

Delaware Chancery Court: Forum Selection Provisions Requiring Federal Securities Act Claims to Be Brought in Federal Court Are “Ineffective and Invalid”

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On December 19, 2018, the Delaware Chancery Court held that provisions in certificates of incorporation requiring claims under the Securities Act of 1933 (the “Securities Act”) to be brought in federal court are “ineffective and invalid.” [Sciabacucchi v. Salzberg, No. 2017-0931-JTL \(Del. Ch. 2018\) \(Laster, V.C.\)](#). The court found that its earlier opinion in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), authored by then-Chancellor Strine, “answers whether a forum-selection provision can govern claims under” the Securities Act.^[1] The *Boilermakers* court held that Section 109(b) of the Delaware General Corporation Law (“DGCL”) permits a Delaware corporation to “adopt a forum-selection bylaw for internal-affairs claims” but “does *not* authorize a Delaware corporation to regulate external relationships.”^[2] *Sciabacucchi*, No. 2017-0931-JTL. Relying on “[t]he *Boilermakers* distinction between internal and external claims,” the *Sciabacucchi* court held that a forum-selection provision cannot govern Securities Act claims because such claims are “external to the corporation.”

The forum selection bylaws at issue in *Boilermakers* concerned derivative suits, fiduciary duty suits, suits asserting claims under the DGCL, and internal affairs suits. The *Boilermakers* court found that “[t]hese are the kind of claims most central to the relationship between those who manage the corporation and the corporation’s stockholders.” The court emphasized that these types of claims are “brought by stockholders *qua* stockholders.” The court contrasted the forum selection laws at issue with hypothetical forum selection bylaws governing tort or contract claims, which would be “beyond the statutory language” of Section 109(b) because such claims concern “external matters” rather than “the rights and powers of the plaintiff stockholder *as a stockholder*.” Following the *Boilermakers* decision, the Delaware General Assembly adopted Section 115 of the DGCL, which specifically authorizes corporations to adopt forum-selection provisions in their certificates of incorporation or bylaws providing “that any or all internal corporate claims shall be brought solely and exclusively in” Delaware courts. 8 *Del. C.* § 115.

In *Sciabacucchi*, the court found that “the reasoning in *Boilermakers* applies equally to a charter-based [forum selection] provision” because “the language of Section 109(b) dealing with the subject matter of bylaws parallels in large measure the language of Section 102(b)(1) dealing with what may be included in a certificate of incorporation.”^[3] The court determined that under *Boilermakers*, “a Delaware corporation does not have the power to adopt in its charter or bylaws a forum-selection provision that governs external claims.”

The *Sciabacucchi* court found that “a federal claim under the [Securities Act] is a clear example of an external claim.” Such a claim “does not turn on 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.” The court noted that a plaintiff may assert a Securities Act claim against a broad range of defendants regardless of whether those defendants have “internal role[s] with the corporation.” Moreover, “shares of a Delaware corporation are only one subset” of one type of security governed by the Securities Act. Finally, the court underscored that a Securities Act claim “does not arise out of or relate to the ownership of the share, but rather from the purchase of the share.” The court explained that “[a]t the moment the predicate act of purchasing occurs, the purchaser is not yet a stockholder and does not yet have any relationship with the corporation that is governed by Delaware corporate law.” The court found it significant that the purchaser does not have to “continue to own the security to be able to assert a [Securities Act] claim.” The court concluded that a Securities Act “claim resembles a tort or contract claim brought by a third-party plaintiff who was not a stockholder at the time the claim arose,” and is therefore “an external claim that falls outside the scope of the corporate contract.”

The *Sciabacucchi* court further found that “[t]he 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 court stated that Delaware law cannot govern claims brought under the Securities Act because “[f]ederal law creates the claim, defines the elements of the claim, and specifies who can be a plaintiff or a defendant.” Consequently, the court held that forum selection laws governing Securities Act claims are “ineffective and invalid.”

[1] Please [click here](#) to read our discussion of the Delaware Chancery Court’s decision in *Boilermakers*.

[2] At the time *Boilermakers* was decided, Section 109(b) provided in relevant part as follows: “The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.” 8 *Del. C.* § 109(b) (2014).

[3] Section 109(b) provides that a corporation’s “bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.” 8 *Del. C.* § 109(b). Section 102(b)(1) similarly provides that a certification of incorporation may include “[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and 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.” 8 *Del. C.* § 102(b)(1).

Authors and
Contacts

Peter Kazanoff
Partner
pkazanoff@stblaw.com
+1-212-455-3525

George Wang
Partner
gwang@stblaw.com
+1-212-455-2228

Cheryl Scarboro
Of Counsel
cscarboro@stblaw.com
+1-202-636-5529

Jonathan Youngwood
Partner
jyoungwood@stblaw.com
1-212-455-3539

