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Title: **The "Darwinism" of Private Ordering: effectiveness and efficiency.**

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Table of contents

Introduction

“With the evolving role of bylaws, these are very interesting times in Delaware corporate jurisprudence and in corporate governance.” [1]

Corporate law is experiencing a sudden increase of regulation by private ordering. With topping up recurrence and creativity, the charter and bylaws of public corporations are used as tools for critical aspects of corporate governance restructuring. The current attention of parties, courts, and scholars has focused on the facial validity of these efforts. In the light of the courts' willingness to support the negotiation of corporate governance, the legal battles will turn from challenges of validity to disputes of interpretation. Yet, principles of interpretation are a subject to which business scholars have devoted limited attention. With performance ready to play an influential role in shaping law and company rules, establishing a cohesive interpretative framework is crucial.

Public corporations are in the middle of an explosion of governance by private legal systems. With increasing frequency and creativity, the memorandum and articles of association of public companies are used as tools to restructure key feature of corporate governance. Forum selection, fee-shifting, arbitration, proxy access, are recent examples of the proceeding role and use of organizational documents as a platform for ex-ante corporate governance. Recently, the Delaware courts have indicated a permissive attitude towards the corporate governance contract, citing the metaphor of the corporate contract. These decisions have fueled the private ordering movement and corporate governance initiatives, dwelling on ex-ante tactics and innovations through amendments to the charter and bylaws.

A growing body of studies focuses on the private order of public, corporate governance, ranging from narrow discussions on the legality of individual provisions to broader discussions on the regulatory value of ex-corporate bargaining. In addition, the legal basis of the contract metaphor in company law and shareholder empowerment.[2]

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[1] *See* duPont Ridgely, Henry, *The Emerging Role of Bylaws in Corporate Governance*, 68 SMU L. REV. 317, (2015).

[2] Shaner, Megan, *Interpreting Organizational 'Contracts' and the Private Ordering of Public Company Governance, in* WILLIAM & MARY LAW REVIEW, Vol. 60:985, 2019.

The rate of shareholder lawsuits claiming breaches of fiduciary duty by managers or directors in several courts has increased dramatically in recent years. One area where this trend is evident is that of mergers. In addition, of the business pursued in 2012, more than 70% went into multiple lawsuits, and over 50% involved lawsuits presented in various forums. For example, target shareholders usually file numerous lawsuits in the company's domicile court, arguing that the board of directors violated its fiduciary duty by selling the company for an inadequate price. Many companies have responded to the growing threat of multi-jurisdictional complaints, especially in the merger scene, embracing exclusive forum provisions in corporate statutes. These provisions require that shareholder disputes must be filed in the company's domicile court. The requirements reduce the cases and disputes brought outside the court of domicile. For example, on the same day that Tesla made an offer to purchase SolarCity in June 2016, the company amended its bylaws requiring all future shareholder lawsuits to be filed in Delaware. The timing of the adoption was convenient, given the likelihood of shareholder lawsuits claiming a breach of fiduciary duty for what appeared to some as a rescue of one of Elon Musk's companies by another.

It is unclear whether the elimination of multi-jurisdictional shareholder cases is beneficial to shareholders or not. On the one hand, some shareholders argue that the provisions limit their legal rights to choose the venue of the litigation. These opponents say that the selection by the board of directors of a state such as Delaware as a mandatory forum covers managers and administrators from the threat and discipline of disputes. Therefore, the *managerial opportunism hypothesis*[3] suggests that a needed forum for shareholder litigation weakens incentives for managers and directors to act in shareholders' best interests and has negative implications for firm value.

On the other hand, firms state that provisions benefit shareholders by halting meritless suits and specifying the right venue for litigation. Firms decrease legal costs by focusing on one lawsuit in one court instead of essentially identical cases in multiple courts every time a major corporate event occurs. A required forum also removes the risk that non-domicile courts misinterpret the incorporation of state corporate law and may discourage frivolous lawsuits. The *shareholder*

[3] *See* Boubakri Narjess et al. *Managerial Opportunism in Accounting Choice: Evidence from Directors' and Officers' Liability Insurance Purchases,* SSRN (March 2008). Available at https://ssrn.com/abstract=1109254 or http://dx.doi.org/10.2139/ssrn.1109254 . (For instance, Managerial opportunism involves the use of internal company information for the personal benefit of one or more managers. For public companies, managers exercise this opportunism when they choose to sell shares they received as part of their compensation when they perceive the market's value of the company as higher than their estimate of its value).

interest hypothesis[4] suggests a needed venue for litigation has a positive impact on firm value and does not inhibit shareholders' ability to discipline managers and directors.

The study begins by exploring the determinants of exclusive forum provision adoption. The results suggest that firms likely to face shareholder lawsuits are more likely to adopt FFPs. These findings are consistent with an attempt to remove multi-forum and duplicative lawsuits by firms most likely to encounter shareholder litigation. Next, it examines the market reactions to firm announcements of exclusive forum provision adoptions. Firms likely to face shareholder litigation earn mostly positive returns around adoption. For example, companies with above-median class action takeover probability undergo a two-day cumulative abnormal return of 0.40%, which represents a $15 million increase in firm value for the median firm with high litigation risk. These results indicate that limiting shareholder lawsuits to domicile courts benefits firms likely to face litigation and suggest that the costs of multi-jurisdictional cases outweigh any disciplinary benefits.[5]

In recent years, litigations under the Securities Act 1933[6] had experienced a worthy of attention increase, coming to a peak in 2015, when over 90% of lawsuits whose were challenged in State Court were frivolous and vexatious since nearly all claims were field by plaintiffs' attorneys to pluck out some fees with little effort. Some abusive procedures sprang up, signaling a frightening utilization of the order.

One strategy that plaintiffs' attorneys put in place was the disclosure-only settlement. The stockholders derived some supplemental disclosures. The plaintiff's attorneys got notable fee awards from the defendant directors, and the defendant directors secured some blanket class releases from future claims. The plan relied upon the courts' routine practice of approving any settlement, even when there is no benefit for the firm or its shareholder. A modification became necessary. At the birth of 2016, the Delaware Court of Chancery with In re Trulia[7] marked a doctrinal relocation in the standard of judicial review for disclosure-only settlements by calling for that additional disclosures convey a "plainly material benefit" to stockholders and that any releases

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[4] *See* Nyberg Anthony et al. *Agency Theory Revisited: CEO Returns and Shareholder Interest Alignment*, in 53 ACADEMY OF MANAGEMENT J. 1029-1049 (October 2, 2009). Available at https://ssrn.com/abstract=1481927.

[5] *See Aggarwal* Dhruv, *Federal Forum Provisions and the Internal Affairs Doctrine,* in 10,2 HARV. BUS. L. REV. 383-434 (2020).

[6] *See* 15 U.S.C. §§ 77a-77mm (1934). (Securities Act of 1933).

[7] *In re Trulia, Inc. Stockholder Litig.* - 129 A.3d 884 (Del. Ch. 2016).

from liability be "narrowly circumscribed." While federal courts have soon walked behind Trulia with In Re Walgreen[8], others have been consuming and seldom unwilling to do so. [9]

Even if Trulia triumphs in restricting disclosure-only settlements, another tactic has arisen to replace it: the mootness dismissal[10] – a voluntary dismissal coupled with the payment of mootness fees to plaintiffs' attorneys by the defendant. Data on litigations show that, after a decline post-Trulia, the number of litigated deals rose again in 2017.[11] A few of these lawsuits were settled, and most cases were freely dismissed, and plaintiffs' attorneys received a mootness fee. Plaintiffs' attorneys spread an adaptive response to the Trulia standard and devised the new scheme to replace the old stratagem. Mootness fees are also, on average, much cheaper than the attorneys' fees accorded in a model disclosure-only settlement. But, furthermore, the scheme is not less harmful to corporations and stockholders.[12]

On the face of it, it would dissuade plaintiffs' attorneys from starting a lawsuit to extract mootness fees. But plaintiffs' attorneys could continue in mootness fee practice, exploiting the lack of transparency. Courts could apply Akorn[13] only if they become aware of the mootness fee. Plaintiffs' attorneys could also return to the scheme of disclosure-only settlements and file claims in those jurisdictions with a more unbiased standard for these agreements.[14] Trulia, Walgreen, Akorn, Cyan[15], and Sciabacucchi[16], as well as other decisions, prove that the courts are reacting and correcting litigation abuse. Despite that, these decisions need to be confirmed, implemented, and complemented, the affirmation may not be enough to halt over-litigation. A failure by Trulia, Akorn,

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[8] *BCBSM, Inc. v. Walgreen Co.*, 20 C 1853 (N.D. Ill. Jan. 8, 2021).

[9] *See* Matera, Pierluigi & Sbarbaro, Ferruccio M., *From Trulia to Akron: A Ride on the Roller Coaster of M&A Litigation,* in 44 DEL. J. CORP. L. 61 (2020).

[10] *See* Weiss, Emma, *In Re Trulia: Revisited and Revitalized*, in 52 U. RICH. L. REV. 529 (2018).

[11] Honigsberg, Colleen & Rajgopal, Shivaram & Srinivasan, Suraj, *The Changing Landscape of Auditor Litigation* Stanford Law and Economics Olin Working Paper No. 512 (September 27, 2017), COLUMBIA BUS. J. W. P. 17-110, Available at https://ssrn.com/abstract=3074923 or http://dx.doi.org/10.2139/ssrn.3074923.

[12] *See* Jane Willis & F. Turner Buford, *Pleading Standards in the Federal and State Trial Courts: The Evolving Impact of U.S. Supreme Court Precedent*, LITIG. COMMENT. & REV. (Aug. 2009), available at https://litigationcommentary.org/2009/2009-august/109-pleading-standards-in-the-federal-and-state-trial-courts-the-evolving-impact-of-us-supreme-court-precedent. The analysis in this article covers securities class actions filed in federal and state court against publicly traded companies between January 1, 2011, and December 31, 2019, that allege misstatements or omissions related to public offerings of securities in violation of either section 11 or 12 of the Securities Act of 1933.

[13] *House v. Akorn, Inc. et al*, No. 1:2017cv05018 - Document 81 (N.D. Ill. 2019)

[14] *Id at* 6, 7.

[15] *Cyan, Inc. v. Beaver County Employees Retirement Fund*, No. 15-1439, 583 U.S. (2018).

[16] *Salzberg v. Sciabacucchi*, No. 346, 2019 (Del. Mar 18, 2020).

and Cyan to adequately address the issues could call into question the regulation-by-litigation model adopted by US corporate law.[17]

With its high costs and non-existent benefits for corporations and shareholders, the over-litigation manifests the crisis of a litigation system that has committed into a non-adversarial process. I reason that such devolution results from stalled and fruitless administration by legislatures and courts of some conflicts of interest and incentives to collude in the process.[18]

I. Context and standards of litigations under Securities Act 1933

In recent years, United States' legal system has produced significant increases in private litigation, mostly against businesses. One report found that between 1998 and 2009, federal class action filings increased by 340 percent, and state class actions increased more than 1000 percent.[19] This increasing caseload absorbs significant company time and resources but provides little economic benefit to plaintiffs and harms the employees and shareholders of the defendants.

In response to runaway litigation described as being "beyond the realm of reason,"[20] Delaware's legal community came to a middle ground with its corporate citizens. The legislature led the way in prohibiting corporations from passing legislation on fee-shifting.[21] In addition, it encouraged closer examination of inter-corporate litigation by judicial officers and the adoption of forum shopping bylaws to reduce socially wasteful litigation. Decisions like Trulia followed these changes, which promised to slay the dragon of excessive corporate litigation, particularly disclosure-only

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[17] *See* Romano, Roberta & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31, 66–71 (2017). (This is consistent with a study that shows that companies that adopted exclusive forum clauses in their bylaws had better corporate governance features than nonadopters).

[18] *See* Chandler, William B. & Rickey, Anthony A., *The Trouble with Trulia: Re-evaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims*, in 52 U. RICH. L. REV. 529 (2018).

