

FEDERAL FORUM PROVISIONS FOR '33 ACT CLAIMS DECLARED FACIALLY VALID

On March 18, 2020, in *Salzberg, et al. v. Sciabacucchi*, a unanimous Delaware Supreme Court, upheld the facial validity of federal-forum provisions—provisions adopted by Delaware corporations in their certificates of incorporation requiring plaintiffs who file actions arising under the Securities Act of 1933 (the “’33 Act”) to do so exclusively in federal court.

In a nutshell - The decision restores a critical tool in combating the rise of state court litigation under Section 11 of the '33 Act challenging disclosures in registration statements. At the same time, the language of the opinion invites the adoption of new, broader provisions, potentially forcing a broader range of actions out of state court and into other forums including arbitration.

The federal forum provisions at issue typically state:

Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of [the Company] shall be deemed to have notice of and consented to [this provision].

In rejecting a facial challenge to such provisions, the Court held that the Delaware General Corporation Law (“DGCL”) as a whole, and Section 102(b)(1) in particular, authorizes corporations to adopt provisions regulating matters extending beyond the “universe of internal affairs” of a Delaware corporation. In addition, the Court explained why federal forum provisions should be upheld by other states when companies seek to dismiss '33 Act cases brought in state courts outside of Delaware.

This expansive reading of the DGCL appears to support the adoption of broader provisions regulating litigation related to corporate operations outside the context of Section 11 claims.

A copy of the Delaware Supreme Court decision can be found here:

<https://www.law360.com/articles/1254562/attachments/0>

Please contact Jason de Bretteville or Ryan Wilkins at Stradling if you would like our assistance in either considering whether to adopt or implementing adoption of a federal forum provision in your company’s charter or bylaws.

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