

Delaware Supreme Court Upholds Federal Forum Provisions in Corporate Charters for Section 11 Claims as “Intra-Corporate Affairs”

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Last week, in a unanimous reversal of the state’s Chancery Court, the Delaware Supreme Court upheld the validity of federal-forum provisions found in the charters of three Delaware-incorporated companies (Blue Apron Inc., Roku, Inc., and Stitch Fix, Inc.). The provisions at issue required shareholders to file complaints for violations of Section 11 of the Securities Act of 1933 (“Securities Act”) exclusively in federal court. Section 11 of the Securities Act allows corporate stockholders to bring claims for damages based on alleged omissions or falsehoods in registration statements. While the Delaware Supreme Court reasoned that federal-forum provisions are consistent with the statutory text of the Delaware General Corporation Law (“DGCL”), as well as state and federal notions of public policy, critics predict this opinion may open the door to more litigation over arbitration rights and other litigation forum and class restrictions.

The Delaware Supreme Court and Chancery Court opinions disagree on the proper scope of DGCL Section 102(b)(1), which governs the proper subject matter of corporate charter provisions/bylaws. The statute authorizes two broad types of provisions: “[1] any provision for the management of the business and for the conduct of the affairs of the corporation; and [2] any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class of the stockholders...if such provisions are not contrary to the laws of this State.”¹

The Chancery Court initially found that Section 102(b)(1) was implicitly amended by Section 115 of the DGCL, which states that a charter or bylaw cannot preclude the incorporating state from presiding over “internal corporate claims.”² The second component of the Chancery Court’s opinion found that Section 102(b)(1) provisions apply only to “internal affairs,” described by the court as “the rights, powers, or preferences of the shares, language in the corporation’s charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation.”³ From here, the Chancery Court took a binary position: all conduct that constitutes “internal affairs” is governed by Section 102(b)(1) and Section 115, or, if the conduct does not constitute “internal affairs,” it is “external” and cannot be subject to an exclusive federal forum restriction in a corporate charter. Emphasizing the fact that Securities Act claims derive from federal law, the Chancery Court held that these claims do not constitute “internal affairs.”

The Delaware Supreme Court unanimously disagreed and held that federal-forum provisions fall within both prongs of Section 102(b)(1). First, the court found that a federal-forum requirement for securities litigation facilitates “management of the business” by funneling potential securities claims through the federal system, obviating the risk of parallel actions at both state and federal levels. This arguably allows the corporation to more efficiently defend itself and minimizes risk of inconsistent judgments. With respect to the second prong, the court asserted that federal-forum provisions “regulat[e] the

¹ *Salzberg v. Sciabacucchi*, No. 346, 2019, 2020 WL 1280785, at *4 (Del. Mar. 18, 2020).

² *Sciabacucchi v. Salzberg*, No. CV 2017-0931-JTL, 2018 WL 6719718, at *14–15 (Del. Ch. Dec. 19, 2018); Section 115 specifically defines “internal corporate claims” as:

“...claims...(i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.” 8 *Del. C.* § 115 (2015).

³ *Id.* at *1.

powers of...the stockholders” by instructing them to exercise their cause of action through a federal forum.⁴

In reaching this conclusion, the Delaware Supreme Court found that Section 115 applies to a specific sliver of internal affairs (i.e. “internal corporate claims”) and, while Section 102(b)(1)’s general language subsumes this sliver, Section 102(b)(1)’s scope is broader and includes what the court described as “intra-corporate affairs.” The court found such intra-corporate affairs to properly include “matters which are *peculiar to the relationships* among or between the corporation and its current officers, directors, and shareholders.”⁵ As a result, the court concluded that a bylaw or charter provision can lawfully govern stockholder Securities Act claims as they naturally relate to the relationship between stockholders and directors and constitute intra-corporate affairs. The court recognized the implications of its ruling on other states that may want to allow residents to file Securities Act complaints in state courts, but determined that permitting federal-forum selection provisions for such claims did not “offend principles of horizontal sovereignty – just as it does not offend federal policy.”⁶

It appears that the Delaware Supreme Court’s decision is aimed at avoiding the risk of parallel actions, and fostering judicial economy. Given this ruling, it is likely that companies will attempt to implement federal forum restrictions—and perhaps forum restrictions on other types of claims—in order to rein in stockholder litigation. It remains to be seen whether other states will follow the lead of the Delaware Supreme Court. If so, this likely will drive Section 11 claims, as well as other claims which may fall within the definition of “intra-corporate affairs” into the federal courts. Going forward, Delaware corporations should assess the pros and cons of incorporating a federal-forum provision in their bylaws in light of these factors.

For assistance in evaluating how these developments may affect your business, please contact **Thomas P. Cimino, Jr.** at +1 (312) 609 7784 , **Brooke E. Conner** at +1 (312) 609 7529, **Nicholas Vera** at +1 (312) 609 7671 or any Vedder Price attorney with whom you have worked.

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⁴ *Salzberg*, 2020 WL 1280785, at *4–5.

⁵ *Id.* at *15 (quoting *McDermott Inc v. Lewis*, 531 A.2d 206, 214 (Del. 1987).

⁶ *Id.* at *20.