[19] *Id at 6, 7.*

[20] *See* MATERA*, From Trulia to Akron, supra note 7.*

[21] *See* Cain, Matthew D.,et al. *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603 (2018) .

settlements. Other decisions follow like *Cyan*, *C&J Energy Services*[22], *Corwin*[23], all the way to *Akorn.*

As the Commission contemplates whether to advocate legislation to increase the incentives for private litigation of competition law claims, a key issue will be how such prospective changes could affect the US's economy, specifically the impact on consumers, businesses, and employees. The experience of US businesses demonstrates how broad procedural and substantive rules providing incentives to litigation produce economic harm not only for individual companies but also for their employees and the greater society. The cost of litigating is exorbitant in the US for all types of civil cases, including antitrust. For example, US tort litigation costs have increased nearly three times faster than its GDP since 1950 – to a 2003 total of $246 billion (€196.8 billion) or $845 (€676) per US citizen per year. [24]

There are two ways to measure the economic harm caused by the flood of often meritless litigation. First, there are the direct costs that defendants must bear to defend themselves, even against groundless suits. For business, these costs include spiraling legal fees and expenses for discovery and document production costs, pre-trial proceedings, trials, time that executives must spend preparing for and being deposed and testifying at trial, and increased budgets to fund in-house law departments. Under America's legal system rules, these costs are rarely recovered, even when a claim is so lacking in merit that a judge dismisses it. These costs also factor into an additional litigation cost: a company's decision to pay a settlement simply as the price of avoiding the costs (financial, to a company's reputation, and in terms of executive distraction) of a trial.

The second area of economic harm goes well on the far side of defendants' immediate litigation costs, including the more considerable losses to society. As litigation costs take a growing share of company budgets, the result is fewer resources available for research, capital investment, market development, and other areas that boost productivity and generate new jobs. As the evidence shows, America's litigation burdens directly impact its business' ability to produce new goods and services and overall employment.

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[22] *C&J Energy Servs. v. City of Miami Gen. Employees' & Sanitation Employees*', Ret. Tr. - 107 A.3d 1049 (Del. 2014).

[23]*Corwin v. KKR Fin. Holdings LLC* - 125 A.3d 304 (Del. 2015).

[24] *See* Eisenbrey, Ross, *The Frivolous Case For Tort Law Change: Opponents of the Legal System Exaggerate its Costs, Ignore its Benefits, in* ECON. POL. INSTITUTE REV. (2018). Available at https://www.epi.org/publication/bp157/ .

A key question at the crossing of state and federal law is whether corporations can use their charters or bylaws to regulate securities litigation to Federal Courts. In December 2018, the Delaware Chancery Court replied to this question negatively in the leading light decision Sciabacucchi v. Salzberg. The Court nullified "federal forum provisions" ("FFPs") that let companies choose federal district courts as the exclusive venue for claims brought under the Securities Act of 1933. The judgment held that the internal affairs doctrine, which is the bedrock of US corporate law, does not allow charter and bylaw provisions that regulate rights under federal law. [25]

In March 2020, the Delaware Supreme Court overturned the Chancery's decision in Salzberg v. Sciabacucchi, clutching that in addition to "internal" affairs, charters and bylaws can manage "intra-corporate" affairs, counting choosing the forum for Securities Act claims. This article hands over the empirical analysis of the federal forum provisions. Using a hand-collected data set, Istudy the patterns of adopting such requirements and adopting firms' characteristics. I unveil that adoption rates are higher for firms with attributes, such as belonging to a particular industry, making them more exposed to claims under the 1933 Act. I also parade that adoption rates significantly increased after the Supreme Court decision in Cyan Inc., which validated concurrent jurisdiction for federal and state courts for 1933 Act claims. I also find that the firms that adopt FFPs at the initial public offering ("IPO") stage veer to share characteristics that have been linked with good corporate governance. To estimate the impact of the Sciabacucchi decision, I also manage an event study. I find that the decision is connected with a significantly negative stock price effect for companies with FFPs in their charters or bylaws.[26] The product is robust even for firms with better governance features that underpriced their stock at the IPOs. Those whose stock price traded at or above the IPO price before the Sciabacucchi decision. In light of the empirical discoveries suggesting that federal forum provisions may work for shareholders' interests by reducing excessive 1933 Act litigation, I consider alternative legal theories for upholding federal forum provisions in corporate charters and bylaws. I recommend two possible procedures: (1) allowing corporate charters and bylaws to label matters that are technically external but deal with the "affairs" of the corporation; and (2) adopting a more "flexible" internal affairs doctrine that could view the 1933 Act claims as being "internal" to a corporation's affairs.

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[25] *See* Sylvia, John F., et al. *Supreme Court of Delaware Overturns Court of Chancery, Allowing Corporations To Enact Federal Forum Provisions to Keep Securities Act Claims in Federal Court*, in NA. LAW REV. (2020). Available at https://www.natlawreview.com/article/supreme-court-delaware-overturns-court-chancery-allowing-corporations-to-enact.

[26] *See* Bebchuk, Lucian A., et al. *What Matters in Corporate Governance?, in* 22 REV. OF FIN. STUD 783-827 (February 2009). Available at SSRN: https://ssrn.com/abstract=593423 or http://dx.doi.org/10.2139/ssrn.593423.

Hence, we are proceeding in a direction that seems to be clear and well defined, or at least it will be till the next coming back.

One of the most vexing and arguable issues in corporate and securities law in recent years has been the debate, "Should a company be allowed to utter the forum in which its shareholders can bring suit?".[27] Upholder argues that a sizable portion of shareholder lawsuits against corporations or their directors and officers lack merit or are even frivolous. The lawyers representing shareholders, especially in class actions, often engage in forum shopping to maximize their chances of success.
Admit the corporation to dictate the forum, possibly even using a mandatory arbitration provision, would help control the abusive shareholder lawsuits and bring sanity back to the system.[28]
On the other hand, Rivals argue that stripping shareholders of the right to bring suit—especially class action suits—in the forum, they opt for can substantially reduce, or even deny, a fundamental right is given to shareholders and can worsen the agency problem managers - shareholders.

A. Strike lawsuits

Before Cyan, allowing the removal of Securities Act requests was the minority position in federal district courts. After Cyan, it has been reported that Securities Act filings in state courts have increased by 40% between 2018 and 2019, and similar actions in the Federal Court have accompanied 45% of those filings. One of the reasons why plaintiffs generally prefer to challenge Securities Act requests in state courts is that such measures are not burdened by federal rules of civil procedure or, probably, by all the strict requirements of the Private Securities Litigation Reform Act 1995 ("PSLRA").[29]

In stating that companies may enact provisions of the Federal Court that oblige claims under the Securities Act to be prosecuted in the Federal Court, the Delaware Supreme Court has acknowledged that such conditions "may provide a company with certain efficiencies in the management of procedural aspects of securities disputes following a. . Cyan". We expect the plaintiff to present a petition for Certiorari to the United States Supreme Court. In a unanimous

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[27] *See* Parsons, Donald F., et al. *Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedure, in* Washington and Lee Law Review, Vol. 70, No. 1, 2013, Available at SSRN: https://ssrn.com/abstract=2226635.

[28] *Id at* 6, 7

[29] *See* 15 U.S. Code § 78u–4 - Private securities litigation.

ruling penned by Justice Karen Valihura[30], the Court held that the challenged Federal Forum Provisions were facially valid under the Delaware General Corporation Law ("DGCL") and survived a facial challenge as a matter of policy. To successfully prosecute a facial challenge, the plaintiff had to establish that:

- The provisions of the Federal Court "cannot operate legally or fairly under any circumstances" (emphasis in the original).
- The provisions "do not address appropriate matters as defined by the Statute."
- The provisions "can never operate coherently with the law."
- The Court rejected the plaintiff's arguments on all three grounds.

The Court first ruled that the provisions of the Federal Court fall perfectly within the broad statute governing the certificate of incorporation of a Delaware company, Section 102(b)(1)[31]. Under Section 102(b) (1), Delaware companies may adopt provisions providing for: (1) the management of the business and conduct of the business of the company; or (2) provisions creating, defining, limiting, and regulating the powers of the company, of directors and shareholders, provided that such provisions are not contrary to State law. According to the Court, the contested provisions of the Federal Court "could easily fall" into both categories and were therefore facial valid.

1. Cyan Inc. decision

In 2018, the United States Supreme Court held that state courts shared concurrent jurisdiction to hear class actions asserting solely Securities Act claims – which create liability for false and misleading statements in offering materials – and that such claims were not removable to the Federal Court.

In *Cyan Inc*, the Supreme Court of the United States held that “the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")[32] preserved state courts' jurisdiction to adjudicate cases brought under the Securities Act of 1933, with defendants having no right to remove a case to federal court”. This decision has led to increased section 11[33] cases prosecuted in state court, often concurrently

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[30] *See* SYLVIA, *Supreme Court of Delaware, supra note 23.*

[31] *See* Section 102 (b) (1), certificate of incorporation of a Delaware company, Section 102(b)(1)

[32] *See* 15 U.S. Code § 78bb - Effect on existing law. (The Securities Litigation Uniform Standards Act of 1998).

[33] *See* 15 U.S. Code § 77k - Civil liabilities on account of false registration statement.

with a lawsuit brought in Federal Court against the same defendants based on the same alleged misstatement. To cure this mischief, the Delaware Supreme Court *Salzberg v. Sciabacucchi* upheld the facial validity of charter provisions that require section 11 cases be brought in Federal Court. The outcome of this suit is a significant relief to Delaware corporations that have recently issued securities or those planning to do so if they have federal-forum charter provisions in place. The impact of *Sciabacucchi* and the extent to which section 11 cases continue being prosecuted in state court is dependent on some factors, including the area to which states treat federal-form provisions as valid.[34]

Section 11 filings in state court have skyrocketed, and there is evidence to suggest that part of what is fueling these state filings are weaker cases than those filed in Federal Court. Equally troubling is that close to half of post-*Cyan* litigation is now proceeding on parallel state and federal tracks. As a policy matter, this dual-track litigation cannot be justified. Plaintiffs' lawyers file cases in state court because the playing field there is attractive relative to that of the federal Court. A more lenient presentation standard coupled with early discovery may allow them to force a defendant to resolve even a weak case. Also, once a plaintiff's attorney files a lawsuit in a state court, there is nothing to prevent another attorney from filing a parallel complaint in a federal court. The cost of bringing two cases at the same time further increases the pressure on the defendants to settle. *Trulia*, *Walgreen*, *Akon,* and a series of other decisions issued in recent years constitute the response of the regulation-by-litigation system to over-litigation in the M&A context – resulting in the challenge to virtually every significant transaction. Such excessive litigation generated costs for the corporation and only benefited the attorneys representing the parties. By these means, merger litigation has become the mere extraction of fees and served no practical function of policing the deals and protecting shareholders' rights. This result was the failure of the adversarial system due to the cooperation between plaintiffs' attorneys and defendant directors. Although these have attempted to cure the racketeering mischief, the decision like *Cyan* has threatened to reverse the gains made towards ending the vice. Perhaps the US supreme court should pronounce itself on the matter and settle the case for good. Supreme Court of Delaware overturns the Court of Chancery, Allowing Corporations to enact Federal Forum Provisions to keep Securities Act Claims in Federal Court. In Cyan, Inc. v. Beaver County Employees Retirement Fund, decided roughly two years ago,

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[34] *See* Klausner, Michael, et al. *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)*, 75 THE BUSINESS LAWYER 1769 (2020). Available at https://law.stanford.edu/publications/state-section-11-litigation-in-the-post-cyan-environment/.

the US Supreme Court held that plaintiffs might bring class actions in Securities Act provides a cause of action for misstatements and omissions in state court under the Securities Act of 1933 ("Securities Act").

Prior to Cyan, some state courts heard. Section 11 cases and others did not, depending on federal district courts interpreting the Securities Litigation Uniform Standards Act ("SLUSA") as if asking them to refer the cases of section 11 to the state court in response to the removal of a defendant. In Cyan, the Court stated that SLUSA did not withdraw jurisdiction over Section 11 cases from state courts and that federal courts must refer those cases to state court. As a result, plaintiffs can now challenge Section 11 class actions in a state court, federal Court, or at the same time for the same underlying violations. The Cyan decision made Section 11 litigation considerably more complicated and presumably more expensive for the defendants; it raised courts concerning judicial efficiency. It has increased the opportunities for plaintiffs' attorneys to profit from submitting cases of dubious merit. [35]

The Delaware Supreme Court has upheld the facial validity of the provisions of the statute that require. Complaints in Section 11 must be submitted to the Federal Court ("federal-forum provisions" or "FFP"). The Sciabacucchi case will mitigate Cyan's impact. As long as other state courts accept the validity of FFPs, they will reject Section 11 cases brought against Delaware companies with FFP in their statutes, and Section 11 disputes against these companies will be limited to the Federal Court. [36]

Companies trading on the stock exchange, those planning mergers to issue shares, and those planning to issue securities in any other context should certainly adopt an FFP. There are no disadvantages, and the provision can well protect the enterprise from inefficiencies and potential abuse.

