

Inside the Courts An Update From Skadden Securities Litigators

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Delaware Supreme Court Upholds Validity of Provisions Designating Federal Courts as Exclusive Forum of 1933 Act Claims

Today the Delaware Supreme Court issued a key decision upholding the validity of corporate charter provisions that designate federal courts as the exclusive forum for the litigation of 1933 Act claims. This opinion is significant in light of the U.S. Supreme Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, which held that federal and state courts have concurrent jurisdiction over class actions based on 1933 Act claims and that such claims brought in state court were not removable to federal court. In the wake of *Cyan*, many companies have been facing an onslaught of 1933 Act claims in state courts, including Section 11 claims relating to their initial public offerings, and have been forced to litigate duplicative claims in both state and federal courts.

The Delaware Supreme Court's opinion, summarized below, may provide a tool for companies to avoid duplicative litigation of securities claims in certain federal and state courts and to temper the wave of claims under the 1933 Act brought in state court.

Overview

In *Cyan*, the U.S. Supreme Court held that federal and state courts have concurrent jurisdiction over class actions based on claims brought under the 1933 Act, and that such claims are not removable to federal court. Following *Cyan*, the filing of 1933 Act cases in state courts escalated. In response, corporations began adopting forum-selection provisions in their charters that designated the federal courts as the exclusive forum for such claims. In *Sciabacucchi v. Salzberg*, C.A. No. 2017-093-JTL (Del. Ch. Dec. 19, 2018), the Delaware Court of Chancery held that such charter provisions were invalid because "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," and that federal forum selection provisions attempted to accomplish that and were therefore invalid.

Today, the Delaware Supreme Court reversed, holding in *Salzberg v. Blue Apron Holdings, Inc., et al.*, No. 346,2019 (Del. Mar. 18, 2020) that federal forum provisions (FFPs) are facially valid under Delaware law.

The court analyzed 8 *Del. C.* § 102, which governs matters contained in a corporation's charter. Section 102(b)(1) authorizes two broad types of charter provisions: "any provi-

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sion for the management of the business and for the conduct of the affairs of the corporation” and “any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders ... if such provisions are not contrary to the laws of this State.” The court held that an FFP “could easily fall within either of these broad categories, and thus, is facially valid.”

The court also remarked that such provisions “can provide a corporation with certain efficiencies in managing the procedural aspects of securities litigation following the United States Supreme Court’s decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*.” The court pointed to the escalation of 1933 Act claims being brought in state courts post-*Cyan* and remarked that “[w]hen parallel state and federal actions are filed, no procedural mechanism is available to consolidate or coordinate multiple suits in state and federal court. The costs and inefficiencies of multiple cases being litigated simultaneously in both state and federal courts are obvious. The possibility of inconsistent judgments and rulings on other matters, such as stays of discovery, also exist. By directing 1933 Act claims to federal courts when coordination and consolidation are possible, FFPs classically fit the definition of a provision ‘for the management of the business and for the conduct of the affairs of the corporation.’” The court further held that the 2015 amendments to the DGCL to add Section 115, which explicitly allowed corporations to adopt forum selection provisions designating Delaware as the exclusive forum for internal corporate claims, further supported the view that FFPs are valid under Delaware law, and did not implicitly amend Section 102(b)(1).

The court also held that FFP’s do not violate the policies of laws of Delaware, given that the DGCL “allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance and governance of their enterprise.” The court

further held that FFPs do not violate federal law or policy. The court referred to the U.S. Supreme Court’s decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, where the Court held that federal law has no objection to provisions that preclude state litigation of Securities Act claims. “The holding in *Rodriguez* provides forceful support for the notion that FFPs do not violate federal policy by narrowing the forum alternatives available under the Securities Act.”

The court also noted that “the most difficult aspect of this dispute is not with the facial validity of FFPs, but rather, with the ‘down the road’ question of whether they will be respected and enforced by our sister states.” The court held that the question of enforceability is a separate analysis that should not drive the initial facial validity inquiry but recognized it as a “powerful concern.” The court remarked that “Delaware historically has, and should continue to be, vigilant about not stepping on the toes of our sister states or the federal government. But there are persuasive arguments that could be made to our sister states that a provision in a Delaware corporation’s certificate of incorporation requiring Section 11 claims to be brought in federal court does not offend principles of horizontal sovereignty — just as it does not offend federal policy.”

The court concluded by stating that “FFPs are a relatively recent phenomenon designed to address post-*Cyan* difficulties presented by multi-forum litigation of Securities Act claims. The policies underlying the DGCL 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 to case-by-case law development. Delaware courts attempt ‘to achieve judicial economy and avoid duplicative efforts among courts in resolving disputes.’ FFPs advance these two goals.”

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