



Securities Litigation ADVISORY ■

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Delaware Affirms Validity of Federal-Forum Selection Clauses for Section 11 Claims

by [Charles Cox](#) and [Jason Outlaw](#)

On March 18, 2020, the Delaware Supreme Court issued its much-anticipated decision in *Salzberg v. Sciabacucchi*, reversing the Court of Chancery and holding that a Delaware corporation may include a federal-forum provision in its charter or bylaws requiring that stockholder actions alleging violations of the Securities Act of 1933 be brought exclusively in federal court.¹ The court's decision comes nearly two years to the day after the U.S. Supreme Court held in [Cyan, Inc. v. Beaver County Employees Retirement Fund](#) that state courts have concurrent subject-matter jurisdiction to hear certain securities class actions alleging violations of the Securities Act and that such actions could not be removed to federal court. In the two years since *Cyan*, there has been a steady increase in the number of state court actions alleging claims under the Securities Act.

In reaching that decision, the Delaware Supreme Court observed 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 exists.” The court then went on to hold that “[b]y directing 1933 Act claims to federal courts when coordination and consolidation are possible, [federal-forum provisions] classically fit the definition of a provision ‘for the management of the business and for the conduct of the affairs of the corporation.’”

¹ The Securities Act creates liability for certain securities offerings, including false registration statements (Section 11), false prospectuses (Section 12(a)(2)), and control person liability for violations of Section 11 or Section 12 (Section 15). Cases involving these acts are typically related to initial public offerings.

A number of implications are expected to result from this important decision:

- We should see a decrease in the number of state-court filings in cases asserting Securities Act claims.
- We anticipate that other state courts will adopt the reasoning of the court in Salzberg, and as a result, we foresee the potential for fewer inconsistent determinations in the interpretation of federal securities laws between state courts and federal courts.
- Issuers and potential issuers may seek to add forum-selection clauses to their charters or bylaws providing for exclusive federal court jurisdiction over stockholder claims brought under the Securities Act.
- There may be an increase in the number of “as applied” challenges to federal-forum-selection clauses by shareholders wishing to have their Securities Act claims heard in state court.

Given the number of strategic and practical decision points that potentially result from this decision, we encourage issuers to contact us for advice on navigating the contours of this latest guidance from the Delaware Supreme Court.

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