*6.

<sup>23</sup> See *ex rel. Gap, Inc. v. Fisher*, 34 F.4th 777, 779 (9th Cir. 2022).

<sup>24</sup> *Id.* at 782.

“overcome” the federal policy *in favor* of enforcing forum selection clauses.<sup>25</sup> Lee petitioned for a rehearing en banc, which was granted.<sup>26</sup>

Sitting en banc, the Ninth Circuit affirmed.<sup>27</sup> Writing for a 6–5 majority, Judge Ikuta<sup>28</sup> found that Gap’s forum selection clause was enforceable.<sup>29</sup>

Judge Ikuta dismissed Lee’s claim that the clause is void under the Exchange Act’s antiwaiver provision.<sup>30</sup> The court reasoned that since Lee could still bring her claim in federal court as a direct action,<sup>31</sup> Gap’s forum selection clause merely waives a certain procedure for bringing section 14(a) claims, and Gap must still comply with the substance of section 14(a) and Rule 14a-9.<sup>32</sup> The court found that the forum selection clause was not unlike arbitration clauses, which the Supreme Court has found do not substantively waive rights but simply eliminate procedural options.<sup>33</sup>

Next, Judge Ikuta turned to Lee’s claim that Gap’s forum selection clause violated a strong federal policy in favor of permitting shareholders to bring federal section 14(a) derivative claims, holding that no such policy exists for derivative actions.<sup>34</sup> Judge Ikuta noted that Lee had relied primarily on *J.I. Case Co. v. Borak*,<sup>35</sup> where the Supreme Court held that the Exchange Act permits a private right of action for shareholders in connection with a corporation’s false or misleading proxy statements.<sup>36</sup> Notably, the Court in *Borak* stated that it “believe[d] that a right of action exists as to both derivative and direct causes.”<sup>37</sup> But the Ninth Circuit rejected Lee’s reliance on that portion of *Borak* and highlighted two reasons why the Supreme Court’s discussion of derivative claims in *Borak* was mere dicta and did not declare a strong federal public policy in favor of section 14(a) derivative claims.

First, the Ninth Circuit noted that while the *Borak* Court stated that there is a private right of action for federal derivative claims, the proposition was poorly reasoned and inconsistent with existing federal case law.<sup>38</sup> The court also mentioned that *Borak* has been viewed unfavorably by the Supreme Court, especially as the Supreme Court has moved away from recognizing implied private rights of action in federal

<sup>25</sup> *Id.* at 779, 782.

<sup>26</sup> *Lee ex rel. Gap, Inc. v. Fisher*, 54 F.4th 608 (9th Cir. 2022) (mem.).

<sup>27</sup> *See Lee*, 70 F.4th at 1135.

<sup>28</sup> Judge Ikuta was joined by Judges Nelson, Bade, Bress, Forrest, and Bumatay.

<sup>29</sup> *Lee*, 70 F.4th at 1135.

<sup>30</sup> *Id.*

<sup>31</sup> *See id.* at 1139.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at 1141 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987)).

<sup>34</sup> *See id.* at 1143–51.

<sup>35</sup> 377 U.S. 426 (1964); *Lee*, 70 F.4th at 1144.

<sup>36</sup> *Borak*, 377 U.S. at 430–31.

<sup>37</sup> *See id.* at 431.

<sup>38</sup> *See Lee*, 70 F.4th at 1144–46 (citing *Borak*, 377 U.S. at 431).

statutes.<sup>39</sup> These developments suggested to the court that Lee's reading of *Borak* as recognizing a strong federal policy in favor of section 14(a) derivative actions was misguided.<sup>40</sup>

Second, Judge Ikuta highlighted that after *Borak*, the Supreme Court held in *Kamen v. Kemper Financial Services, Inc.*<sup>41</sup> that state law dictating the allocation of governing power in corporations — notably, who can sue directors on behalf of the corporation — should be used to fill the gaps in federal securities law.<sup>42</sup> Because the Exchange Act does not classify direct and derivative actions, the law of the state of incorporation is used to determine the classification of Lee's claim as long as such a classification is not inconsistent with the federal scheme's underlying policy goal.<sup>43</sup> Applying Delaware law, the Ninth Circuit found that Lee's claim seemed to be a direct claim, not a derivative claim.<sup>44</sup> Thus, because Lee would be able to bring a direct action in federal court and hold Gap accountable, the court held that the application of Delaware law and the classification of Lee's claim as direct would not contravene section 14(a)'s underlying policy, which *Borak* identified as the private enforcement of the proxy rules.<sup>45</sup>

The Ninth Circuit then turned to address Lee's final claim that Gap's forum selection clause violated Delaware law, where the court split with the Seventh Circuit.<sup>46</sup> Judge Ikuta found that section 115 of the Delaware General Corporation Law,<sup>47</sup> which permits internal corporate claims to be channeled exclusively into Delaware state court,<sup>48</sup> does not address federal claims and therefore does not invalidate the forum selection clause.<sup>49</sup> The court also briefly addressed the circuit split that this ruling would create with the Seventh Circuit, which had recently refused to enforce a similar forum selection clause in *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*.<sup>50</sup> Judge Ikuta reasoned

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<sup>39</sup> See *id.* at 1147–49 (summarizing the Supreme Court's refusal to extend *Borak*); see also Mohsen Manesh & Joseph A. Grundfest, *Abandoned and Split, But Never Reversed: Borak and Federal Derivative Litigation*, 78 BUS. LAW. 1047, 1081–88 (2023).

