

Chancery Court Decision Provides Guidance on Multiforum Litigation

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In *In re Wal-Mart Stores Delaware Derivative Litigation*, C.A. No. 7455-CB (Del. Ch. May 13, 2016), the Delaware Court of Chancery held that an order of the U.S. District Court for the Western District of Arkansas dismissing an Arkansas complaint precluded Delaware plaintiffs from litigating demand futility in a Delaware derivative action challenging the same underlying conduct. Although the Court of Chancery's opinion primarily involves an analysis of the requirements for issue preclusion under Arkansas law, it also provides important guidance on multiforum litigation for Delaware corporations and practitioners.

In the wake of a 2012 New York Times article, 15 derivative lawsuits were filed in Arkansas and Delaware alleging claims related to the alleged cover-up of bribery claims at a Mexican subsidiary of Wal-Mart Stores Inc. One of the Delaware plaintiffs demanded inspection of Wal-Mart's books and records under Section 220 of the Delaware General Corporation Law, seeking to uncover information to support its derivative claims. After Wal-Mart disputed certain document requests, the Delaware plaintiff filed a Section 220 action in September 2012 to obtain the disputed documents. The Section 220 action was resolved three years later (in May 2015), but only after extensive proceedings in the Court of Chancery, and an appeal to the Delaware Supreme Court.

While the Section 220 action was pending in Delaware, the Arkansas plaintiffs proceeded to litigate similar claims in Arkansas. In July 2012, a motion to stay the Arkansas action pending resolution of the Delaware action was initially granted by the Arkansas district court; however, the U.S. Court of Appeals for the Eighth Circuit reversed that decision in December 2013 because the Arkansas complaint contained an additional claim under Section 14(a) of the Securities Exchange Act. A more limited motion by Wal-Mart to stay the demand futility portion of the Arkansas action was later denied by the Arkansas court. In March 2015 (about a month before the resolution of the Section 220 dispute in Delaware), the Arkansas district court, analyzing the demand requirement under Delaware law, granted Wal-Mart's motion to dismiss the Arkansas complaint for failing to adequately allege demand futility. In April 2015, the Arkansas court entered a final judgment dismissing the Arkansas complaint with prejudice, although an appeal of that judgment was pending before the Eighth Circuit at the time of the Court of Chancery's decision in *Wal-Mart*.

In June 2015, Wal-Mart moved to dismiss the Delaware complaint, arguing that the decision of the Arkansas court precluded the Delaware plaintiffs from litigating the demand futility issue in Delaware. The Chancery Court, analyzing the preclusion issue under Arkansas law, determined that preclusion applied because demand futility was litigated in the Arkansas action, the Delaware plaintiffs and the Arkansas plaintiffs were in privity and the Arkansas plaintiffs were adequate representatives. Accordingly, the Court of Chancery granted Wal-Mart's motion to dismiss the Delaware lawsuit.

Although the analysis was framed under Arkansas law (and the Restatement (Second) of Judgments), the Court of Chancery's discussion of adequate representation is relevant to Delaware corporations and practitioners. The

Delaware plaintiffs' primary attack on the Arkansas plaintiffs' adequacy focused on the decision to pursue the Arkansas litigation without first seeking access to Wal-Mart's books and records or waiting for the outcome of the Section 220 action in Delaware. While the Delaware Supreme Court, in *Pyott v. Louisiana Municipal Police Employees' Retirement System*, 74 A.3d 612 (Del. 2013), rejected the notion that there is an irrebuttable presumption of inadequacy against so-called "fast filers" under Delaware law, the court left open the possibility that a fast filer could be an inadequate representative in a particular case. The Delaware courts have often encouraged plaintiffs to use all of the "tools at hand" (including Section 220) to investigate derivative claims and have been critical of plaintiffs who do not avail themselves of the opportunity to inspect the corporation's books and records under Section 220 before filing suit. In *Wal-Mart*, however, the Court of Chancery concluded that, while the Arkansas plaintiffs' litigation strategy may have been "imperfect" and its decision not to pursue books and records under Section 220 potentially "ill-advised," it was not "so grossly deficient as to render them inadequate representatives."

The *Wal-Mart* decision provides another example of the inefficiency of multiforum litigation in matters concerning the internal affairs of Delaware corporations. The Delaware plaintiffs' decision to pursue their Section 220 demand—a litigation strategy that has been encouraged by the Delaware courts—ultimately proved to be a fruitless and undoubtedly expensive endeavor because of the actions of derivative plaintiffs in another jurisdiction. It is worth noting that this case was instituted before the widespread adoption of forum selection provisions by Delaware corporations and the addition of new Section 115 to the DGCL expressly authorizing forum selection provisions. If *Wal-Mart's* organizational documents had contained a forum selection provision at the outset, the duplicative costs of multiforum litigation could have been largely avoided in this case. In light of *Wal-Mart*, Delaware corporations and their counsel should consider the benefits of proactively adopting forum selection provisions to avoid the time and expense of litigating the same matters in multiple jurisdictions.

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