Although the substance of section 11 is the same regardless of whether a case is prosecuted in a state or federal court, more favourable procedural rules for plaintiffs in state courts can have a significant impact on litigation costs for defendants, on the value of a case for plaintiffs and their lawyers, on judicial efficiency and the opportunity for plaintiffs and their lawyers to take advantage

[35] *Id at 7*

[36] *See* Honigsberg, Colleen, et al. *The Changing Landscape of Auditor Litigation, in* STANDFORD LAW & ECONOMICS OLIN W. P. 512, Available at SSRN: https://ssrn.com/abstract=3074923 or http://dx.doi.org/10.2139/ssrn.3074923.

of submitting weak claims. Those procedural rules are the filing standards of motion filing, the timing of the discovery of decisions on motion filing, and the coordination (or otherwise) of parallel state and federal cases.

As applied to Section 11 cases, state court presentation standards will be an essential factor in determining the impact of Section 11 cases in state courts across the nation. Federal courts follow the Twombly–Iqbal[37] pleading standard, under which a plaintiff can withstand a motion to dismiss only by alleging "enough facts to state a claim to relief that is plausible on its face" in light of "judicial experience and common sense." Facial plausibility is satisfied when a complaint permits a "court to sketch the reasonable deduction that the defendant is liable for the misconduct alleged." Conclusory statements are insufficient to demonstrate facial plausibility to cases raising section 11 claims has granted motions to dismiss in 38 percent of rulings since 2011.[38]

Federal courts applying this pleading standard; in contrast, many states generally follow a more lenient pleading standard than the Twombly–Iqbal plausibility standard.

In California—where section 11 cases had been prosecuted for several years before Cyan—a plaintiff must merely plead a "statement of the facts constituting the cause of action, in ordinary and concise language."[39] In New York, where 40 percent of section 11 cases have been filed since Cyan, the pleading standard is more stringent than the California standard but still more lenient than the federal standard. [40]

2. First Sciabacucchi decision

The Delaware Supreme Court clasped on March 18 in Salzberg, et al. v. Sciabacucchi that the exclusive federal forum provisions in certificates of incorporation for three Delaware corporations

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[37] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), For instance federal notice pleading standard, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

[38] *Id at 34.*

[39] CAL. CIV. PROC. CODE § 425.10 (Deering 2019).

[40] *See* N.Y. C.P.L.R. 3013 (Consol. 2019). (Requiring a pleading to be "sufficiently particular to give notice of the transactions or occurrences and the material elements of each cause of action.)

were not facially invalid.[41] The conclusion will lay out many Delaware corporations sued in state court for violations of the Securities Act of 1933 with grounds for ousting, likely counteracting the jurisdictional consequence of the US Supreme Court's decision in Cyan, Inc.

In 2018, the US Supreme Court clutch in Cyan that both state and federal courts have concurrent jurisdiction regarding lawsuits carried under the Securities Act of 1933 (1933 Act). In particular, the Supreme Court assumes that the measures to the 1933 Act in the Securities Litigation Uniform Standards Act of 1998 did not bolt state court jurisdiction over class actions alleging only 1933 Act violations. It authorizes the shifting of such claims from state to Federal Court.[42]

The Cyan conclusion prompted a significant shift in the securities litigation landscape, as plaintiffs increasingly filed 1933 Act claims in state court to evade the procedural protections of the Private Securities Litigation Reform Act in 1995 (PSLRA). As Salzberg realized, in 2018, there were 55% more state-only 1933 Act filings than there were federal-only 1933 Act filings. And in 2019, "the number of state 1933 Act filings in 2019 rose by 40% from 2018," and "about 45 percent of all state 1933 Act filings in 2019 had a parallel action in federal court."[43] From Cyan, there have been at least 43 parallel class actions filed in multiple jurisdictions. Corporations replied to Cyan in part by adding federal-forum provisions in their certificates of incorporation. The FFPs indicate that the federal courts are the only forum for any lawsuits carried under the 1933 Act.[44]

At the end of 2017, a shareholder of three Delaware corporations with FFPs—Blue Apron Holdings, Inc., Stitch Fix, Inc., and Roku, Inc.—sought a declaratory verdict those corporations' FFPs are invalid under Delaware law.[45] The Delaware Court of Chancery supported that the "constitutive documents of a Delaware corporation could not tie a plaintiff to a specific forum when the lawsuit does not include rights and relationships that were accepted by or under Delaware's

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[41] *See Hughes,* Laura, et al. *Delaware Supreme Court ruling allows exclusive federal forum provisions for '33 act claims*, in MORGAN LEWIS (March 2020). Available at https://www.morganlewis.com/pubs/2020/03/delaware-supremecourtrulingallowsexclusivefederalforumprovisionsfor33actclaims.

[42] *See* Kim, Nicole M., *Notes and Comments, Malone v. Brincat: The Fiduciary Disclosure Duty of Corporate Directors under Delaware Law*, in 74 Wash. L. Rev. 1151 (1999). Available at: https://digitalcommons.law.uw.edu/wlr/vol74/iss4/5.

[43] *See* Aganin, Alexander, *Securities Class Action Filings 2019 Year in Review, in* HARV. L. SCHOOL FORUM ON CORP. GOV. (February 2020). Available at https://corpgov.law.harvard.edu/2020/02/14/securities-class-action-filings-2019-year-in-review/

[44] *Id at* 39.

[45] *See* Delaware General Corporation Law (DGCL), 8 Del. C. 1953, § 398; 56.

corporate law." Because "the FFPs strive to fulfill that feat," the Court spot that the FFPs were "ineffective and invalid." Defendants appealed.

On appeal, the Delaware Supreme Court upended the Chancery Court's decision, holding that FFPs are allowed under Delaware corporate law. The Delaware Supreme Court began its analysis with the plain text of Section 102(b)(1) of the Delaware General Corporation Law (DGCL). Section 102 governs the matters included in a corporation's certificate of incorporation and allows two types of provisions in the certificate: 1) "any provision for the running of the business and for the action of the affairs of the corporation," or 2) "any provision creating, defining, limiting and controlling the powers of the corporation, the Board, and the stockholders, or any class of the stockholders, if such provisions are not opposing to the laws of this State." Because these categories are pretty broad, the Court held that an FFP "could easily fall within either" of the categories, "and thus, is facially valid."[46] Specifically, because an FFP directs 1933 Act claims to federal Court, the provisions "classically fit" within the meaning of a provision "for the administration of the business and for the behavior of the affairs of the corporation" under the first prong of Section 102. Since an FFP dictates where current and former shareholders can bring 1933 Act claims against the corporation, an FFP also "defines, limits and regulates the powers of the corporation, the directors and the stockholders." FFPs, fall within the second prong of Section 102.[47]

The Court proffers some of its earlier decisions to find that FFPs "do not break the policies or laws" of Delaware. In Sterling v. Mayflower Hotel Corp.[48], the Court bore that "the stockholders of a Delaware corporation may by agreement embody in the certificate of incorporation a provision departing from the rules of the common law, on condition that it does not misbehave a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself." And the Court's decision in Williams v. Geier[49] "supports the view that FFPs in stockholder-approved charter amendments should be respected as a matter of policy."

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[46] *See* Skadden, Arps, et al. *Delaware Supreme Court Upholds Validity of Provisions Designating Federal Courts as Exclusive Forum of 1933 Act Claims,* available at *https://www.skadden.com/insights/publications/2020/03/delaware-supreme-court-upholds-validity. See also* Sameer Advani & Alexander Cheney, *'Sciabacucchi': Federal Forum Selection Clauses a Year Later, in* Delaware Business Court Insider, available at *https://www.law.com/delbizcourt/2021/05/26/sciabacucchi-federal-forum-selection-clauses-a-year-later/?slreturn=20210503133120*

[47] *Id at* 39, 15.

[48] *Sterling v. Mayflower Hotel Corp*., Del.Supr., 33 Del. Ch. 293, 93 A.2d 107 (Del. 1952).

[49] *Williams v. Geier*, 671 A.2d 1368 (1996) U.S. 241.

The Court emphasized the need to resolve "the post-Cyan difficulties presented by multi-forum litigation of Securities Act claims." Underlying the inefficiencies and burdens coming from Cyan, the Court discerned: "When aligned state and federal actions are filed, no procedural mechanism is accessible to consolidate or coordinate multiple suits in state and federal court. The costs and failures of multiple cases being litigated simultaneously in both state and federal courts are obvious."[50]

FFPs also do not break federal law or policy. The US Supreme Court has upheld many types of forum selection clauses, has held that "federal law has no demur to provisions that preclude state litigation of Securities Act claims," and has found that Delaware courts can resolve claims subject to exclusive federal jurisdiction without violating federal law or policy. Further, nothing in Cyan prohibits FFPs.

Addressing what the Court said was "perhaps the most challenging feature of this debate"—the "down the road" issue of whether FFPs will be recognized and enforced by other states.—

The Court concluded that because FFPs are procedural mechanisms rather than substantive measures, they, therefore, "do not violate principles of horizontal sovereignty."[51]

Lastly, the Court concluded that FFPs are consistent with a central purpose of the DGCL to supply "immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise." Since the DGCL was "planned to dispense directors and stockholders with versatility and broad care for private ordering and adaptation to a new challenge," a board's choice to employ a new use of "plain statutory authority" does not create such an action invalid under Delaware law.

B. Facial validity of charter provisions

The Court also ruled that the provisions of the Federal Court did not fail to comply with the substantive law of Delaware. As stated by the Court, amendments to the Articles of Association approved by shareholders such as the Federal Forum Provisions "enjoy great respect under

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[50] *See Flynn,* Michael S., et al. *The Supreme Court's Cyan Decision and What Happens Next, in* Harvard Law School Forum on Corporate Governance (May 2018). Available at https://corpgov.law.harvard.edu/2018/05/03/the-supreme-courts-cyan-decision-and-what-happens-next/.

[51] *Id at* 39, 15.

Delaware law." The Court noted that the Delaware Act allows "immense freedom" for companies to acquire their organizational and governance provisions. The Court drew attention that the 2015 amendments to the DGCL did not change the broad function of section 102(b)(1). Applying these concepts, the Court concluded that the provisions of the Federal Court are not contrary to Delaware'sDelaware's substantive law or public order.[52]

Significantly, the Court rejected the Chancery Court, noting that Section 102(b)(1) drew a "binary world" between purely "internal" and "external" claims, with only the former being subject to legal regulation of corporate statutes. The Court specifically noted that the claims of the Securities Act are "internal" to a company in so far as they result from "internal business conduct" on behalf of the board. Therefore, federal provisions of the forum that seek to regulate the forum for Securities Act complaints are not "external," fall within the scope of Section 102(b)(1), and therefore may be governed by statutes and amendments. The Court concluded that, unlike the "binary" view of the Chancery Court, matters governed by Section 102 fall within a "continuum" between "internal affairs" and purely "external" claims.
Finding Section 102's102's definition of "intra-corporate affairs" more expansive than the definition of "internal affairs" of the Chancery Court, the Court opined that at least some issues are falling outside the boundary of "internal affairs" but within the limit of Section 102(b)(1), and therefore legally permissible to be included in the company statutes and amendments.

In a nod to the impact that the Cyan decision has had on securities disputes since 2018, the Court acknowledged that the provisions of the Federal Court allow companies to adopt "certain efficiencies" in dealing with the procedural aspects of disputes under the Securities Act. Because Cyan allows concurrent litigation of Securities Act complaints in state and federal courts, the Federal Forum Provisions provide a procedural mechanism for companies to consolidate these claims absent in state courts.

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[52] Oxford reference, The document that governs the running of a registered company. It sets out voting rights of shareholders, conduct of shareholders' and directors' meetings, powers of the management, etc. Either the articles are submitted with a memorandum of association when application is made for incorporation or the relevant model articles contained in the Companies Regulations 2008 are adopted. The articles constitute a contract between the company and its members but this applies only to the rights of shareholders in their capacity as members. Therefore directors or company solicitors (for example) cannot use the articles to enforce their rights. The articles of a public company may be altered by a special resolution of the members in a general meeting; since 2007 it has been possible to change the articles of a private company by written resolution.

Without Federal Forum Provisions, the Court recognized that companies would lack the ability to make stronger these cases, thereby exposing the genuine possibility of inconsistent judgments and other essential rulings, such as discovery stays. [53]

With these provisions, companies can now funnel Securities Act claims to federal forums where coordination and consolidation are possible.