<sup>40</sup> *Lee*, 70 F.4th at 1149. The court further noted that the Exchange Act's exclusive jurisdiction provision also did not help Lee establish a strong federal policy in favor of her claim. See *id.* at 1150–51.

<sup>41</sup> 500 U.S. 90 (1991).

<sup>42</sup> See *Lee*, 70 F.4th at 1146 (citing *Kamen*, 500 U.S. at 92).

<sup>43</sup> See *id.* at 1147 (citing *Kamen*, 500 U.S. at 98).

<sup>44</sup> See *id.* (citing *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766 (Del. 2006) (“[W]here it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct.” *Id.* at 772.)).

<sup>45</sup> See *id.* at 1147 (noting *Borak* “ensure[s] that private parties can supplement SEC enforcement actions”).

<sup>46</sup> *Id.* at 1151, 1156.

<sup>47</sup> DEL. CODE ANN. tit. 8, § 115 (2023).

<sup>48</sup> See *id.*

<sup>49</sup> See *Lee*, 70 F.4th at 1154–55 (citing *Salzberg v. Sciabacucchi*, 227 A.3d 102, 120 n.79 (Del. 2020)).

<sup>50</sup> 23 F.4th 714 (7th Cir. 2022).

that the Seventh Circuit misinterpreted the scope of recent Delaware case law and placed too much weight on *Borak* while neglecting *Kamen*.<sup>51</sup>

Judge Sidney Thomas<sup>52</sup> dissented.<sup>53</sup> He would have held that Gap's forum selection clause was not enforceable.<sup>54</sup> He noted that the Exchange Act's antiwaiver provision is not conditional; rather, the provision prohibits *any* condition or stipulation that forecloses a shareholder's ability to recover under the Act, making no exceptions when there are "alternate remedies available."<sup>55</sup> Thus, it made no difference that Lee could have still brought a direct action against Gap.<sup>56</sup> He also highlighted that direct claims, which result in damages awarded to individual shareholders, do not help shareholders hold directors accountable through corporate governance reforms or other equitable relief.<sup>57</sup>

The Ninth Circuit may be correct in its opinion that *Borak* cannot be relied upon for a private right of action for derivative section 14(a) claims. But in its attempt to defend Gap's forum selection clause, the court inadvertently thwarted the federal scheme by relying too mechanically on Delaware law.

Federal securities regulation notoriously frustrates the division between federal and state law.<sup>58</sup> Corporations are "creatures of state law,"<sup>59</sup> but the Exchange Act introduces a federal component to corporate law, largely without expressly preempting state law. *Borak* appeared to settle fundamental questions regarding section 14(a)'s relationship to state causes of action by making clear that section 14 implied a federal right to fair corporate suffrage, allowing shareholders to seek relief for false proxy statements.<sup>60</sup> But the *Borak* Court hastily signed off on both direct and derivative actions without any robust reasoning or acknowledgement of the differences between the two actions under state law.<sup>61</sup> *Borak*'s status as good law is disputed<sup>62</sup> and the Supreme

<sup>51</sup> See *Lee*, 70 F.4th at 1156–59.

<sup>52</sup> Judge Thomas was joined by Chief Judge Murguia and Judges Nguyen, Friedland, and Mendoza.

<sup>53</sup> *Lee*, 70 F.4th at 1159 (Thomas, J., dissenting).

<sup>54</sup> See *id.*

<sup>55</sup> *Id.* at 1161.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> Cf. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1191 (1993). For a description of the inconsistent federalism in American securities law, see generally Theresa A. Gabaldon, *State Answers to Federal Questions: The Common Law of Federal Securities Regulation*, 20 J. CORP. L. 155 (1994).

<sup>59</sup> *In re Delmarva Sec. Litig.*, 794 F. Supp. 1293, 1301 (D. Del. 1992) (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977)).

<sup>60</sup> See *J.I. Case Co. v. Borak*, 377 U.S. 426, 430–31 (1964) ("[P]rivate parties have a right . . . to bring suit for violation of § 14(a) of the Act.").

<sup>61</sup> See *Lee*, 70 F.4th at 1146.

