



ALERTS

Delaware Supreme Court Holds Federal Forum Provisions Valid

May 29, 2020 | [Delaware](#)

Highlights

The Delaware Supreme Court upheld the validity of federal forum provisions in corporate charters

The provisions give corporations a way to avoid having to simultaneously litigate securities disputes in both state and federal court

Delaware corporations should consider adopting a federal forum provision to save company resources and prevent duplicative litigation

The Delaware Supreme Court recently upheld forum-selection provisions that require all Securities Act of 1933 claims to be litigated in federal court as facially valid.

The [Matthew B. Salzberg et al. v. Matthew Sciabacucchi](#) decision is a response to the U.S. Supreme Court's *Cyan* decision from 2018.

The U.S. Supreme Court held in *Cyan* that state courts and federal courts have concurrent jurisdiction for 1933 Act claims and that these claims are not removable to federal court. Delaware is taking a different approach.

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Salzberg only applies to corporations incorporated under Delaware law. The Delaware Supreme Court emphasized that while it does not want to be viewed as “stepping on the toes of our sister states,” it believes there are persuasive arguments that can be made as to why other state courts should follow Delaware’s interpretation.

The primary takeaway from the Salzberg decision is that Delaware corporations should consider whether it is beneficial to add a federal forum provision (FFP) to their corporate charters for 1933 Act claims. Limiting such litigation to federal court – as opposed to paying for costly trials in both federal and state court – could save company resources and prevent duplicative and potentially inconsistent decisions.

Often referred to as the “truth in securities act,” the 1933 Act requires that investors receive significant information about securities offered for public sale. It also prohibits deceit, misrepresentations, and other fraud in securities sales.

Post-*Cyan*, the perceived advantages of filing 1933 Act claims in state court (such as avoiding the Private Securities Litigation Reform Act) led to a dramatic uptick in 1933 Act class actions being filed exclusively in state court. In addition, there was a large increase in the number of cases with parallel state court and federal court proceedings.

According to the Cornerstone 2019 Year in Review Report cited by the Delaware Supreme Court, the number of state-only 1933 Act claims filed in 2019 increased by 40 percent, and approximately 45 percent of all 1933 Act claims had parallel state court and federal court proceedings. Overall, *Cyan* led to corporations facing more unpredictability and higher costs in securities litigation cases.

As a solution to the increase in parallel litigation, some corporations began adopting federal forum provisions in their corporate charters that 1933 Act claims could only be brought against the corporation in federal court.

The plaintiff in Salzberg sought a declaration that the FFPs recently adopted by three Delaware corporations – Blue Apron Holdings, Inc., Stitch Fix, Inc., and Roku, Inc. – violated Delaware law. The District Court agreed with the plaintiff. On appeal, the Delaware Supreme Court disagreed. The Court held that the FFPs were consistent with Delaware law. In addition, significant public policy considerations strongly favored upholding the FFPs.

The Delaware Supreme Court also said *Cyan* led to a multitude of inefficiencies in recent 1933 Act claims, such as an increase in costs to litigate cases simultaneously in federal and state court without a mechanism to consolidate the cases. The Court also pointed to “the possibility of inconsistent judgments and rulings on other matters, such as stays of discovery” as problematic. The FFPs offer a solution to help mitigate the procedural inefficiencies brought about by *Cyan*.

But some critics of the decision believe that it may lead to the upholding of other forum-related provisions in Delaware corporation corporate charters, such as mandatory arbitration provisions for all securities litigation claims. The Court addressed this issue in a footnote, stating that a provision mandating the arbitration of all internal corporate claims “would violate Section 115 [of the Delaware General Corporation Law] which provides that, ‘no provision of the certificate of incorporation or the

bylaws may prohibit bringing such claims in the courts of this state.”

Still, it remains to be seen what broader effects the decision may have on forum provisions in securities litigation.

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