CORPORATE LITIGATION:

ENFORCEMENT OF EXCLUSIVE FEDERAL FORUM PROVISIONS

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Two years after the U.S. Supreme Court ruled that state courts have concurrent jurisdiction over securities class actions brought under the Securities Act of 1933 (the 1933 Act), and that such actions are not removable to federal court, Delaware corporations are increasingly addressing the "*Cyan* problem"—the risk to companies conducting IPOs or follow-on offerings of facing parallel, multi-jurisdictional 1933 Act class action filings—by adopting in the certificate of incorporation a provision designating federal courts as the exclusive forum for resolution of claims under the 1933 Act. The ability of a corporation to exercise control over the venue for 1933 Act litigation serves to reduce the threat of duplicative and multi-forum securities litigation, and steer 1933 Act litigation into federal courts more accustomed to addressing federal securities laws. In two recent decisions, California Superior Courts issued the first rulings applying federal forum provisions to dismiss state court class actions asserting claims under the 1933 Act, rejecting challenges that such provisions are unenforceable under California law. State court enforcement of exclusive federal forum provisions for 1933 Act claims is the final step to issuers and other participants in securities offerings subject to the Act curbing duplicative state court litigation, and these California decisions provide important guidance toward that objective.

Background

The 1933 Act is primarily concerned with new offerings of securities. When Congress enacted the 1933 Act, it (1) created a private right of action for purchasers of registered securities to sue for false or misleading information contained in registration statements and (2) granted federal and state courts concurrent jurisdiction over 1933 Act claims by private plaintiffs and barred defendants from removing such suits filed in state court to federal court. After Congress enacted the Securities Litigation Uniform Standards Act (SLUSA) in 1998, federal courts split on whether SLUSA permits removal of state court class action claims under the 1933 Act, until the U.S. Supreme Court held in Cyan v. Beaver County Empl. Ret. Fund, 138 S. Ct. 1061 (2018), that SLUSA does not. After Cyan, the number of 1933 Act non-removable class actions filed in state court dramatically increased, along with a growing phenomenon of parallel, substantially identical 1933 Act claims filed in federal court which cannot be consolidated or sometimes even coordinated with the state court action. In an effort to curb both state court and inefficient multi-jurisdictional 1933 Act class action filings, and to reduce the risk of inconsistent state court rulings on federal securities law issues, some Delaware corporations adopted forum selection provisions in their certificates of incorporation requiring that stockholder plaintiffs bring 1933 Act claims exclusively in federal courts. In Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020), the Delaware Supreme Court held that a federal forum selection provision contained in the certificate of incorporation of a Delaware corporation is facially valid and enforceable under the Delaware General Corporation Law. Although Salzberg settled that

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federal forum provisions are valid as a matter of Delaware law, they are subject to "as applied" challenges if a company invokes the provision in state court to seek dismissal of 1933 Act claims. "As applied" challenges typically assert that application of a specific forum selection provision would be unreasonable under the circumstances or would contravene the public policy of the state in which the action is brought.

Recent Decisions

The Supreme Court has held that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens." *Atlantic Marine Const. Co. v. U.S. Dist. Court for Western Dist. of Texas*, 571 U.S. 49, 60 (2013). In September, a San Mateo California state court in *Wong v. Restoration Robotics*, enforced a federal forum provision by dismissing on forum non conveniens grounds 1933 Act class action claims against Restoration Robotics, a Delaware-incorporated issuer, and its named directors and officers. No. 18CIV02609 (Cal. Super. Sept. 1, 2020). The court was not enamored of the forum provision in the abstract, characterizing it as "a unilateral, specially-targeted provision, to be added to and buried in their corporate governing documents, to force all persons purchasing their corporate stock to give up their opportunity to pursue 1933 Act claims in any state court. In this fashion, they seek to circumvent the express language of the 1933 Act, circumvent the Supreme Court and circumvent Congress." Nonetheless, the court did not consider whether the Delaware Supreme Court had gone too far in *Salzberg v. Sciabacucchi* or otherwise revisit the facial validity of federal forum provisions. Instead, applying by analogy California law regarding the enforceability of contractual forum selection clauses, the court answered a more limited question: whether plaintiffs had met their burden of proving that the federal forum provision at issue—which was adopted by shareholder vote and applied only prospectively—was "unenforceable, unconscionable, unjust, or unreasonable" under California law. Finding plaintiffs had not met this burden, the court declined to exercise jurisdiction over Restoration Robotics and its directors and officers.

Important to the court's analysis was its observation that the federal forum provision had merely procedural effect, and did not disturb any substantive rights or remedies available under the 1933 Act. Nor was the provision substantively unconscionable; although it was "buried in a prolix printed form," it did not "shock the conscience" in light of its stated purpose to conserve resources that would otherwise be expended in defending against multi-forum securities lawsuits. While plaintiffs also argued that the forum provision violated the U.S. Constitution, they offered no case law suggesting that forum selection provisions contravene federal law, and the court said constitutional challenges would be more appropriately brought in federal court than considered alongside forum non conveniens challenges.

The court, however, declined to dismiss the 1933 Act claims against the underwriters of the issuer's IPO and certain venture capital investor defendants because they were non-parties to the issuer's corporate charter containing the federal forum provision, and had failed to demonstrate standing to assert rights conferred by the Restoration Robotics charter.

Last month, in *In re Uber Technologies Sec. Litig.*, another California state court dismissed 1933 Act claims, this time going further than *Restoration Robotics* by dismissing claims against both the issuer and the underwriters. No. CGC-19-579544 (Cal. Super. Ct. Nov. 16, 2020). Like *Restoration Robotics*, *Uber* emphasized that the forum provision at issue was adopted with shareholder approval; it did not impair substantive rights available under the 1933 Act nor eliminate the concurrent state and federal jurisdiction guaranteed by the Supreme Court in *Cyan*; and its intent to preserve corporate resources and avoid costly defense of securities cases in dual fora was incompatible with a finding of substantive unconscionability. While Uber's underwriters, like those in *Restoration Robotics*, were non-signatories to Uber's federal forum provision, the court held they, too, were entitled to dismissal in light of the provision's broad directive that federal courts "shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the" 1933 Act—not merely of "claims" thereunder.

Conclusion

State court enforcement of exclusive federal forum provisions for 1933 Act claims is a significant victory for corporations which have included or may incorporate such a provision into their charter—particularly those planning to go public or otherwise issue securities that may become subject to 1933 Act claims. *Restoration Robotics* and *Uber* offer guidance on the characteristics and limitations of forum provisions likely to withstand "as applied" challenge. For example, these charter provisions did not apply retroactively and permitted plaintiffs to file in any federal court, rather than attempting to limit them to some remote location. The *Uber* court's focus on the wording of the forum provision—which applied to "any complaint asserting a cause of action arising under the Securities Act" and not merely to claims under the Act—likewise counsels careful attention when drafting to the scope of the mandatory forum provision. IPO underwriters are frequent defendants in 1933 Act litigation, and *Uber* provides precedent and reasoning supporting their inclusion in the dismissal.

Finally, foreign corporations with American depositary shares listed on a U.S. stock exchange are increasingly targets for 1933 Act litigation, and should consider amending their deposit agreements to designate federal courts as the exclusive forum for 1933 Act claims. While time will tell if other state courts are equally willing to enforce federal forum provisions in a corporation's organizing documents, the reasoning of *Restoration Robotics* and *Uber* borrows from established frameworks for analyzing contractual forum selection clauses and points the way to additional enforcement.

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