<sup>62</sup> See, e.g., Transcript of Oral Argument at 40, *Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019) (mem.) (statement of Roberts, C.J.) ("[W]e now know that [*Borak*] was not the right approach. . . . *Borak* would not be decided the same way today."). See generally Manesh & Grundfest, *supra* note 39.

Court has moved away from recognizing implied rights of action,<sup>63</sup> leaving the Ninth Circuit to try and reckon with *Borak*'s opaque reasoning.

The majority may have found it easy to plug and play Delaware's classification of direct claims and find that since Lee's claim can survive as a direct action, section 14(a)'s policy goal of private enforcement was satisfied.<sup>64</sup> But if the court had taken *Kamen*'s federal-policy carveout seriously and looked at the entirety of Delaware's direct-derivative scheme, it could have found that deferring to Delaware law on such matters could systematically block recovery for violations of the federal right to fair corporate suffrage. Upon looking at this scheme, the court should have at least investigated whether such a distinction hinders the federal policy goal of private enforcement.

It is up to courts to decide whether a claim alleges a violation of a shareholder's rights (a direct claim) or the company's rights (a derivative claim). But false proxy claims can often be categorized as both direct and derivative.<sup>65</sup> When corporate managers issue a misleading proxy statement, the shareholder's *individual* right to make an informed vote is violated, which would suggest a direct action. But any harm that results from a proxy authorization acquired through false statements — such as some corporate action that reduces firm value — would seem to naturally fall on the *corporation*, suggesting a derivative action. So what happens when a shareholder casts a vote based on false information, and such a vote results in reduced firm value? Is the claim both direct and derivative?

Delaware's solution to this paradox is to simply classify the claim as derivative and block recovery for the direct claim. Consider *In re J.P. Morgan Chase & Co. Shareholder Litigation*,<sup>66</sup> the case cited by the Ninth Circuit for the proposition that false proxy claims are direct claims under Delaware law.<sup>67</sup> The Delaware Supreme Court noted that the violation of a shareholder's right to "cast an informed vote" creates a *direct* claim,<sup>68</sup> but actually held that the claim in the case was *derivative* because the plaintiff sought \$7 billion in money damages for acquisition overpayment, a sum that would naturally flow to the corporation (since the corporation was the one that allegedly overpaid).<sup>69</sup> The

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<sup>63</sup> See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66–70 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

<sup>64</sup> See *Lee*, 70 F.4th at 1147.

<sup>65</sup> See *Brookfield Asset Mgmt. v. Rosson*, 261 A.3d 1251, 1264 n.42 (Del. 2021) ("[T]he distinction between direct and derivative claims is frustratingly difficult to describe with precision." (quoting *Agostino v. Hicks*, 845 A.2d 1110, 1117–18 (Del. Ch. 2004))); see also Comment, *Private Actions and the Proxy Rules: The Basis and the Breadth of the Federal Remedy*, 31 U. CHI. L. REV. 328, 329 n.12 (1964).

<sup>66</sup> 906 A.2d 766 (Del. 2006).

<sup>67</sup> See *Lee*, 70 F.4th at 1140 (citing *J.P. Morgan*, 906 A.2d at 772).

<sup>68</sup> See *J.P. Morgan*, 906 A.2d at 772.

<sup>69</sup> See *id.* ("To the extent the plaintiffs' claim is that the compensatory damages worth \$7 billion flow from the disclosure violation, that damages claim is derivative, not direct.").

Delaware Supreme Court then affirmed the dismissal of the false proxy claim, holding that even if an individual shareholder's rights are violated by a misleading proxy disclosure, the individual shareholder is not automatically entitled to the remedy that the *corporation* would naturally be entitled to.<sup>70</sup> Direct claims cannot get the benefit of derivative remedies, and direct claims for misleading proxy statements can only result in nominal damages.<sup>71</sup> In a more recent case, *Brookfield Asset Management, Inc. v. Rosson*,<sup>72</sup> the Delaware Supreme Court held that claims regarding misleading statements in proxy materials cannot be both direct and derivative, overruling precedent that allowed for "dual-natured" claims.<sup>73</sup> The Delaware Supreme Court in *Rosson* cited practicality and administrability concerns.<sup>74</sup>

In the very cases the Ninth Circuit cited as definitional,<sup>75</sup> Delaware courts' affray with false proxy claims demonstrates that such claims are not so easily classified as direct or derivative. Ultimately, Delaware's decision in *J.P. Morgan* to block recovery for direct claims is a matter of state fiat, based on uneasiness regarding workability and other available state law remedies.<sup>76</sup> And while states are well within their rights to make artificial distinctions in traditional corporate law, these distinctions can create problems when applied to a federal policy of private securities law enforcement.

