

March 19, 2020

Delaware Supreme Court Rejects Facial Challenge to Federal Forum Provisions

The Delaware Supreme Court yesterday ruled that charter provisions designating the federal courts as the exclusive forum for lawsuits brought under the Securities Act of 1933 are permissible under Delaware law. [*Salzberg v. Sciabacucchi*, No. 346, 2019 \(Del. Mar. 18, 2020\)](#). The Court’s ruling reaffirmed the “immense freedom” Delaware entities enjoy “to adopt the most appropriate terms for the organization, finance, and governance of their enterprise.”

In 2018, the U.S. Supreme Court ruled that ’33 Act claims can be brought in state court as well as federal court. That ruling triggered a surge in ’33 Act claims filed in state court, often leaving companies to defend duplicative cases in federal and state courts with no means to coordinate or consolidate them. In response to this obvious inefficiency, several Delaware companies launched IPOs with charters containing provisions designating federal courts as the exclusive venue for such claims. Stockholder plaintiffs promptly challenged those “federal forum” provisions as impermissible. The Court of Chancery agreed, ruling that the “constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware’s corporate law.”

The Supreme Court reversed in a decision emphasizing the breadth of the permissible scope of a Delaware charter. The Court observed that, as a matter of Delaware statute, a charter may regulate “intra-corporate affairs”—all matters “defining, limiting, and regulating the powers of the corporation, the directors and the stockholders.” Because a ’33 Act claim may raise such matters (at least in some cases), the Court held a federal forum provision is not necessarily invalid.

The holding of *Salzberg* thus permits Delaware corporations to include federal forum provisions in their charters, and its reasoning clearly permits them in bylaws as well. Importantly, however, the decision does not endorse the application of these provisions in every circumstance. Corporations considering amending their bylaws or charters to include a federal forum provision—and corporations seeking to enforce such provisions once enacted—should do so only on the strength of a record reflecting robust deliberation and consideration of all relevant information. More broadly, this decision confirms the grand flexibility of Delaware corporate law—a continuing invitation for innovation and adaptation.

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