

Salzburg, et. al. v. Sciabacucchi – Delaware Supreme Court Finds Charter Provisions Requiring Federal Court Forum for Federal Securities Claims are Facially Valid

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In a highly anticipated decision issued March 18, 2020, the Delaware Supreme Court reversed the Court of Chancery on a matter of first impression by holding that provisions in corporate charters designating federal courts as the exclusive forum (Federal-Forum Provisions) to resolve claims brought under the Securities Act of 1933 (1933 Act) are facially valid under Delaware law.

This dispute arose from a stockholder challenge to the Federal-Forum Provisions enacted by Blue Apron, Stitch Fix, and Roku prior to their initial public offerings in 2017. The Federal-Forum Provisions designated the federal courts as the exclusive forum for the resolution of claims under the 1933 Act. The Court of Chancery decided at the summary judgment stage that the Federal-Forum Provisions were invalid under Delaware law because a Delaware corporation's "constitutive documents" could not "bind a plaintiff to a particular forum where the claim d[id] not involve rights and relationships [] established by or under Delaware's corporate law." The individual members of each company's board of directors appealed the Court of Chancery's decision.

In reversing the Court of Chancery, the Delaware Supreme Court looked to the plain language of the Delaware General Corporate Law (DGCL) § 102(b)(1), which governs the matters contained in a corporation's certificate of incorporation. In particular, the Delaware Supreme Court remarked that the Federal-Forum Provisions fit within § 102(b)(1)'s broad categories of authorized provisions because they addressed the "management of the [corporations'] business" and the "conduct of the affairs of the corporation[s]." More generally, the Delaware Supreme Court found that Federal-Forum Provisions are consistent with the broad and flexible nature of the DGCL, which is designed to give Delaware corporations the freedom to adopt appropriate contractual terms to govern an enterprise.

Parsing through its 2014 *ATP Tour, Inc. v. Deutscher Tennis Bund* decision and the Court of Chancery's 2013 *Boilermakers Local*

154 Retirement Fund v. Chevron Group decision, the Delaware Supreme Court distinguished claims under the 1933 Act from the types of “internal corporate claims” (e.g., breach of fiduciary duty) that may not be precluded from litigation in Delaware courts. However, the Delaware Supreme Court explained that claims brought under Section 11 of the 1933 Act (to remedy false or misleading information included in a registration statement) fall within the purview of DGCL § 102(b)(1) because they arise from internal corporate conduct on the part of a company’s board of directors.

Turning from the issue of validity to enforceability, the Delaware Supreme Court offered its view that Federal-Forum Provisions should be enforced when plaintiffs challenge them in state court. The Delaware Supreme Court reasoned that such provisions are most similar to charter provisions regulating internal affairs, which supports deference being given to them to promote uniformity and predictability. Moreover, because Federal-Forum Provisions are procedural and not substantive, they do not offend constitutional principles that prohibit valid state laws from having extraterritorial application. The Delaware Supreme Court’s decision in *Salzburg v. Sciabacucchi* may resolve practical inefficiencies due to the concurrent jurisdiction shared by federal and state courts over class actions brought under the 1933 Act. These actions, when brought in state court, are not removable to federal court. As a result, corporations facing federal securities claims are often forced to engage in costly and duplicative litigation across multiple jurisdictions. Noting an increased number of multi-jurisdictional 1933 Act lawsuits filed in recent years, the Delaware Supreme Court suggested that Federal-Forum Provisions like those at issue in *Salzburg* could reduce such costly and duplicative litigation. As a result of the ruling, Delaware corporations now have increased ability to control the forum for federal securities claims, including the ability to consolidate or coordinate multiple securities class action suits. However, the *Salzburg* opinion does not say a Federal-Forum Provision will be upheld in every situation. Indeed, “[c]harter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.”