*Lee* creates a category of false proxy cases where the denial of a derivative remedy leaves shareholders — whose federal rights were violated — with no remedy at all. Contrary to the Ninth Circuit's assumption that shareholders can always recover through a direct claim if no derivative claim exists, the Delaware framework prevents shareholders that are *solely* seeking vindication for violation of their right to an informed vote from reaching a court through a direct claim. *J.P. Morgan* and *Rosson* demonstrate that when a shareholder casts a misinformed vote and files a direct claim for redress, the Delaware framework will bar any recovery that could theoretically flow to the corporation. Delaware courts would classify such recovery as available to the corporation and therefore derivative; thus, if *Lee* brought her suit as a direct claim for diminished firm value due to corporate mismanagement, Delaware courts would bar recovery. And under *Gap's* forum selection clause, *any derivative claim* to that effect would have to be dismissed from Delaware court for lack of jurisdiction.

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<sup>70</sup> *Id.* at 773–74.

<sup>71</sup> *Id.*

<sup>72</sup> 261 A.3d 1251 (Del. 2021).

<sup>73</sup> *Id.* at 1265, 1276, 1281.

<sup>74</sup> See *id.* at 1276–77. For example, the court noted that such a dual-natured claim is "[s]uperfluous" in Delaware, since "[o]ther legal theories, e.g., *Revlon*, provide a basis for a direct claim for stockholders to address fiduciary duty violations" under state law. *Id.* at 1276.

<sup>75</sup> See *Lee*, 70 F.4th at 1140.

<sup>76</sup> See *Rosson*, 261 A.3d at 1276–77.

Instead of diminished firm value, Lee could try to bring a direct claim simply for the violation of her federal right to “fair corporate suffrage” under section 14(a),<sup>77</sup> but such a claim would similarly not yield a meaningful remedy for lack of quantifiable damages.<sup>78</sup> If proof of economic harm, a requirement to state a direct section 14(a) claim,<sup>79</sup> is impossible to show or is negligible,<sup>80</sup> and equitable remedies such as corporate governance reforms only flow to the corporation and are therefore derivative (and would be dismissed),<sup>81</sup> there is little incentive for plaintiffs to vindicate their federal right to fair corporate suffrage. The ease with which the Ninth Circuit eschewed such concerns is alarming, since the Delaware framework may be incompatible with a policy goal that is built on providing attractive remedies to plaintiffs.<sup>82</sup>

For all of its faults, *Borak* is consistent with *Kamen* in that the Court expressed a reluctance to invariably defer to state law remedies when the Exchange Act’s policy goal of private enforcement is at stake.<sup>83</sup> This component of *Borak*, which the Ninth Circuit acknowledged has survived abrogation by subsequent Supreme Court developments,<sup>84</sup> suggests a *strong* theory of private enforcement, requiring that the policy under section 14(a) be *actually effectuated* regardless of state law.

To be sure, it is quite plausible that *Borak*’s blessing of derivative section 14(a) claims is set to be overruled.<sup>85</sup> But *Kamen* still allows courts to eschew state law deference in favor of a federal policy.<sup>86</sup> Empowered by *Kamen*, the Ninth Circuit should have modeled the *Borak* Court’s state law skepticism and taken a hard look at whether the federal policy of private enforcement would be damaged by adopting Delaware’s view of direct and derivative claims. Instead, the Ninth Circuit signed off on Delaware’s haphazard and somewhat arbitrary distinctions without assessing the impact on the federal scheme. The fascinating awkwardness of the Exchange Act’s relationship to state corporate law persists.

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<sup>77</sup> See *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (quoting H.R. REP. NO. 73-1383, at 13 (1934)).

<sup>78</sup> See *In re J.P. Morgan Chase & Co. S’holder Litig.*, 906 A.2d 766, 773–74 (Del. 2006).

<sup>79</sup> See *Grace v. Rosenstock*, 228 F.3d 40, 47 (2d Cir. 2000).

<sup>80</sup> This is often the case unless a shareholder sells her stock at a loss, or a merger process produces a stock valuation. See *id.*

<sup>81</sup> See *Lee*, 70 F.4th at 1167 (Thomas, J., dissenting).

<sup>82</sup> It is generally accepted that a policy of private enforcement requires an incentive for private individuals to bring suit. See Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 579–80 (1981). Thus, if private enforcement is the underlying policy of section 14(a), some private right of action that incentivizes shareholders to bring suit must be available.

<sup>83</sup> See *J.I. Case Co. v. Borak*, 377 U.S. 426, 434–35 (1964) (“[T]he hurdles that the victim might face [under state law] . . . might well prove insuperable to effective relief.” *Id.* at 435.).

<sup>84</sup> See *Lee*, 70 F.4th at 1149.

<sup>85</sup> See, e.g., Transcript of Oral Argument, *supra* note 62, at 40.

<sup>86</sup> See *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 92 (1990).