1. Overpass the first verdict through the second Sciabacucchi decision

While the scope to which other state courts will follow Salzberg continues to be seen, the conclusion provides Delaware incorporated defendants that have embraced FFPs with grounds to seek dismissal of 1933 S A cases filed in state court. In light of Salzberg, Delaware corporations making provisions for an IPO or secondary public offering should contemplate including an FFP in their certificates of incorporation and offering materials.[54]

On the far side of the FFPs at issue in Salzberg, the Delaware Supreme Court's decision has potentially far-reaching implications for the scope of matters subject to private ordering for Delaware corporations. The decision will likely be the subject of judicial and academic discourse for a long time to come.[55]

On March 18 of the last year, the Delaware Supreme Court overturned a Chancery Court decision that had banned Delaware corporations from embracing federal forum selection provisions for actions arising under the federal Securities Act of 1933 (Securities Act). In its opinion in Salzberg v. Sciabacucchi, the Court held that permitting federal forum selection provisions in a corporation's governing documents proceeded the goals of achieving judicial efficiency in resolving claims and offering flexibility to engage in private ordering.[56]

The case had been closely watched given its prospective to upend recent trends of forum selection in Securities Act litigation. Far apart from some securities laws, the Securities Act confers private

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[53] *See* Sylvia, John F., *Supreme Court of Delaware Overturns Court of Chancery, Allowing Corporations To Enact Federal Forum Provisions to Keep Securities Act Claims In Federal Court, in* Mintz.com, march 2020, available at https://www.mintz.com/insights-center/viewpoints/2901/2020-03-20-supreme-court-delaware-overturns-court-chancery-allowing

[54] *See* Brendan, Johnson, et al. *After Salzberg: Impact of Delaware's Validation of Federal Forum Provisions, in* HARV. LAW REV. (March 2020). Available at https://www.bclplaw.com/images/content/1/8/v2/183614/After-Salzberg-Impact-of-Delaware-s-Validation-of-Federal-Forum.pdf

[55] *See* Hughes, *Delaware Supreme Court , supra note 15, 39.*

[56] *See* Skadden, *Delaware Supreme Court Upholds Validity of Provisions, supra note 16, 44.*

rights of action to purchasers of securities, allowing plaintiffs to enforce the law's registration and disclosure requirements by bringing claims in either state or federal court. The statute also bars the removal of a case from state to federal Court so that the plaintiff has power decision over forum selection. When it was passed in 1995, the Private Securities Litigation Reform Act (PSLRA) was meant to counter perceived abuses of class action litigation regarding nationally traded securities by, among other things, limiting recoverable damages, placing restrictions on the selection of lead counsel, and imposing mandatory sanctions for frivolous litigation. However, the unintended consequence of PSLRA was that it drove several class-action lawsuits into state courts under state law as plaintiffs shifted around the PSLRA's fences. Federal forum selection clauses increased in notability among corporations that incorporated such terms into their bylaw to turn Securities Act litigation end into federal Court and avoid the inefficiencies of multi-forum litigation claims.

Sciabacucchi required challenges to three Delaware corporations[57] — Blue Apron Holdings, Inc., Roku, Inc., and Stitch Fix, Inc. — that each launched an initial public offering in 2017. Before filing registration statements with the SEC, each company adopted a federal forum provision in its certificate of incorporation providing that any cause of action asserting claims under the Securities Act would be resolved exclusively in the federal courts, collectively, the Federal Forum Provisions.[58] The appellee bought shares of common stock of each company in or shortly after each company's IPO. He subsequently filed a putative class action complaint in the Court of Chancery against the individual directors of the three corporations and the corporations as nominal defendants seeking a declaratory judgment that the Federal Forum Provisions are invalid under Delaware Law.

The Chancery Court allowed the motion for summary judgment, declaiming as "prime principles" of Delaware company law the proposition that "A Delaware company's founding documents cannot bind a plaintiff to a particular forum when the complaint does not involve rights or relationships that have been established by or under Delaware company law." Since the provisions of the Federal Court infringed this principle, the Chancery Court held that they were ineffective and invalid.

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[57] In a highly anticipated decision, the Delaware Supreme Court issued an opinion yesterday in Salzberg v. Sciabacucchi, upholding the validity of "federal forum provisions" ("FFPs") in corporate charters that require any claims brought under the federal Securities Act of 1933 (the "Securities Act") to be pursued in federal court. [Businesses incorporated in Delaware have increasingly adopted FFPs in their charters, particularly in response to the U.S. Supreme Court's 2018 decision in Cyan, Inc. v. Beaver County Employees Retirement Fund, which held that federal and state courts have concurrent jurisdiction over class action claims brought under the Securities Act, and that such claims are not removable to federal court. Cyan had an immediate and significant impact, with state Securities Act filings increasing by 40% in 2019, and actually exceeding the number of federal-only court filings. The Salzberg decision has the potential to reverse that trend. In light of the Delaware Supreme Court's decision, and the significant benefits that often come from litigating Securities Act claims in federal court, companies without an FFP in their corporate charter should strongly consider adopting one. Although all three clauses were substantively similar, Blue Apron's federal forum provision differed in that it stated that federal courts would be the exclusive forum "to the fullest extent permitted by law."

[58] *Id at 6, 7.*

Otherwise, the Supreme Court anchored its analysis to Section 102 of Delaware General Corporation Law (DGCL). Section 102(b) governs the content of the certificate of incorporation of a company. Authorization (i) "any provision for the management of the company's affairs and conduct of the company's affairs and (ii) any provision which creates, defines, limits and governs the powers of the company, its directors and its shareholders... if such provisions are not contrary to the law" Delaware. From the point of view of the Supreme Court, the provisions of the Federal Court are facially valid under both broad categories outlined in Section 102(b).

First, the Court noted that the preparation and revision of registration declarations related to an IPO or a secondary offer are essential functions of a company's management. The use of the federal provisions of the forum to manage the risks of litigation relating to the information contained in the registration declarations is then a prudent part of that management, especially, the Court noted, in the light of Cyan, Inc. v. Beaver County Employees Retirement Fund. In Cyan, the United States Supreme Court has stated that federal and state courts have concurrent jurisdiction over class actions based on claims under the Securities Act. This decision resulted in an immediate and historically unprecedented wave of the only state and parallel state and federal archiving. The absence of a procedural mechanism to consolidate cases in state and federal courts has left the defendants faced with the possibility of handling simultaneous state and federal cases (which could lead to inconsistent judgments). In the view of the Delaware Supreme Court, avoiding the costs and inefficiencies of parallel lawsuits through the use of the Federal Forum Provisions is responsible for "business management" in a post-Cyan world. As to the second Section 102(b) category, the Court explained that the DGCL allows immense freedom for businesses to adopt the most appropriate terms for the organization and governance. A corporation's charter document is fundamentally a contract between the corporation and its stockholders, and as such, should be respected as a matter of policy.

In the Court's view, therefore, the Federal Forum Provisions are facially valid both under Section 102(b) and as a matter of Delaware public policy.[59]

The Court also addressed the appellant's argument that the 2015 amendments to the DGCL altered the scope of Section 102. The 2015 amendments added Section 115, which provides that the organizational documents of a company may require that "internal claims of the company are brought only and exclusively in the courts of that State, and no provision of the Certificate of

[59]*See* Locker, Nicki & Smilan, Laurie, *Saying So Long to State Court Securities Litigation*, in HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (2019) ("Securities class action plaintiffs have achieved a much higher rate of success in surviving threshold motions in IPO-related federal securities class actions litigated in state courts, extracting significant settlements out of proportion to results typically achieved in federal fora.").

Incorporation or the Statute may prohibit such claims from being brought in the courts of that State." The appellant had argued, and Chancery Court agreed, that the addition of Section 115 had implicitly modified the scope of Section 102(b). Contesting this conclusion, the Court first noted that "the statutes should not be replaced or altered by implication unless there is an irreconcilable conflict." In this case, however, the Court did not find such a conflict irreconcilable since there was a direct way to read both provisions in a course that could "harmonize" their meaning. The 2015 amendments added a new section 102(f) (on the distribution of taxes) but did not alter the expansive permissions of section 102(b). If the General Assembly wanted to amend Section 102(b), it would have done so.

Rather, the Court explained that Section 115 makes it clear that Delaware courts cannot be excluded as a forum for some internal corporate complaints. On the contrary, the general provisions of Section 102(b)(1) continue to apply to questions that exist on a continuum between these purely internal affairs (subject to Section 115) and those which are strictly external (and, therefore, outside the appropriate purpose of a certificate of incorporation or a statutory provision). Reversing the decisions of the Chancery Court, the Supreme Court concluded that the requirements of the Federal Court were within an "external band" of issues that are not purely internal corporate affairs, but still within the statutory scope of Section 102(b)(1), explaining in a footnote that "internal corporate complaints and Section 115 were likely to cover matters to be decided under Delaware company law as opposed to federal law".[60]

The Court's conclusion that the provisions of selection of the federal Court are facially valid and have important implications for Delaware companies. As a general question, Sciabacucchi reaffirms that Delaware law favors flexibility and broad discretion for private law to balance the interests of directors and shareholders appropriately. More specifically, the decision means that federal court selection provisions remain available as a tool to avoid potentially overwhelming expenses of parallel state and federal disputes permitted by Cyan. D&O insurers coping with Cyan in the absence of legislative action. Delaware corporations should re-visit when adopting a federal forum selection provision in their charters would be appropriate and advisable in light of this decision.[61]

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[60] *See* Grundfest, Joseph, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi*, in 75 BUS. LAW. 1319 (2020). *See also* Klausner, Michael D. and Hegland, Jason, *State Section 11 Litigation in the Post-Cyan Environment* (June 28, 2019). Available at SSRN: https://ssrn.com/abstract=3411861 or http://dx.doi.org/10.2139/ssrn.3411861

[61] *See* Kevin LaCroix, *Delaware Supreme Court Holds Federal Forum Provisions Facially Valid, in* The D&O Diary, March 2020, available at https://www.dandodiary.com/2020/03/articles/securities-litigation/delaware-supreme-court-holds-federal-forum-provisions-facially-valid/

First, the Delaware Supreme Court only upheld the facial validity of FFPs, which means it found that FFPs are valid in some, but not necessarily, all situations. Thus, the Court left open the possibility that FFPs will be ruled invalid in particular contexts. State litigation against a Delaware corporation could proceed notwithstanding an FFP, even in a case filed in Delaware state court.

Second, there is no assurance that other states will accept the validity of FFPs in the charters of Delaware corporations, facially or as applied. If a state court concludes that a Delaware corporations' FFP is invalid, it will allow the case to proceed. Therefore, we could find ourselves in a situation similar to where we were before Cyan, where some states recognize FFPs as valid, and some do not—and where plaintiffs' attorneys understandably try to file state cases in the latter.

Third, at this point, FFPs have not been validated in states other than Delaware. Companies preparing to issue securities, therefore, will presumably incorporate in Delaware and adopt FFPs. This could lead other state legislatures to validate FFPs, but we do not know how this will play out. Consistently, federal legislation that accomplishes what Congress intended to achieve in SLUSA would be the most successful way to address the problems we document when section 11 cases are prosecuted in state court. Therefore, the efficient balance between incentives and filters is essential for litigation to perform its function. Conversely, over-litigation is a detrimental distortion and a critical indication that the regulating mechanism is not working efficiently and that some corrective actions are required. [62]

In recent years (at least since 2009), M&A litigation has experienced a dramatic increase with challenges to 95% of deals valued at more than $100 million in 2014. It reached a peak in 2015 when over 96% of publicly announced mergers were challenged in shareholder litigation. Delaware courts magnetized a substantial proportion of these lawsuits[63]. It is implausible to think that so many significant public company merger deals involve wrongdoing. One commonality confirms the irritating nature of such litigation: many cases followed the same opportunistic pattern. Shortly after the filing of the case, the claims used to be quickly settled on non-monetary terms, providing some

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[62] *See* Klausner, *State Section 11 Litigation , supra note 12, 32.*

[63] For data collecting, *see* Jens Kengelbach, Georg Keienburg, Jeff Gell, Jesper Nielsen, *The 2019 M&A Report: Downturns Are a Better Time for Deal Hunting, in* BCG (sept 2019), available at https://www.bcg.com/it-it/publications/2019/mergers-and-acquisitions-report-shows-downturns-are-a-better-time-for-deal-hunting

supplemental disclosure of little or no value to shareholders, some significant fee awards to the plaintiff's attorneys, and some general class release from future claims to defendant directors. [64]

II. Firm reaction to FFPs

A. Effect on Corporations value

It is important to remember that FFPs does not prohibit the filing of legal cases; they only require plaintiffs-shareholders to submit their application to the federal court. Thus, it can be argued that Sciabacucchi does not matter much because it means that IPO companies will be sued in state rather than federal courts. However, due to different procedural rules, whether a firm issued in federal court or state court can matter a lot to the outcome of a case. There are four main differences between cases in federal and state courts.[65]

First, in federal court, the PSLRA requires the discovery to be suspended until after the motion to dismiss has been decided. This procedural rule saves defendants the cost of discovery in lawsuits that are rejected and imposes the costs on plaintiffs to obtain detailed information without the benefits of discovery. To be sure, some states have adopted discovery rules that resemble those of the PSLRA. Recently, the courts of New York and Connecticut have ruled that the suspension of the discovery of the PSLRA applies to actions of Section 11 of the 1933 Act in federal court and actions of Section 11 in state court. However, states such as California - home to many IPO companies, including over 50% of companies that have adopted FFPS - adopt more lenient standards than the PSLRA.[66] In particular, California allows the discovery to begin before the dismissal motion phase is concluded, thus substantially increasing the cost to the defendants.

