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## Skadden Discusses California Decision Upholding Uber's Federal Forum Charter Provision

By *Peter B. Morrison, Virginia Milstead and Zachary Faigen* December 4, 2020

### Comment

A California state court dismissed a putative securities fraud class action against Uber, as well as certain individuals and underwriters, on the grounds of inconvenient forum, holding that the federal forum selection provision (FFP) in Uber's charter was valid and enforceable, and thus plaintiffs were required to bring their claims in federal court.

Plaintiffs, purported shareholders of Uber, brought claims under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (Securities Act), alleging that the offering documents for Uber's May 2019 IPO contained false or misleading statements. Uber, along with the individual and underwriter defendants, moved to dismiss on the grounds that the FFP in Uber's charter, which was also contained in the offering documents, precluded the claims from being adjudicated in state court. Plaintiffs opposed, arguing that the FFP was not enforceable.

First, the court decided which state's law to apply to determine whether the FFP is valid: Delaware, because Uber is a Delaware corporation; or California, the jurisdiction of the forum. Under the "internal affairs doctrine," the law of the state of incorporation regulates a corporation's internal affairs. Here, however, the court concluded that federal securities claims brought by shareholders do not address the "internal affairs" of a company. Therefore, California law applied.

Having resolved the choice-of-law question, the court then determined whether Uber's FFP was enforceable under California law. For a contractual provision to be valid under California law, it must have a "lawful object." Plaintiffs argued that the FFP did not have a lawful object because it contravened the Securities Act's (i) anti-removal, (ii) concurrent jurisdiction and (iii) anti-waiver provisions. The court rejected all three arguments. With respect to the Securities Act's anti-removal provision, which prohibits defendants from removing certain Securities Act claims from state court to federal court, the court noted that the defendants had not attempted to remove the case, and, in any event, the anti-removal provision does not control whether parties can agree to litigate all Securities Act claims in federal court. With respect to the concurrent jurisdiction provision, which provides that both state and federal courts have jurisdiction over Securities Act claims, the court concluded that the FFP did not purport to limit a state court's jurisdiction, the provision simply required the contracting parties not to invoke another state court's jurisdiction. With respect to the anti-waiver provision, the court held that the FFP as a procedural agreement did not require plaintiffs to waive any substantive protections under the Securities Act.

Finally, the court determined that, in addition to being a valid contractual provision, the FFP is enforceable under California law. In California, a forum selection clause is unenforceable if it is (i) outside plaintiffs' reasonable expectations or (ii) unconscionable. Here, the court found that the FFP did not fall outside plaintiffs' reasonable expectations, given that it appeared in the offering documents and was also contained in Uber's charter, which was approved by a majority of shareholders. As to unconscionability, the court did find that the FFP was procedurally unconscionable, considering that shareholders had no opportunity to negotiate the provision and that it was arguably buried in the documents that contained it. However, the provision was nevertheless enforceable because it was not substantively unconscionable in that it does not eliminate any substantive protections that the Securities Act provides.

The court dismissed the complaint for all defendants, including the underwriters who were not signatories to the FFP, reasoning that the FFP by its terms applies to "any complaint asserting a cause of action arising under the Securities Act," and to hold otherwise "would be to permit a plaintiff to sidestep a valid forum selection clause." This is the second California trial court decision in the last three months upholding a federal forum selection provision under California law. See *Wong v. Restoration Robotics, Inc.*, No. 18CIV02609 (Cal. Super. Ct. Sept. 1, 2020).

*This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "Within Three Months, a Second California State Court Enforces a Federal Forum Charter Provision for Securities Act Claims," dated November 25, 2020, and available [here](#).*

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