

*Salzberg v. Blue Apron Holdings, Inc., et al.*, No. 346,2019 (Del. Mar. 18, 2020)

Reactions from Legal Experts to Footnote # 169 in Response to CII Staff  
Email Inquiry  
As of March 27, 2020

**Footnote # 169:**

169 Much of the opposition to FFPs seems to be based upon a concern that if upheld, the "next move" might be forum provisions that require arbitration of internal corporate claims. Such provisions, at least from our state law perspective, would violate Section 115 which provides that, "no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this state." 8 *Del. C.* §115; *see* Del. S.B. 75 syn. ("Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, *or an arbitral forum*, if it would preclude litigating such claims in the Delaware courts." (emphasis added)).

**Frederick Alexander, Founder of the Shareholder Commons, and former Managing Partner of Morris, Nichols, Arsht & Tunnell LLP**

The obvious concern for shareholders trying to parse footnote 169 of Blue Apron is whether a large class of shareholder claims can now be burdened with fee-shifting, federal forum selection or mandatory arbitration bylaws. But read carefully, the holding is very narrow. The statute already prohibits such bylaws for internal claims (generally covering direct and derivative corporate law claims) and the Court explained that tort, commercial and other claims not involving intracorporate disputes ("external claims") are not subject to bylaw restrictions at all. The Court found there is a narrow band between internal and external claims where bylaws can impose reasonable limits on litigation, and that the band includes at least one category of the 1933 Act claims the bylaw purported to cover. Given the Court's precise delineation of the type of claim that the bylaw could lawfully extend to ( Section 11 claims-which involve director action-where the entire class consists of existing shareholders) it does not appear that the case will give corporations broad license to restrict shareholder claims, but shareholders should certainly monitor developments in this area.

**James D. Cox, the Brainerd Currie Professor of Law, Duke Law**

The above footnote appears in a recent Delaware Supreme Court decision upholding bylaws by three publicly traded firms that renders federal district courts the exclusive forum for securities litigation involving alleged misstatements in an offering unless the board of directors otherwise consents to suit being in a state court. Prompting the bylaw is the epidemic of securities fraud class actions filed in state courts under the provisions of the Federal Securities Act of 1933. Unlike the more common antifraud suits under Rule 10b-5 of the Securities Exchange Act of

1934, the '33 Act suits can be maintained in either state or federal courts. The bylaws seek to reduce the number of the '33 Act suits by placing such suits in the federal courts.

Two studies prepared by Cornerstone Research, a defense-oriented litigation support firm show both a remarkable rise during the last two years in '33 Act claims filed in state forums; further data in those studies reflect success rates in the state forum in terms of settlements that are better for investors than occur in the federal forum. The surge in such litigation and the variance in outcomes between federal and state forums should raise our concern. Are we witnessing an abuse of process by eager plaintiffs' counsel or are these disparate outcomes the result of years of accretion of burdens placed on investor lawsuits by statutory and doctrinal developments that surround private litigation under the securities laws?

With more than one-half of American public companies incorporated in Delaware, it is natural to expect that the Delaware judiciary will from time-to-time assume a self-important role. Certainly this is the tone of *Salzberg v. Sciabacucchi*. How else to view Delaware Supreme Court embracing a position of allowing company boards to decide whether venue for a suit should be as the U.S. Congress provided, either in federal or state court, and only in federal court? Even though curbing abusive, costly litigation is a worthwhile objective, in a federal and constitutional form of government we need to ask "whether the ends justifies the means." Is this not a matter better left to the political system? To get to its objective, *Salzberg* greatly expanded the prerogatives of Delaware boards of directors vis-à-vis the limited franchise enjoyed by shareholders. It did this by greatly expanding the meaning of "internal affairs." What occurred in the decision can only be expected to further the erosion of shareholder protection, now perhaps after *Salzberg* this means investor protection as well.

Some may find comfort in footnote 169, believing it reflects the court's view that a bylaw cannot embrace "arbitration" as a means for handling shareholder and investor disputes involving "internal matters" to be resolved. This is a false view. It certainly seems a bylaw could authorize the board of directors to *choose* between arbitration or suit in Delaware. All the statute prohibits is a *bylaw* foreclosing resort to the Delaware courts. Thus, it seems likely that a carefully drafted bylaw could be crafted so as not to "prohibit" suit in a Delaware court, the express proscription in the Delaware statute. For example, the bylaw might provide that the board can in writing withhold its consent to a suit filed outside of Delaware with the consequential effect the suit must then be pursued per the bylaw either in the Delaware courts or pursued through arbitration. This does not seem expressly rejected by Section 115 nor is it covered by the legislative history quoted by the court. If this conjecture is correct, then investors would lose a great deal for arbitration has not been consumer or investor friendly. Thus, while footnote 169 was written to allay concerns that *Salzberg* might be seen as resurrecting fears of a full-out frontal assault on shareholder litigation, akin to the Delaware Supreme Court's earlier embrace of fee shifting in *ATP*, the footnote may be a harbinger of just that.

**Adam C. Pritchard, the Frances and George Skestos Professor of Law, Michigan Law**

The footnote is carefully drafted. "Much of the opposition to FFPs seems to be based upon a concern that if upheld, the "next move" might be forum provisions that require arbitration of internal corporate claims. Such provisions, *at least from our state law perspective*, would violate Section 115 which provides that, "no provision of the certificate of incorporation or the bylaws

may prohibit bringing such claims in the courts of this state.” Such provisions, at least from our state law perspective, would violate Section 115 which provides that, “no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this state.” (emphasis supplied).

The question is whether section 115 discriminates against arbitration, which it seems to me is preempted by the Federal Arbitration Act. The court doesn't address that question, quite appropriately, as it is not relevant to the issue before it. When an arbitration provision in a Delaware charter is presented, the court cannot ignore federal law. See Supremacy Clause.

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At the very end of its opinion, the Delaware Supreme Court dropped a footnote – No. 169 – that fundamentally misunderstood the nature of investors’ concerns, and needlessly opens another potential threat to stockholders’ rights. In Footnote 169, the Supreme Court stated: “Much of the opposition to [federal forum provisions] seems to be based upon a concern that if upheld, the ‘next move’ might be forum provisions that require arbitration of internal corporate claims. Such provisions, at least from our state law perspective, would violate Section 115 ...”The problem with the Court’s observation in this regard is that the previous 52 pages of the opinion makes unquestionably clear that Section 115 *only applies to internal corporate claims*. This means that everything else is fair game. And by incorrectly suggesting that Section 115 is somehow intended to prevent arbitration, the Supreme Court, perhaps inadvertently, has now exposed Section 115 itself to challenge as being preempted by the Federal Arbitration Act.

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