Secondly, the PLSRA imposes various requirements on the identity of the lead plaintiff. In particular, there is a presumption that the court should appoint as the principal plaintiff the member

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[64] *Id a*t 23, 61.

[65] *See* Winship, Verity, *Contracting Around Securities Litigation: Some Thoughts on the Scope of Litigation Bylaws*, in 68 SMU L. REV. 913 (2015); *see also Shareholder Litigation by Contrac*t, in 96 B.U. L. REV. 485 (2016); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, in 56 B.C. L. REV. 1 (2015)

[66] *See* Lynn A Baker, Michael A Perino & Charles Silver, *'Setting Attorneys' Fees in Securities Class Actions: An Empirical Assessment'*, in 66 *Vand. L. Rev*. pp. 1677 and 1683–91 (2013). *See also* William Savitt and Noah B Yavitz, *The Securities Litigation Review: USA,* (Jun 2020), in The law Rev. , available at https://thelawreviews.co.uk/title/the-securities-litigation-review/usa

of the class with the most considerable financial interest in the required relief. The main actor has the authority to select and maintain the legal counsel of the class, a position coveted by the plaintiff's attorneys. This requirement has been relatively effective in preventing unscrupulous lawyers from recruiting named plaintiffs and filing claims only to further their interests. There is a possibility that the actions of Section 11 in state courts are brought by opportunistic lawyers representing plaintiffs with minimal economic losses to extract nominal deals from deep-pockets defenders who want the case to go away. Thirdly, although federal courts have a well-developed process to consolidate collective title cases, there is no similar process for claims on titles filed in state courts. The federal consolidation process allows cases brought by shareholders scattered in different jurisdictions against the same defendant, with the same identical charges, to be tried together, in a single venue, under one or more main actors.

These rules facilitate the judicial economy and promote consistent results by having similar cases tried in one court instead of many. They can also reduce costs for defendants, who have to defend action only in one venue.[67] However, there is currently no method of similarly consolidating actions brought in the courts of several states or consolidating parallel state and federal actions. Although some state courts may facilitate the judicial economy by applying the doctrines of lis pendens (suspending the case until a federal court decides on the matter) or forum not convenient (rejecting the case in favor of a more suitable forum, either federal court or the courts of another state), they may choose not to do so. As a result, defendants may incur more costs to defend such actions in more than one forum, and different courts may reach different conclusions on the basis of the same facts. Fourth, federal courts require that memoirs in Section 11 cases adhere to the Twombly/Iqbal standard: the plaintiff must attach "enough facts to state a request for relief that is plausible on his face" and you can't rely on conclusive statements to make their case. Most federal courts that hear complaints from Section 11 apply the even stricter pleading standard imposed by Rule 9(b) of the Federal Rules of Civil Procedure to the extent that such cases are based on "fraud" claims. According to Rule 9(b), a complaint must "declare in particular the circumstances constituting fraud or error". By contrast, the standards of declaration in many state courts are more

[67] *Id at* 24, 63.

lenient than Twombly/Iqbal frameworks or Rule 9(b).[68] In particular, the standard in California simply requires a plaintiff to declare a "statement of the facts that constitute the cause of the action, in ordinary and concise language".[69]

Finally, there is concern that state judges may be unduly supportive of actors. With exceptions notably the Delaware Chancery Court, state judges appointed through a partisan trial or popular elections are more susceptible to political pressure. State courts may lack the technical competence of federal court judges. For example, The California justice system - in which judges are appointed by the governor or popularly elected - is ranked at 47% by the United States Chamber of Commerce [70]in its influential investigation of the state's judicial climate for corporate defendants. Local judges may be more supportive of local law firms whose lawyers often share the same background as judges, and local judges may want to encourage local disputes to improve their reputation.

Recent trends in forum-shopping in Section 11 cases after the Cyan decision show that these differences have an impact on where plaintiffs present instances. A recent study found a sharp increase in the proportion of cases filed in state courts in 2018.[71] The number of cases filed exclusively in federal courts fell from 67% from 2014 to March 2018 to only 23% from March to December 2018. Most filings occur in New York City, where cases were previously removed from federal court on the basis of a restricted SLUSA building, and in California, where many of the IPO companies are based. There's also a drop in federal court filings against companies based in

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[68] *See* Feldman, Boris & Freshfields Bruckhaus, *The Forum Wars of Section 11,* (Dec 2020), in Harv Law Forum of Corp. Gov. , available at https://corpgov.law.harvard.edu/2020/12/10/the-forum-wars-of-section-11/ , for instance The battle over filing Section 11 lawsuits in state court may be approaching resolution. Multiple California courts have now upheld "Federal Forum Clauses," which require shareholders to litigate Section 11 claims in Federal court. Judicial validation of such provisions has significant implications for companies going public and for the D&O insurance industry.

[69] The lack of significant findings has been analyzed in depth, with commentators noting that empirical analysis on the effect of these cases poses a litany of issues. For example, there is evidence that plaintiffs dynamically respond to the new pleading standards by changing their complaints. Boyd et al. (2013) provide evidence that the number of causes of action pled per case declined after *Twombly*, and Hazelton (2014) provides evidence that plaintiffs changed their language in complaints. Thus, without sufficiently accounting for selection effects through a strategy such as the "straddle" approach proposed by Hubbard (2013), which limits the sample to cases filed before the decision, empirical work studying these cases may incorrectly find null results.

[70] *See* Anderson, Robert IV, *The Delaware Trap: An Empirical Analysis of incorporation decisions*, in 91 CAL. L. REV. 657, 710 (2018).

[71] Data are collected from the study paper by Gibson Dunn, Shareholder Litigation Developments and Trends, (Apr 2021), available at https://www.gibsondunn.com/wp-content/uploads/2021/04/WebcastSlides-Shareholder-Litigation-Developments-and-Trends-28-APR-2021.pdf

California. Overall, these preliminary trends are consistent with a broader phenomenon of forum shopping by plaintiffs to jurisdictions that would be more receptive to their trial strategy.[72]
Furthermore, the current trend towards filing in a state court is consistent with the evidence that results in state courts tend to be less favorable to corporate defendants. The percentage of cases in state courts where a motion for dismissal is granted is substantially lower than in federal courts (19 percent in state courts compared to 42 percent in federal courts from 2011 to 2018).

Cases relating to Section 11 that take place in state courts are resolved more often than in federal courts, presumably because most of the latter do not survive motions to dismiss. In particular, from 2011 to 2018, the resolution rate was 59% for cases brought exclusively in federal courts, 65% for cases brought exclusively in state courts and 83% if the case was brought in both state and federal courts. Although there is no clear evidence that the amounts of transactions in state courts are materially different from those in federal courts, the lower rate of dismissal and the higher probability of settlement suggest that the overall litigation expenses for corporate defendants are substantially higher in state courts than in federal courts. [73]

In the light of the above, it is easy to see why FFP can be essential for companies that are susceptible to Section 11 causes. An FFP may mean that the company is much more likely to have complaints dismissed, thus avoiding not only the possibility of making a settlement payment but, perhaps more importantly, avoiding the reputation and opportunity costs associated with litigation of cases that may not be meritorious. A study suggests that the negative impact on the share price associated with collective actions on securities can be substantial. As a result, FFPs can save high costs for companies, in particular those that want to go on the stock exchange, and similarly, the Sciabacucchi decision that banned FFP has probably had the opposite effect. So, it is not surprising that after Cyan and before Sciabacucchi, several law firms predicted that more IPO companies would adopt FFPs in their organizational documents.

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[72] In general, large stock price effects may be partly driven by thinly-traded stocks with very low prices. When the stock price is low (for example, below one dollar) or the volume of trading is low, any small changes in the price or a small number of trades can generate large shifts in stock returns. However, we emphasize that the relatively large stock price effect is not driven by low stock prices or trading volume. All the firms in our sample are listed on the New York Stock Exchange or Nasdaq, and the price of the stock at the IPO is at least five dollars. Moreover, even when we exclude five firms whose stocks traded below three dollars or whose trading volume was below 1,000 stocks on the date Sciabacucchi was decided, the results are qualitatively the same.

[73] *See* Scott Dodson, *A New Look at Dismissal Rates in Federal Civil Cases*, 96 Judicature 127 (2012). Available at: http://repository.uchastings.edu/faculty_scholarship/1396

1. How FFPs affects Firm value

In this part, I empirically examine the adoption model of the FFP provisions. I manually collected data on exclusive forum provisions from the SEC[74] website. The complete dataset includes companies that have adopted an exclusive forum provision in their statutes or regulations. Out of 107 companies, 72 adopted the provision in their statutes, and the rest adopted it in the statutes. The adoption of the provision in the Articles of Association makes it more difficult for shareholders to repeal the provision, because only the Board of Directors generally has the right to propose amendments to the Articles of Association, while shareholders have the right to initiate changes to the articles of association. While there is some variation, a typical federal provision on the exclusive forum states that: "Unless the Company consents in writing to the choice of an alternative forum, the Federal District Courts of the United States of America will be the exclusive forum for the resolution of any claim alleging a cause of action arising from the Securities Act of 1933".[75] While most companies seek to limit lawsuits to federal courts in general, some companies go beyond explicitly limiting the forum to the federal district court in the district where they are incorporated, mainly Delaware, or the district they're in. Although the wording of the arrangement tends to be very similar among companies, there are also some idiosyncratic provisions.[76]

Most companies adopted the provision in their IPOs, the first IPO company being Snap, Inc. in February 2017.[77] This is not surprising, because most of the complaints under the 1933 law relate to incorrect statements or omissions in the prospectus or registration declaration filed prior to the IPO. Some companies adopted the provision in the context of a merger operation in which the acquiring company issued and registered new shares. Indeed, the first issuer that adopted the provision in September 2016, Lpath, Inc. was not an IPO undertaking.[78]

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[74] U.S. Securities and Exchange Commission, *SEC Docket*, Vol. 106, No. 13 (Jul. 1-5, 2013)

[75] *UNITED STATES SECURITIES AND EXCHANGE COMMISSION*, WASHINGTON, D.C. 20549, FORM 8-K - SEC.gov

[76] *See* James W. Kolari & Seppo Pynnonen, *Event Study Testing with Cross-Sectional Correlation of Abnormal Returns*, in 23 REV. FIN. STUD. 3996 (2010).

[77] *See* Rob Kalb and Rob Yates, *Snap, Inc. Reportedly to IPO with Unprecedented Non-Voting Shares for Public, in* Harv. L. Rev. , (Feb 2018), available at https://corpgov.law.harvard.edu/2017/02/07/snap-inc-reportedly-to-ipo-with-unprecedented-non-voting-shares-for-public/

78 See Michael W. McCracken & Serena Ng, *FRED-MD: A Monthly Database for Macroeconomic Research*, in Research Division Federal Reserve Bank of St. Louis Working Paper Series, available at https://files.stlouisfed.org/files/htdocs/wp/2015/2015-012.pdf

Since the adoption of the provisions of the Federal Exclusive Court is primarily led by the IPO companies, I track the likelihood that an undertaking will adopt the provision in the IPO in Figure 1, shown in Appendix A. I calculate this probability simply as the percentage of IPOs in a given month that adopted the provision on that month's total number of IPOs, starting in February 2017 (when Snap, Inc. adopted the first provision). As is clear from the figure, Cyan and Sciabacucchi have had a material impact on the fact that the companies have adopted federal provisions on the exclusive forum. Before the Cyan decision, there is a slight increase in the probability of adopting the provision. After Cyan, there is a big jump of over 10 percent in the probability of adoption, and a continuous increase of this probability until the Shambles decision. After Sciabacucchi, however, there is a sharp drop of over 10 percent, and then a gradual decrease until June 2019. Presumably, some companies continued to adopt the provision with the hope that the Delaware Supreme Court would overturn the Sciabacucchi decision. [79]

In Table 1, I assess the characteristics of companies that adopt FFP in the IPO phase and compare them with companies that have not adopted an FFP. I got the IPO business data first from the DSC database and then matched it to Compustat's financial data. Financial data refer to the fiscal year ending before the year of the IPO. As already shown in Figure 1, most adoptions occurred in the period after the Cyan decision, but before the Sciabacucchi decision.

