California Court of Appeal Upholds Federal Forum Provision

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In the first published decision of a court of appeal outside Delaware, on April 28, 2022, the California Court of Appeal in *Wong v. Restoration Robotics*, Case No. A161489, affirmed the trial court's decision to enforce a charter provision requiring suits under the Securities Act of 1933 to be brought in federal court — a so-called "federal forum provision," or "FFP."

Wong arose from a drop in the price of Restoration Robotics' stock price following its initial public offering (IPO). A stockholder plaintiff thereafter brought suit in San Mateo County Superior Court under the Securities Act, alleging misstatements in Restoration Robotics' registration statement. In response, the company moved to dismiss based on *forum non conveniens*, pointing to a provision in the company's charter — which had been adopted by its board of directors, approved by stockholders before the IPO and disclosed in connection with the registration statement — that provided:

> Unless the Corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933, as amended. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to this [provision].

Restoration Robotics was incorporated in Delaware. In *Salzberg v. Sciabacucchi*, 227 A.3d 102, 111 (Del. 2020), the Delaware Supreme Court held that such provisions are facially valid under Delaware statutory law governing charters. The California trial court considering the issue in *Wong* found the FFP enforceable and granted the company's motion. The plaintiff appealed. The California Court of Appeal affirmed.

First, the court rejected the plaintiff's argument that the FFP was unenforceable under the Securities Act itself. Although the Securities Act expressly provides for concurrent state and federal jurisdiction — and forbids removal of actions asserting only Securities Act claims to federal court — the Securities Act by its plain language "does not prohibit the enforcement of a forum selection clause concerning [Securities] Act claims that is part of a company's certificate of incorporation." Just as the U.S. Supreme Court in *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477 (1989), had concluded that a provision requiring arbitration of Securities Act claims in a "standard customer agreement" was enforceable and did not amount to a "waiver" of compliance with the Securities Act, so, too, was the FFP enforceable.

Second, the court rejected the plaintiff's argument that, to the extent Delaware law permits FFPs, it "violates the Commerce Clause and the Supremacy Clause of the United States Constitution." As for the Commerce Clause, the court concluded that there was no state action. Delaware law merely permitted Restoration Robotics — a nonstate actor — to adopt the FFP. Moreover, Delaware had a legitimate interest in permitting corporations organized under its law to use FFPs, as they "allow for consolidation and coordination of [Securities Act] claims to avoid inefficiencies and unnecessary costs." Because the FFP did not prevent a stockholder from bringing a claim in court and did "not require venue in any particular federal district court," "[a]ny burden on interstate commerce here [was] slight compared to the benefits." As for the Supremacy Clause, the court rejected the argument that the Delaware statutory scheme discriminates in favor of state law and against similar federal claims: "Delaware does not purport to shut its doors, or the doors of any other state court to [Securities Act] claims."

Finally, the court rejected the plaintiff's arguments that the FFP was unenforceable under California law. Under California law, a forum selection clause is enforced unless "it [is] outside the reasonable expectations of the weaker or adhering party or [] enforcement would be unduly oppressive or unconscionable." The court concluded that the FFP was consistent with the parties' expectations, because, under the FFP, plaintiffs can bring claims in the federal court of their choosing, conduct discovery and have a trial by jury. As for the plaintiff's argument that the FFP was hidden in the exhibits of a 154-page registration statement, the court concluded that the point of the Securities Act was to provide those disclosures, so it "hesitate[d] to agree that an investor is excused from attending to the required disclosures, particularly when they concern the governing documents of a corporation."

The court also rejected the plaintiff's arguments that the FFP was procedurally and substantively unconscionable. It reasoned that the FFP was not procedurally unconscionable because, even though the parties had not negotiated the FFP, and it was "hidden in a prolix amendment to the registration statement," "the provisions of a certificate of incorporation are typically not negotiable, and prolixity is a common characteristic of registration statements." Moreover, the FFP was not substantively unconscionable because it merely resulted in the "waiver of a waivable procedural right to a state forum" and did not "restrict a plaintiff's procedural right under the statute to file suit in a local federal court."

Prior to the Court of Appeal's ruling in *Wong*, trial courts from several states outside Delaware had generally enforced FFPs, but no appellate court had opined on the issue. As the first appellate ruling, the decision in *Wong* may become influential on future courts at both the trial and appellate levels that consider the enforceability of FFPs.