



D&O Insights: *Sciabacucchi* and Its Aftermath

By: Miles R. Afsharnik

Introduction

In our March 2020 Advisory, we discussed the very significant Delaware Supreme Court decision in *Salzberg, et al. v. Sciabacucchi*, No. 346, 2019, 2020 Del. LEXIS 100 (Del. Mar. 18, 2020). In *Sciabacucchi*, the court upheld the facial validity of federal forum provisions (“FFP”) in the charters of three Delaware corporations which required shareholder actions under the Federal Securities Act of 1933 (“’33 Act”) be brought in federal court vs. state court. The significance of the FFPs to companies is, of course, to be able to avoid the unnecessary costs and burden of defending multiple cases simultaneously in both state and federal courts and the possibility of inconsistent judgment and rulings. We opined that it would be interesting to see whether other states follow the Delaware Supreme Court’s ruling. That time has come.

The Dropbox Litigation

Dropbox is a Delaware corporation based in California which included an FFP in its bylaws prior to completing its Initial Public Offering (“IPO”) in 2018. Multiple shareholder securities class action lawsuits were filed in state and federal courts in 2019 following the announcement of the company’s 2nd Quarter results for fiscal year 2019.

The state court actions were consolidated and stayed pending the Delaware court’s decision in *Sciabacucchi*. Now the company has moved to dismiss the California state court action based on the *Sciabacucchi* decision. Under California law, contractual forum selection clauses, including those found in corporate bylaws, are enforced through the doctrine of forum non conveniens. Under that legal doctrine, Dropbox has argued in its motion to dismiss that the company’s mandatory FFP must be enforced unless the shareholders can demonstrate that that to do so would be “unreasonable”.

California state courts have led the way in the number of ’33 Act lawsuits due to the number of technology and life science IPOs in that state, and the state court rulings have generally been favorable up to now for plaintiff shareholders. While Dropbox is not the only company

seeking to enforce an FFP in states other than Delaware, companies are sure to be waiting with bated breath for the outcome of the court’s decision due to the significance of California jurisprudence in setting a legal precedent for other state courts.

A legal victory dismissing the state court shareholder lawsuit against Dropbox would certainly be welcomed by companies that have such FFPs in their bylaws and D&O insurers as it could provide some relief from the prohibitively costly defense expenses incurred in responding to multiple lawsuits in various venues and jurisdictions. Stay tuned.

How USI Can Help

USI’s Executive and Professional Risk Solutions (EPS) Practice proactively reviews clients’ D&O insurance policies and keeps abreast of coverage enhancements in the marketplace to address evolving exposures. The practice structures a comprehensive risk management program based upon this assessment and client’s potential needs.

For more information, please contact your local USI consultant, or visit us at www.usi.com