It is important to note that companies that adopt are more likely to belong to sectors that are known to be particularly vulnerable to collective stock lawsuits. Vulnerable industries include biotechnology, computer hardware, electronics, retail and computer software industries. In particular, over 70 percent of companies that adopt operate in the pharmaceutical, medical equipment or software industry. [80]

The IPOs of the companies they adopt tend to be relatively large, as evidenced by the relatively larger revenues of these IPOs ("IPO Proceeds").[81] A little more significant is the fact that these Ipos tend to be underestimated. In other words, while most companies see their share price increase considerably on the first day of trading, the percentage increase is higher in our sample for

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[79] *See* Douglas J. Skinner, *Earnings Disclosures and Stockholder Lawsuits*, in 23 J. ACCT. & ECON. 249, 256 n.5 (1997); Jonathan L. Rogers & Phillip C. Stocken, *Credibility of Management Forecasts*, in 80 ACCT. REV. 1233, 1257 (2005); Francois Brochet & Suraj Srinivasan, *Accountability of Independent Directors: Evidence From Firms Subject to Securities Litigation*, in 111 J. FIN. ECON. 430, 448 (2014).

[80] *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, in 43 STAN. L. REV. 497, 571 (1991) (citing the foregone business time man- agers need to spend on the litigation as a major indirect cost of securities litigation).

[81] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

companies with PFF than companies that do not adopt. This is consistent with the assumption that companies adopting FFP face a high probability of litigation, since previous research suggests that companies with a higher probability of litigation are more likely to underestimate their emissions. Other variables also suggest that companies that adopt may be more susceptible to lawsuits. In particular, these companies are more likely to have negative gains, which could potentially induce investors to sue if the company fails to generate income after the IPO, and also relatively higher levels of liquidity, that make the company a good target for lawsuits. The governance of companies adopting PFF tends to be more favorable to shareholders than that of companies not adopting PFF. First, more than 80% of them are supported by venture capital companies ("VC") or private equity companies ("PE"). Previous research has shown that IPOs supported by VC or PE are more likely to exhibit a better governance structure, such as more independent boards of directors. In addition, companies that adopt are less likely to have a double-class structure after the IPO. This suggests that these provisions are not guided by shareholders who seek to protect themselves from potential responsibilities.

Finally, virtually all the companies they adopt are incorporated in Delaware and over half are based in California. This is not surprising, given the high percentage of IPOs supported by VC/PE in the sample. More interestingly, I document the association between maintaining law firms that have been pioneers in the use of PFF and adoption rates. In Table 2, I show the descriptive statistics of companies that have been subject to lawsuits under Section 11 of the 1933 Act from 1996 to 2018, and compare them with IPO companies that have not been subject to such lawsuits. I obtained this data from the Securities Class Action Clearinghouse of Stanford Law School[82], which I combined with previous data on IPOs and data from Compustat (as appropriate). The characteristics that distinguish the IPOs followed by a lawsuit seem to be very similar to those that characterize companies that adopt FFP. In particular, companies tend to belong to sectors vulnerable to litigation, have larger IPO revenues, are more likely to have negative earnings and higher liquidity, are more likely to be supported by VC or PE companies, and they're more likely to underestimate their IPOs.

2. Which are the influenced firms?

In this part, I empirically examine the impact of Sciabacucchi. I focus on companies that have adopted an FFP in their organizational documents, and see if the Sciabacucchi decision has had any

[82] SCAC, Securities Class Action Clearinghouse of Stanford Law School.

perceptible effect on their stock prices. Although various commentators have argued the importance of SBB, whether it has a significant effect on the assessment of a company has been open to debate. Using the methodology of the study of events, I try to examine the magnitude of the effect.

I obtain data on securities returns from the Center for Research in Security Prices ("CRSP"). [83]

I used the methodology of the event studies to assess the effect on stock prices of the Sciabacucchi decision. The first is a standard event study. The basic assumption of events studies is that markets are efficient, so when a case is decided, Stock prices reflect the news. The first step in an event study is to define the event of interest and the date or dates on which the market learned or anticipated the event. I define the day on which Sciabacucchi was decided as event date 0. I focus on the period starting two working days before the decision date and two working days after the decision, but I also examine the period that begins seven trading days before the decision and ends seven days after the decision. In particular, since the market may be familiar with the views of Delaware judges on broad policy issues, and since Delaware judges tend to be vocal on such issues, it is possible that the market may anticipate a decision a few days before it is announced. In addition, it may take investors a few days to be fully informed about a decision and its full ramifications.[84]

In Panel B, I only examine companies that have adopted the exclusive FFP in their statutes in pre and post Cyan period. While shareholders have the right to amend the articles of association, This probably means that these provisions may be more binding and it may be more difficult for shareholders to amend them if they are not favorable to shareholder value. The results are broadly robust to this specification, although they tend to be less statistically and economically significant.[85]

III. Effectiveness and Efficiency of Private Ordering

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[83] *CRSP*, Center for Research in Security Prices Read, The Center for Research in Security Prices (CRSP) is a provider of historical stock market data. The Center is a part of the Booth School of Business at the University of Chicago. CRSP maintains some of the largest and most comprehensive proprietary historical databases in stock market research. Academic researchers and investment professionals rely on CRSP for accurate, survivor bias-free information which provides a foundation for their research and analyses.

[84] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

[85] *See* Pamela S. Palmer, Samuel D. Harrison & Meredith Sherman, *Supreme Court's Cyan Decision Means Open Season for Investor Class Actions After IPOs, available at* https://www.troutman.com/insights/supreme-courts-cyan-decision-means-open-season-for-investor-class-actions-after-ipos.html

This article analyses a solution of private law to disputes between shareholders multi-forum: provisions of exclusive jurisdiction in the statutes and statutes. Let us examine what drives the growth of these provisions and whether, as some critics argue, their adoption reflects managerial opportunism.

I find that almost all of Delaware's new companies adopt the provision in the IPO phase, and that the transition from zero to almost universal adoption of the IPO in the 2009-19 period is driven by law firms. The characteristics of individual companies seem to play little or no role in adoption decisions. Instead, the adoption model follows what can be described as a light switch model, where law firms suddenly switch from never adopting to always adopting the arrangement in the IPOs they recommend.[86]

For midstream adoptions, I compare the corporate governance features of adopters with a matched sample of non-adopters to verify the assumption that midstream adoption of the law reflects managerial opportunism. If the assumption is correct, then we would expect to find that adopters show bad corporate governance over non-adopting adopters (using the metrics of good governance practices as identified by the critics of the provisions). I find, however, that there are no significant differences in governance or that it is the adopters who have superior governance characteristics. Nor do I find any significant differences in governance and ownership structure between companies whose boards adopt provisions such as statutes and those which obtain shareholder approval.[87]

A. *Effectiveness & Efficiency*

Although the results of the empirical analysis are not decisive, they generally support the view that the framework programs are desirable and do not undermine shareholders' rights. The most direct political response to this problem could be to reform the 1933 law or the SLUSA[88] to limit these cases to federal courts, the road taken by the jurisdictional rules under the 1934 law.113 However, Congress may be slow to act, and there may not be enough political support to reform federal law. Moreover, it still leaves open the question of how far a company's organizational documents can

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[86] For fuller explanation of each factor, *see* Mark M. Carhart, *On Persistence in Mutual Fund Performance*, in 52 J. FIN. 57, 60–61 (1997).

[87] *See* Romano, Roberta & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation, in* Journal of Empirical Legal Studies Volume 14, Issue 1, 31–78, March 2017, available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6364&context=fss_papers

[88] The Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub.L. 105–353, 112 Stat. 3227

regulate federal issues, such as the 1933 Act complaints. Consequently, it may be worth examining the legal basis of Sciabacucchi to assess whether or not there is a plausible legal theory that could justify the opposite result of validating FFP in statutes and statutes. More generally, reviewing Sciabacucchi is an opportunity to assess the scope of existing corporate law doctrines on internal affairs and corporate contract. [89]

I stress that I do not claim that Sciabacucchi's legal basis is unfounded. There is a legitimate argument that a claim based on the 1933 law is not a claim that has to do with the "internal affairs" of a company and, furthermore, statutes or statutes can only deal with matters pertaining to "internal affairs". For example, Boilermakers may be intended to support the proposition that a forum selection provision is valid if it regulates "the internal business claims brought by the shareholders as shareholders."[90] In line with this reasoning, Sciabacucchi argued that the claims under the 1933 law are "external" to the affairs of the company. The cause of action under the 1933 Act belongs to an acquirer of "securities", including securities other than shares, rather than shareholders, who already own shares in the company. Boilermakers, on the other hand, validated the forum selection provisions referring to lawsuits under Delaware company law, such as derivatives disputes and lawsuits alleging breach of fiduciary duties.[91]

As it is clear from Sciabacucchi's description, there are two important issues that need to be resolved in order to answer whether a statute or a statutory provision may dictate the right of shareholders to lodge a complaint under the 1933 law in a specific forum. The first concerns the question of how a statute or statutory provision may deal with matters which are "external" (or "not internal") to the affairs of a company.

That is, if I determine or assume that a claim under the 1933 Act is an "external" claim, that is, it has nothing to do with the internal affairs of a company, does that mean that the statute or statute can no longer dictate or regulate its forum? This problem touches more generally on the question of the scope of contract theory that courts have used in relation to company statutes and statutes. The second question has to do with the boundaries of the very doctrine of home affairs. Can we argue that a complaint of the 1933 Act can be treated as an "internal" complaint, rather than an "external" one?

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[89] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

[90] *See* Grundfest, Joseph, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi*, 75 BUS. LAW. 1319 (2020). Notably, the article documents a notable rise in the D&O insurance premium, which also covers liability based on federal securities laws.

[91] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

In addressing these issues, two sets of provisions of the Delaware General Corporation Law play an important role. The first is DGCL §102(b)(1), along with§109(b), and the second is DGCL §115. DGCL§102, entitled "Content of the certificate of incorporation", which sets out the types of issues that can be addressed through a statute or regulation. More specifically, DGCL§102(b) states that: the certificate of incorporation may also contain one or all of the following issues: (1) Any provision for the management of the company's business and conduct of business, and any provision that creates, defines, limits and regulates the powers of the company, directors and shareholders. Similarly, DGCL§ 109 (b), which deals with the content of the statutes, states that: "the articles of association may contain any provision, not incompatible with the law or the certificate of incorporation, relating to the activity of the company, the conduct of its business and its rights or powers or the rights or powers of its shareholders, directors, officials or employees. ." [92]

While DGCL 102 and 109 deal fairly broadly with the admissible issues that can be addressed through the statutes and instruments of incorporation, DGCL, on the other hand, deals more specifically with the selection of the forum. On the contrary, it deals more specifically with the selection provisions of the forum. The section states: The memorandum or articles of association may require. . any or all domestic business claims are brought solely and exclusively in one or all courts of that State, and nothing in the certificate of incorporation or the Statute shall prohibit the bringing of such claims to the courts of that State. "Internal company complaints" means complaints, including complaints in company law, (i) which are based on a breach of a duty by a current or former director or official or shareholder in that capacity, or (ii) for which this title confers jurisdiction on the Court of Chancery.
In short, the DGCL§115 allows a statute of a statutory provision to dictate that an "internal corporate claim" be brought "into one or all courts" of Delaware, but does not allow such claims to be brought exclusively to courts not of Delaware. [93]

Here I address the first question concerning the extent to which a statute or statutory provision can deal with claims that are not "internal" corporate claims. Suppose, for the sake of the argument, that we agree that a complaint of the 1933 Act is not an internal business complaint, as defined in the DGCL§115. The first obvious implication of this assumption is that, since the DGCL§115 deals

[92] Delaware Code Title 8. Corporations § 109. Bylaws, New York Consolidated Laws, Business Corporation Law - BSC § 601. By-laws

[93] Delaware Code Title 8. Corporations § 115. Forum selection provisions

only with "internal complaints to the company", a complaint of the 1933 Act will no longer be subject to the requirements of the DGCL§115. At the same time, however, this conclusion does not necessarily prevent the statutes and statutes from adopting an exclusive forum clause for an "external" complaint. Note, above all, that both the DGCL §102(b)(1) and the §109(b) are written quite broadly. In the case of §102(b)(1), for example, a provision of the Articles of Association may concern not only "the conduct of the affairs of the company", but may also "create, limit and regulate the powers of the company, the directors and the shareholders". [94]

One possible interpretation of the statute is to say that while a federal provision of the forum does not deal with an "internal" corporate claim, "rule" or "limit" the "powers... of shareholders", namely their power to bring a suit of the 1933 Act as shareholders, and it also deals with the "business" of the company, that is, whether and how certain communications should be made to shareholders under both federal securities laws and corporate ones. After all, it can be argued that, as shareholders, they have a set of rights, including those under state company law and federal securities law, and therefore when they file a claim under Law 1933, they are exercising Provisions of the Federal Forum and Home Affairs Doctrine [95]

What the provision on the Federal Court does is therefore "limit" or "regulate" their rights or powers (as shareholders) to file a complaint under the 1933 Act. More fundamentally, this approach would expand the scope of the contractual perception of statutes and statutes, the so-called "business contract".[96] The idea that statutes and statutes can be treated as a "contract" played an extremely important role in Boilermakers. For the position in-, Chancery Court stated: "In an uninterrupted series of decisions dating back several generations, our Supreme Court made it clear that the statute and the bylaws constitute a binding part of the contract between a Delaware company and its shareholders ".

