

MARKET ALERT

A WIN FOR CORPORATE FILERS

Delaware Supreme Court Decision Validating Federal Forum Provisions in Certificates of Incorporation is a Win for Issuers and the D&O Marketplace

On March 18, 2020, a very important decision was handed down in the Delaware Supreme Court. The case, *Matthew B. Salzborg et al. v. Matthew Sciabacucchi*, involved three companies (Blue Apron Holdings, Inc., Roku, Inc. and Stitch Fix, Inc.) which added Federal Forum Provisions (FFP) to their certificates of incorporation prior to filing their initial public offerings in 2017. Their FFPs provided that any Securities Act of 1933 claim (e.g. any Section 11 or related claim) must be brought in Federal Court. This provision was designed to eliminate the Cyan problem of litigating offering-related claims in both Federal and State Court.

A shareholder of the three companies petitioned the Delaware Court to hold that the FFPs were not valid under Delaware law. In December, 2018, the Delaware Court of Chancery found that FFPs were in fact invalid. Specifically, “(t)he court decided that the ‘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. Because ‘the Federal Forum Provisions attempt to accomplish that feat,’ the court held that the Federal Forum Provisions are ‘ineffective and invalid.’”

The Supreme Court of Delaware just reversed that decision. After a lengthy discussion of Delaware corporate law, the Supreme Court concluded that:

FFPs are a relatively recent phenomenon designed to address the post-Cyan difficulties presented by multi-forum litigation of Securities Act claims. The policies underlying the DGCL (Delaware General Corporation Law) include certainty and predictability, uniformity, and

prompt judicial resolution to corporate disputes. Our law strives to enhance flexibility in order to engage in private ordering, and to defer case-by-case law development. Delaware courts attempt ‘to achieve judicial economy and avoid duplicative efforts among courts in resolving disputes.’ FFPs advance these goals.

Our General Assembly has also recognized the need to maintain balance, efficiency, fairness, and predictability in protecting the legitimate interest of all stakeholders, and to ensure that the laws do not impose unnecessary costs on Delaware entities. FFPs do not violate that sense of balance as they allow for litigation of federal Securities Act claims in a federal court of plaintiff’s choosing, but also allow for consolidation and coordination of such claims to avoid inefficiencies and unnecessary costs.

Finally, our DGCL was intended to provide directors and stockholders with flexibility and wide discretion for private ordering and adapting to new situations. ‘[T]hat a board’s action might involve a new use of plain statutory authority does not make it invalid under our law, and boards of Delaware corporations have flexibility to respond to changing dynamics in ways that are authorized by our statutory law.’”

WHAT DOES THIS MEAN?

Given the significant litigation exposure ‘33 Act filers face, this is a big win for public companies incorporated in Delaware. It is important to note that many insurers have been pursuing legislative reform around the Cyan decision. Therefore, it will be interesting to see if this decision is viewed as meaningful change by the insurance marketplace or just a step in the direction of reform.

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to the previously unsolvable.**

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JOHN TANNER

Chief Legal Officer
404.426.0267
John.Tanner@cacspecialty.com

COLIN DALY

Executive Vice President
Financial Lines Co-Practice Leader
303.513.8891
Colin.Daly@cacspecialty.com

CARRIE O'NEIL

Senior Vice President Legal & Claims
720.563.1106
Carrie.Oneil@cacspecialty.com

DARREN SONDERMAN

Executive Vice President
Financial Lines Co-Practice Leader
770.580.5070
Darren.Sonderman@cacspecialty.com

