

Delaware Court of Chancery Declares Ineffective Exclusive Federal Forum Provision for 1933 Act Claims

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In [*Sciabacucchi v. Salzberg*](#), C.A. No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018), the [*Delaware Court of Chancery*](#) (Laster, V.C.) held that a forum-selection provision in a Delaware corporation's charter or bylaws which purported to govern external investor claims not involving the internal affairs of the corporation are not authorized under Delaware law. Thus, the Court declared ineffective a provision in a certificate of incorporation requiring any claim brought against it under the [*Securities Act of 1933*](#) ("1933 Act") to be filed in federal court. This decision clarifies the limits on the scope of forum selection provisions enacted by Delaware corporations.

The 1933 Act bars any person from offering or selling securities except pursuant to a registration statement approved by the Securities and Exchange Commission (the "SEC") or in compliance with an exemption. The 1933 Act grants private rights of action to purchasers of securities so they can enforce its registration and disclosure requirements. When Congress enacted the 1933 Act, it gave state and federal courts concurrent jurisdiction over claims by private plaintiffs and barred defendants from removing actions filed in state court to federal court. In 1998, Congress amended the 1933 Act in a manner that cast doubt on this jurisdictional allocation. In 2018, the Supreme Court of the United States held that state courts continue to have concurrent jurisdiction over claims by private plaintiffs and that defendants cannot remove actions filed in state court to federal court. See [*Cyan, Inc. v. Beaver Cty. Empls. Ret. Fund*](#), 138 S. Ct. 1061 (2018).

Delaware law permits corporations to adopt forum-selection clauses in their certificates of incorporation or bylaws addressing "internal affairs claims brought by stockholders *qua* stockholders." [*Boilermakers Local 154 Ret. Fund v. Chevron Corp.*](#), 73 A.3d 934, 952 (Del. Ch. 2013) (Strine, C.); see [8 Del. C. §§ 102\(b\)\(1\), 109\(b\)](#). Corporations have used this authority typically to ensure that stockholder breach of fiduciary duty claims are brought exclusively in Delaware Chancery Court.

Before their initial public offerings, the three nominal defendant corporations in this case adopted provisions in their certificates of incorporation that require any claim under the 1933 Act to be filed in federal court ("Federal Forum Provisions"). Contrary to the federal regime, the provisions preclude a

plaintiff from asserting a 1933 Act claim in state court.

In 2017, the shareholder plaintiff purchased shares of nominal defendants Blue Apron Holdings, Inc., Roku, Inc. and Stitch Fix, Inc. The plaintiff then filed an action seeking a declaratory judgment challenging the enforceability of the Federal Forum Provisions. The parties filed cross-motions for summary judgment in response to the facial challenge to the provisions.

The Court granted plaintiff's motion for summary judgment, declaring the Federal Forum Provisions ineffective. The Court held that "[u]nder existing Delaware authority, a Delaware corporation does not have the power to adopt in its charter or bylaws a forum-selection provision that governs external claims. The Federal Forum Provisions purport to regulate the forum in which parties external to the corporation (purchases of securities) can sue under a body of law external to the corporate contract (the 1933 Act). They cannot accomplish that feat, rendering the provisions ineffective." Holding otherwise, the Court reasoned, would lead to vast implications such as asserting that state corporate law could be used to regulate federal claims in violation of Delaware public policy.

While this decision indicates that Delaware corporations cannot affect the forum selections by shareholders for *investor suits* brought against companies and their officers and directors, nothing in this decision affects the utility of forum selection provisions for *shareholder suits* addressing the internal affairs of a Delaware corporation.

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