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[94] This argument is further buttressed by the fact that DGCL §102(b) uses the phrase "affairs of the corporation" and not "internal affairs of the corporation." Hence, under §102(b), "affairs of the corporation" also includes non-internal affairs, such as stockholders' rights under federal securities laws. Instead of using "external" versus "internal" distinction, some commentators have used the phrase "intra-corporate" claims to denote those that deal with the "affairs" of corporation. *See*, e.g., Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325 (2013). Under this approach, one can argue that DGCL §102(b) allows corporations to put in provisions in their charters and bylaws so long as they deal with "intra-corporate" matters, even if, technically, the issue may fall outside of corporate law.

[95] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

[96] *See* Morgan, J., *Contract law minimalism. In Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law, in* Cambridge University Press. (2018) available at https://www.cambridge.org/core/books/contract-law-minimalism/contract-law-minimalism/F4E49F76EE569B8918C66F45A41CAE40

Chancery Court relied, in part, on Justice Strine's earlier articulation of Delaware's corporate law in general: Delaware's corporate law is not what . . . could be called a broad corporate law. Aspects of company law such as competition law, labour law, trade and the requirements for the presentation of regular information to public investors are not part of Delaware company law. Delaware's corporate law governs only the internal affairs of the company. In this sense, our law is a specialized form of contract law that governs the relationship between business managers - directors and company officials - and shareholders.[97]

Therefore, Sciabacucchi espouses a narrow view of both corporate law and corporate contract. But, of course, this is not the only possible interpretation of company law and corporate contract. Other commentators have argued that, compared to other issues, Delaware's company law and company contract already regulates issues that technically do not fall within as I will demonstrate later, Delaware's corporate law, along with federal securities laws, also regulates the delegation process.[98] In fact, this seems to be the reasoning adopted by the Delaware Supreme Court when it overturned the decision of the Chancery Court in Salzberg v. Sciabacucchi. The Court focused heavily on the statutory language of the DGCL §102(b) and put it in contrast to the language of the DGCL§115. In the trial, the Court held that questions concerning the right of shareholders to sue under the Federal Securities Act, although not part of internal affairs, can be classified as "intra-corporate" affairs and, therefore, be regulated through statutes and statutes.[99]

If we were to adopt a more expansive concept of the company contract (and also of company law more generally), as the Court did in Salzberg v. Sciabacucchi, since FFP will no longer be subject to restrictions of DGCL 109 and 115, It follows quite naturally that Delaware companies may not be able to adopt other non-Delaware forums to resolve the 1933 Act disputes. They could also attempt to adopt a mandatory individual arbitration clause for the claims of Law 1933. A compensation arrangement perhaps also similar to the version we saw in ATP Tour Inc. v. Deutscher Tennis Bund[100] with Compared to the claims of the 1933 Act is also a possibility.[101]

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[97] *See* Roe, Mark J., *"Delaware's Competition." , in* Harv L. Rev., vol. 117, no. 2, 2003, pp. 588–646. *JSTOR*, available at www.jstor.org/stable/3651948. Accessed 7 June 2021.

[98] *See* Armour, John, et al. *THE ESSENTIAL ELEMENTS OF CORPORATE LAW: WHAT IS CORPORATE LAW?, in* Harvard Law School Discussion Paper No. 643 (2019), available at http://www.law.harvard.edu/programs/olin_center/

[99] *See*, Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENNESSEE L. REV. 6 (2020) (suggesting mandatory arbitration).

[100] *ATP Tour Inc. v. Deutscher Tennis Bund,* Delaware Supreme Court 91 A.3d 554 (2014)

[101] *Id at* 36, 97.

Some may argue that this is an unattractive byproduct of an expansive notion of a corporate contract. In this article I do not take a position on mandatory arbitration provisions, largely because it is impossible to assess their use and effectiveness empirically. However, I stress that, at least for a policy issue, it does not follow that validating FFPs should also lead to validating mandatory arbitration provisions that may preclude shareholders from filing cases together. After all, even if FFPs are supported, shareholders are free to bring their 1933 Act complaints to federal court, either individually or as a class action action.

A mandatory individual arbitration clause, on the other hand, not only denies the right of shareholders to file a complaint in (any) court, but may also vitiate their right to file a collective action complaint. While the statutes and statutes are not formal "contracts", even according to the Federal Arbitration Act, the provisions of mandatory arbitration may be unenforceable where there are grounds for the revocation of such agreements.[102] It is possible that such provisions in the context of company law are seen as inconceivable, for example, because shareholders typically do not have the opportunity to consent to the provisions in the articles of association or articles of association.It may be argued that the waiver of the right to sue cannot be made without explicit consent. Therefore, the validity of the mandatory arbitration provisions requires a separate analysis and does not arise immediately from the validation of FFPs.

The second question is whether a complaint of the 1933 Act can be treated as an "internal" business complaint. According to the DGCL§115, "claims within the company" are claims "based on a breach of a duty by a director or current or former official or shareholder in that capacity. While the legal provision provides a useful starting point for thinking about the boundaries of "internal corporate claims", it presumably does not nullify the existing doctrine based on jurisprudence. As mentioned above, Boilermakers makes an important distinction between "internal" and "external" claims. However, the distinction made in Boilermakers was not so exact as to exclude any claim under federal law. The main distinction on which Boilermakers relied was between the rights of shareholders, which are governed by the bylaws and statutes, and the rights of third parties, which are not.

As stated in Boilermakers: the Statute would regulate external matters if the Board of Directors were to adopt a regulation requiring a plaintiff, including a plaintiff shareholder, to be bound by it,

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[102] *See* Lipton, Ann, *Locked Out: The Carlyle Group Tries to Bar Investors from Court,* ADVOCATE FOR INST. INV. Summer 2012, at 4, 6–7 (citing, for instance, how arbitration tends to favor corporations over individual investors).

seeking to bring an action for civil misconduct against the company on the basis of personal injury suffered on the premises of the company or a contractual case based on a commercial contract with the company.[103] The decision in Sciabacucchi applies this analysis to the claims under the law of 1933 stating: For the purposes of Boilermakers' analysis, a claim for compensation under the 1933 Act resembles a claim for compensation for civil misconduct or contract submitted by a third party applicant who was not a shareholder at the time the claim arose. At best, for the defendants, a complaint under the 1933 Act resembles a civil misconduct or a contractual complaint filed by a plaintiff who also happens to be a shareholder, but in circumstances where shareholder status is incidental to complaint.[104]

That is, according to the Court, a shareholder acts in two capacities: first, as buyer with respect to the initial purchase of his shares, and second, as shareholder with respect to that acquisition.[105] A claim under the 1933 Law only refers to the first capacity. However, is a complaint under the 1933 Act similar to a civil misconduct complaint or a contract complaint? It is true that when an investor buys a share, the investor is not yet a shareholder. However, when the purchased security is a share, the right to sue under the 1933 Act directly relates to the shareholder status of the investor.[106] The claimant would not be able to sue if he had not become a shareholder, and the case will probably have a direct effect on the relationship between shareholders and the company. Consistent with this reasoning, a more flexible version of the Home Affairs Doctrine would regulate the claims that are raised by shareholders (which shareholders) against the company, regardless of whether the claim is

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[103] *Boilermakers Loc. 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 963 (Del. Ch. 2013). In upholding such a bylaw, the court applied the "contractarian" approach. According to the court, "the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders," and when the right to amend the bylaws has been granted to the directors, the shareholders "will be bound by bylaws adopted unilaterally by their boards." ; *see also* Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments,* in 104 IOWA L. REV. 1 (2018).

[104] *See* Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction to Hear Securities Act Class Actions, But the Frequent Failure to Ask the Right Question Too Often Produces the Wrong Answer*, in 17 U. PA. J. BUS. L. 739, 747 (2015). For instance, The internal affairs doctrine provides that matters relating to the "internal affairs" of a corporation are governed by the laws of the state of incorporation, regardless of where the corporation operates or is headquartered.

[105] SHAREHOLDERS' AGREEMENT, EX-10.3 4 A shareholders' agreement is a contract that stipulates obligations, rights, and protections between shareholders. This contract typically outlines agreements pertaining to company stock, shareholder protection, firm leadership and management.

[106] *See* Lobell, Nathan D., *"Rights and Responsibilities in the Mutual Fund.", in* The Yale Law Journal, vol. 70, no. 8, 1961, pp. 1258–1294. *JSTOR*, available at www.jstor.org/stable/794253.

based on federal or state law, as long as they deal with the "domestic" relationship between the shareholders and the company.[107]

This is reinforced by the fact that investors buying shares in the company acquire these shares under the terms specified in the company's articles of association and articles of association, which are (as explained in Boilermakers) part of the "contract" between the company and the shareholders that regulates the "internal" relationship between the shareholders and the company.[108] On the contrary, a consumer who purchases a product from a company or a victim of an illegal act of the company is presumably not bound by any of the provisions of the Articles of Association or the Articles of Association,137 and therefore, such requests are truly "external" to the company.

Previous decisions in Delaware company case law support this flexible interpretation of Home Affairs doctrine. In Vantagepoint Venture Partners 1996 v. Examen, Inc.[109] the Delaware Supreme Court stated that the Home Affairs Doctrine "applies to those matters which concern relations between or between the company and its directors, directors and shareholders"[110]. The court saw Internal Affairs as "not ... just a principle of conflict of laws".[111] The court has explained that doctrine has also played a valuable role by prospectively informing managers and administrators about the law that will apply to their actions, and informing shareholders of the standards to which the company's management may regard.[112] The framework programs similarly regulate the relationship between two "internal" parties to the company: the managers (directors and officials) making disclosure decisions and the shareholders deciding where to file a case on the basis of disclosure. The FFPs put both management and shareholders on the advice that a breach of the 1933 Act will be challenged in a federal district court.

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[107] *See* Mendelson, Nina A., A *Control-Based Approach to Shareholder Liability for Corporate Torts, in* Columbia Law Review, vol. 102, no. 5, 2002, pp. 1203–1303. Available at www.jstor.org/stable/1123672

[108] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

[109] *Vantagepoint Venture Partners 1996 v. Examen, Inc.,* 871 A.2d 1108 (Del. 2005).

[110] *See* Loewenstein, Mark, *Pushing the Envelope: Salzberg v. Sciabacucchi and Delaware's Evolving View of the Internal Affairs Doctrine,* in U of Colorado Law Legal Studies Research Paper No. 21-8 (2020).

[111] *See* Avery, John, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 336 (2006).

[112] *See* Mahoney, Paul, *The Political Economy of the Securities Act of 1933*, 30 J. LEGAL STUD. 1, 1 (2001).

The flexible notion of home affairs is also supported by the existing regulatory framework which already allows for the overlapping of jurisdiction. I have previously noted that Delaware's company law regulates the right of shareholders to buy and sell securities and the rights of other non-corporate applicants in winding-up proceedings. Another important area is delegation. Rule 14a-8 of the SEC (according to the 1934 Act) allows companies to exclude shareholder proposals from their proxy materials if the proposals seek to influence the results of the election of directors. According to the federal law, therefore, companies may oblige shareholders who wish to appoint directors to circulate their dissident proxy with their list of candidates. However, in 2009, Delaware promulgated the DGCL's '§112' to allow (but not oblige) companies to adopt a statute allowing shareholders access to the company's proxies when appointing their candidates for the post of director. This statute, if adopted, would appear to change the company's ability to exclude shareholder proposals from the proxy statement,[113] and some professionals believe that the§112 "would seem to preclude an argument" that shareholders' attempts to influence.

