Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE—U.S.: Battle joined in Delaware judge selection case as would-be judge files merits brief, (Feb. 21, 2020)

By Mark S. Nelson, J.D.

Politically unaffiliated James Adams argued that he does have Article III standing to challenge the validity of judge selection provisions contained in Delaware’s constitution that purport to limit state judgeships to Democrats and Republicans.

James Adams filed his response to Delaware’s assertion that he lacked Article III standing to contest Delaware’s process for selecting state judges. The case arose after Adams, previously a Democrat, switched his political affiliation to "unaffiliated" days before filing a lawsuit challenging how Delaware selects its judges. Adams won in the lower courts and has urged the Supreme Court to affirm, but the justices added a wrinkle to the case when they granted certiorari by adding a question asking whether Adams had Article III standing. The Supreme Court recently set oral argument in the case for March 25, 2020 (Carney v. Adams, February 20, 2020).

Adams claims Article III standing. Adams argued that he did suffer an injury in fact as required by the Supreme Court’s Article III standing precedents. Specifically, Adams asserted that Delaware’s major party requirement excludes him from any state judgeship because of his "unaffiliated" political status and that Delaware’s bare majority requirement curbs his judicial job opportunities. Some of Delaware’s courts must have a bare majority of members drawn from the state’s major political parties (currently the Democratic and Republican parties); some Delaware courts have only a bare majority requirement.

Adams disputed Delaware’s claim that he should have applied for a judgeship for which he would have had a "realistic possibility" of getting the job. Adams said that he need not show he would have received a judgeship but for the state’s constitutional barrier against his becoming a judge. Adams also said Delaware’s judge selection provisions chilled his First Amendment associational rights (more of this point later).

According to Adams, Delaware’s assertions about his "dishonesty" in seeking (or not seeking) a judgeship missed the mark. For one, Adams rejected the idea that he had to engage in a futile act (i.e., apply for a Delaware judgeship). Adams also said that his transformation from a Democrat to an unaffiliated voter occurred over time and was the result of his disillusionment with more conservative Delaware Democrats after he retired from the Delaware Department of Justice following the untimely death of then-Delaware Attorney General Beau Biden, whom Adams said he liked working for.

Moreover, Adams posited that Delaware’s constitutional provisions spelling out how state judges are to be selected were the direct cause of his injury. Adams also said that a decision by the Supreme Court in his favor could redress his injury because such decision, in combination with the U.S. Constitution’s Supremacy Clause, would ensure that Delaware could not exclude from its judiciary a judicial candidate whose political affiliation was neither Democrat nor Republican.

Lastly, Adams did not cite Gill v. Whitford, a case that potentially could help a claimant who lacks Article III standing. To be sure, the substantive discussion of Article III standing in Gill mostly cuts against claimants who cannot assert an injury that is personal to them (Delaware and its many amici made this point in their merits-stage briefs). However, the majority in Gill also concluded that, from a procedural standpoint, the court can, in unusual cases, vacate and remand a case without directing the lower court to then dismiss the case. In Gill, that meant a claimant who failed to show standing to challenge a state’s redistricting gerrymander got a second chance to establish Article III standing.
Policy makers, First Amendment. In addition to arguing that Adams lacked Article III standing, Delaware and numerous amici argued that the Supreme Court’s trio of patronage cases and several federal constitutional principles ensure to the states the right to engage in experimentation as to how they order their governments and that the work of judges can be evaluated within the policy maker exception, which states that governments can hire and fire based on politics when a government job involves making policy.

A key issue to watch for at oral argument will be the extent to which the justices may suggest via their questions how they believe the court’s patronage opinions have evolved over time. It also remains to be seen at oral argument whether any of the justices might express reservations about applying the policy maker exception or some variation of this standard to judges.

With respect to state experimentation, Adams cited a case in which Justice Thomas concurred to note that state experimentation is limited by the federal constitution. Adams also disputed that state judges are inherently policy makers. Delaware had argued that its state judges, especially its Chancery Court judges, decide cases based on common law (e.g., the business judgment rule) and, thus, make policy. Adams had opened this section of his merits brief by suggesting that judges, who are not part of a state’s executive branch of government, ought to be seen as more “immune from political qualifications in their hiring” than some other government officials.

Adams also elaborated on his Frist Amendment arguments. For one, Adams said the major party and bare majority requirements do not serve the state interest in having a qualified and independent judiciary that has the public’s confidence. Adams also argued that Delaware has not establish less restrictive alternatives. For example, Adams said Delaware judges’ impartiality is already guarded by a combination of factors, including the state’s judicial code of conduct, the need for state Senate confirmation, and Delaware’s dependence on business franchise tax revenues.

Second, Adams suggested further reforms that could serve as less restrictive means than the current state constitutional limits on who can be a judge. He would have the judicial application process ask about judicial philosophy instead of party affiliation. He also suggested amending the Delaware constitution to provide for Senate confirmation by a supermajority vote instead of a majority vote of state senators. Adams also noted that the existing 12-year judicial terms and gubernatorial terms of up to eight years (two four-year terms) already afford protection against court packing.

The case is No. 19-309.