We recognize that the doctrine of home affairs is limited by federal laws that override state laws.[114] At the same time, however, validating FFP in statutes and statutes is consistent with the federal courts' broad deference to provisions "contractual" rules governing the settlement of legal disputes. In the Bremen v. Zapata Off-Shore Co.[115] case, the Supreme Court held that the choice of court clauses in trade agreements are valid, provided that they are not "affected by fraud, undue influence or excessive bargaining power " and that the provisions "should be applied unless the resisting party demonstrates that the application is unreasonable". There is no reason to believe that limiting claims under the 1933 law to federal courts would be wrong according to the Bremen test. Although the statutes and instruments of incorporation are not technically "contracts", in validating the statutes of the exclusive forum with respect to claims for breach of fiduciary duty[116], furthermore, the Supreme Court adopted a deferential approach to the choice of forum, also in the context of the 1933 Act.

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[113] Delaware Code Title 8. Corporations § 112, Access to proxy solicitation materials. The bylaws may provide that if the corporation solicits proxies with respect to an election of directors, it may be required, to the extent and subject to such procedures or conditions as may be provided in the bylaws, to include in its proxy solicitation materials (including any form of proxy it distributes), in addition to individuals nominated by the board of directors, 1 or more individuals nominated by a stockholder

[114] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

[115] *Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 92 S. Ct. 1907 (1972)

[116] *See* Loewenstein, *Pushing the Envelope, supra note 40, 108.*

In Rodriguez de Quijas v. Shearson/American Express, Inc.[117], the Court stated that brokerage companies may, through a mandatory arbitration clause in an agreement with clients, force investors to arbitrate claims under the 1933 Federal Arbitration Act. Rodriguez's opinion also stated that "the right to choose the court and the widest choice of courts are not. . . essential characteristics of the law of 1933. " Unlike arbitration agreements, FFP do not deny applicants the right to sue, and therefore, until the adoption of an FFP is the result of fraud or excessive bargaining power, it is likely to be considered favorably by federal courts. Moreover, at least according to Delaware jurisprudence, the statutes and statutes are not formally considered as "contracts", thus potentially placing them outside the scope of the Federal Arbitration Act.

Before concluding, an implication of the adoption of a more flexible concept of "home affairs" is that the FFPs which are contained in the statutes and statutes will now be subject to the DGCL§115, which states, in part, relevant: "the certificate of incorporation or the bylaws may require . . that any or all domestic corporate claims are brought only and exclusively in one or all courts of that State, and no provision of the Certificate of Incorporation or the Statute may prohibit the bringing of such claims in the courts of that State". Although it is not entirely clear what the phrase "the courts of this state" meansIf an FFP were to dictate a federal forum that resides outside of Delaware, for example, it can be argued that such an FFP would be incompatible with the Statute. A more consistent approach, on the other hand, would allow the plaintiff to file (or at least not to prohibit the plaintiff from filing) a complaint under Law 1933 in a federal district court in Delaware.[118] In addition, unlike the earlier more expansive construction of the DGCL§102(b), according to the more flexible doctrine of internal affairs, a forum arrangement for complaints under Law 1933 that imposes any non-Delaware forum (both federal and state), including mandatory arbitration provisions, would not be valid. A fee-sharing clause will also not be considered valid under DGCL 102(f) and 109(b).

To the extent that the Delaware legislator considered it important not to allow the use of a non-Delaware forum or expenditure transfer arrangements, the flexible approach of home affairs may be more consistent with the legislative intent.

The agreements, the FFP do not deny the claimants the right to sue, and therefore until the adoption of an FFP is the result of fraud or excessive bargaining power, it is likely to be viewed favorably by federal courts. Moreover, at least according to Delaware jurisprudence, the statutes and statutes are

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[117] *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989)

[118] *See* Hershkoff, Helen & Kahan, Marcel, *Forum-Selection Provisions in Corporate "Contracts",* in NYU Law and Economics Research Paper No. 17-28, August 2017.

not formally considered as "contracts", thus potentially placing them outside the scope of the Federal Arbitration Act.[119]

The federal provisions of the forum constitute a unique legal arrangement at the intersection of corporate and federal laws on titles. These provisions have attracted criticism from both academics and professionals, largely because constitute a private-law device that customizes and limits the rights conferred on shareholders by Congress and interpreted by the Supreme Court in Cyan. On the other side of the spectrum, advocates of the provisions of the Federal Forum have argued that they can serve a useful role in curbing excessive litigation and can direct litigation to its more natural location, federal courts, where cases will be subject to the various procedural and substantive rules under the PSLRA and the SLUSA that Congress deemed desirable for federal securities litigation.

Conclusion

Several milestones relating to private ordering are already behind us. The ex-ante corporate governance activity has shown no signs of slowing down. Shareholders, management, and their counsel will continue to test the bounds of contractual flexibility in drafting charter and bylaw amendments. As the courts develop a portfolio of ex-ante governance provisions that pass legal and equitable muster, disputes will naturally progress to raising interpretation questions.

This Article seeks to provide a comprehensive interpretative framework that considers some light on this issue through empirical analysis.

Finally, it is important to point out: First, companies with a high probability of facing IPO-related lawsuits are more likely to adopt remuneration schemes, and it is difficult to argue that companies lead adoption with more severe agency problems.[120] This suggests that companies that choose to adopt FFP programs may not necessarily be the "rotten apples" but rather companies that are more likely to be targeted by plaintiffs. The broad shift of Section 11 cases from federal to state courts indicates that plaintiffs, probably influenced by their lawyers, are trying to circumvent the stricter requirements imposed by the PLSRA and federal defense standards.[121]

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[119] Federal Arbitration Act, 9 U.S. Code Title 9— ARBITRATION

[120] *Id at* 38, 105.

[121] *See* Bebchuk, Lucian, *The Case for Increasing Shareholder Powe*r, in Forthcoming, Harvard Law Review (December 2020).

Second, the Sciabacucchi decision is associated with a high negative effect on the share price, and the effect persists for companies with allegedly lower agency costs and for companies less likely to pay damages in Section 11 cases either because their security was rated relatively low at the time of the IPO or because their security was traded at a price higher than that of the IPO prior to the Sciabacucchi decision and disputes in the broad sense.[122] However, all results for these companies are economically and statistically more significant than for the total sample, even if the total sample is smaller. Of course, we cannot rule out the possibility that there is some unobserved fraudulent intent associated with the adoption of the PFF.

Moreover, there is concern that the decline in share prices may simply reflect the increased likelihood that companies will have to pay large sums of compensation from their own funds rather than reflecting the desirability of these provisions. However, I stress that the negative effect of the share price seems very high compared to the typical liquidation amounts. The greater probability of obtaining a recovery in a settlement if a claim in a federal court is also challenged in a state court, compared to the one that is contested only in a state court (83% compared to 59%)[123], multiplied by the average amounts of transactions in Section 11 causes (about $10 million)[124] is well below the loss in market value observed in the event study, whatever the event window used. A likely explanation is that the adverse effect of litigation does not only reflect the likely recovery amounts, but rather primarily reflects the impact of litigation on the reputation and goodwill of the company , and the concern that the protracted litigation may distract managers from pursuing valuable projects[125].

This is consistent with the high negative effect on the share price associated with the presentation of collective cases on securities, which also substantially exceeds the potential recovery amounts.[126]

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[122] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

[123] *See* Alexander, Janet, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, in 43 STAN. L. REV. 497, 571 (2006), citing the foregone business time man- agers need to spend on the litigation as a major indirect cost of securities litigation.

[124] See Eisenberg, Theodore & Lanvers, Charlotte, *"What is the Settlement Rate and Why Should We Care?"* (2019), in Cornell Law Faculty Publications. Paper 203.

[125] *See* Dhruv, *Federal Forum Provisions, supra note 5, 3.*

[126] *See* Loewenstein, *Pushing the Envelope, supra note 40, 108.*

The findings, while not conclusive, are consistent with the more benign and positive view of FFPs. The analysis has shown that the firms that adopt them tend to be firms that are often the target of shareholder lawsuits, but they do not appear to be the firms that are susceptible to high agency costs. Moreover, the Sciabacucchi decision that validated these provisions is associated with a significantly negative stock price effect on the firms that had previously adopted FFPs[127]. This analysis thus suggests that there may be good policy-based reasons to support the Delaware Supreme Court's reversal of Sciabacucchi or for Congress to create exclusive federal jurisdiction for 1933 Act claims.

Finally, I argue that validating FFPs does not necessarily interfere with the existing corporate law doctrines. Delaware corporate law is broadly consistent with the approach that federal courts have taken concerning forum selection clauses.

In sum, the article has attempted to embrace two critical aspects of corporate law simultaneously: (1) the "Darwinism" of Private Ordering and (2) the outcome of the Court's responses on firm value. As a result, the natural selection figured out from the private ordering will be subject to discussion as long as the effectiveness of shareholder litigation as a governance mechanism will remain debated;

the jury is still out.[128]

[127] Hypothetically, if the 1933 Act did not exist, an investor who alleged misstatement in an IPO document could presumably only raise a common law fraud claim, rather than a corporate law claim. Nonetheless, a charter or bylaw provision that regulates this claim would be valid, because the claimant is a shareholder, and the claim relates closely to the rights of shareholders.

[128] *See* Wilson, Jared, *The consequences of limiting shareholder litigation: Evidence from exclusive forum provisions, in* 111 J. FIN. ECON. 430, 448 (2020).

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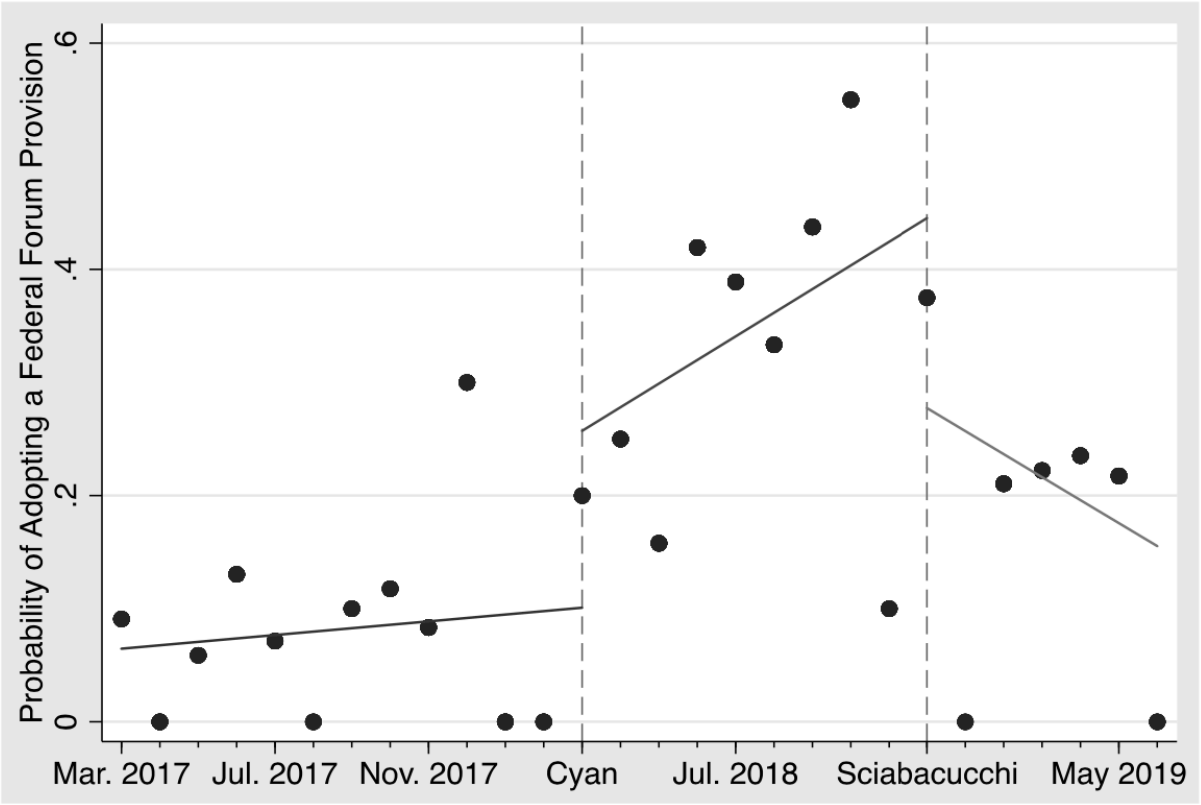
- Delaware Code Title 8. Corporations § 115. Forum selection provisions

APPENDIX A

FIGURE 1: FEDERAL EXCLUSIVE FORUM PROVISIONS AT IPO



APPENDIX B