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The Cyan Decision and its Impact on State-Level Securities Class Actions

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THE *CYAN* DECISION AND ITS IMPACT ON STATE-LEVEL SECURITIES CLASS ACTIONS

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ABSTRACT

The Supreme Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*[†] preserved the Securities Act of 1933's bar on removing securities class actions brought in state court to federal court. The unanimous ruling cut against a nearly quarter-century long trend of pushing securities class action litigation to the federal courts. *Cyan* was resolved purely through statutory interpretation, leaving many of the underlying policy questions to be resolved by state courts and in future rulings.

This Note examines the intention of the drafters of the Securities Act of 1933 in designing a disclosure-focused regulatory scheme with a private right of action to protect the integrity of the financial markets. As such private litigation grew in quantity and dollar amount through the class action mechanism, Congress attempted to limit such actions by raising various procedural and substantive requirements in federal courts in successive reform legislation. These reforms made state courts a more attractive venue for securities class actions, raising concerns about forum shopping, conflicting rulings, and possible chilling effects on future Initial Public Offerings of securities due to this uncertainty.

With the *Cyan* ruling, investors and their advocates have retained the ability to litigate claims brought solely under the Securities Act of 1933 in state courts. The significance of this relatively narrow class

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[†]138 S. Ct. 1061 (2018).

of securities lawsuits, primarily affecting IPO-related litigation, remains to be seen.

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INTRODUCTION

The Supreme Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*[1] was remarkable in several aspects. First, it preserved the bar on removing claims brought in state court set forth in the Securities Act of 1933, marking a rare freeze in a nearly quarter-century general trend of pushing securities class action litigation to the federal courts.[2] Second, it was a unanimous ruling in the highly politicized area of securities litigation during the polarized 2017 Supreme Court term, during which the Court issued a record percentage of 5–4 decisions with a conservative majority.[3] Key to the *Cyan* result

1. 138 S. Ct. 1061 (2018).

2. *See infra* Sections I.B.–I.D.; *see also* Marc I. Steinberg & Brent A. Kirby, *The Assault on Section 11 of the Securities Act: A Study in Judicial Activism*, 63 RUTGERS L. REV. 1, 3-4 (2010).

3. *See* Adam Feldman, *Final Stat Pack for October Term 2018*, SCOTUSBLOG, (June 28, 2019, 5:59 PM), https://www.scotusblog.com/2019/06/final-stat-pack-for-october-term-2018 [https://perma.cc/HTY2-6QKT]. During the 2017 term, 74% of the

was that the dispute was resolved solely as a question of statutory interpretation with respect to applying the Securities Litigation Uniform Standards Act of 1998 (SLUSA) amendments to the original 1933 Act,[4] leaving lower courts to reconcile the policy implications in subsequent decisions.[5]

The two primary regulatory mechanisms for the large U.S. corporation are the federal securities laws and state corporate law, primarily that of Delaware.[6] The securities laws, particularly the 1934 Act, operate principally as disclosure and trading rules, while state corporate law regulates shareholder voting and the internal affairs of the corporation.[7] However, there is substantial overlapping authority and complex interaction between these bodies of law.[8] Especially where the safeguards of state corporate law and internal accounting controls fail, as in the Enron,[9] WorldCom,[10] Vivendi,[11] and Halliburton[12] scandals, investors turn to federal authorities and securities law for relief, not to state corporate law.[13] Accordingly, when statutory conflict arises, it is usually left to the federal courts to untangle these interactions.[14]

This note seeks to place the *Cyan* decision in a broader policy context by: (1) relating the history and intent of the federal securities

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5–4 decisions were decided by a conservative majority, a record amount for the Roberts Court. *Id.*; *see also* DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS 16 (4th ed. 2017).

4. *See Cyan*, 138 S. Ct. at 1066.

5. *See infra* Sections II.A, II.C; *see, e.g.*, In re Everquote, Inc. Sec. Litig., 106 N.Y.S.3d 828, 837 (Sup. Ct. 2019); Coffey v. Ripple Labs, Inc., 333 F. Supp. 3d 952, 958–59 (N.D. Cal. 2018); Salzberg v. Sciabacucchi, 227 A.3d 102, 132–37 (Del. 2020).

6. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 610 (2003).

7. *See id.* at 615–16.

8. *See, e.g.*, *id.* at 611-16.

9. *See id.* at 591.

10. *See id.*

11. *See* Jennifer Bayot, *Vivendi Pays $50 Million In Settlement With S.E.C.*, N.Y. TIMES (Dec. 24, 2003), https://www.nytimes.com/2003/12/24/business/vivendi-pays-50-million-in-settlement-with-sec.html [https://perma.cc/2NX7-YVGW].

12. *See* Press Release, SEC, Halliburton Paying $29.2 Million to Settle FCPA Violations (Jul. 27, 2017), https://www.sec.gov/news/press-release/2017-133 [https://perma.cc/R2KF-QNLM] (announcing the settlement agreement related to Halliburton's violations of the Foreign Corrupt Practices Act (FCPA) while competing for oil field contracts in Angola).

13. *See, e.g.*, *id.*; Roe, *supra* note 6, at 591; Bayot, *supra* note 11.

14. On the occasions that the federal security laws intersect with state corporate law, the state courts may have their say. *See, e.g.*, Salzberg v. Sciabacucchi, 227 A.3d 102, 109 (Del. 2020).

laws and class action reform; (2) discussing how the conflict at the center of the dispute arose through repeated Congressional amendments to the federal securities laws; (3) observing the questions left unanswered by the ruling; and (4) analyzing the development of subsequent case law. Part I outlines the development of the federal securities laws from the Securities Act of 1933 and Securities Exchange Act of 1934 through the class action reform era, during which Congress and the federal courts progressively raised the threshold requirements to maintaining such suits. Part II discusses *Cyan* and its immediate progeny, analyzing its effect on state court class action filings by comparing pre- and post-*Cyan* empirical studies. Part III suggests that while a reversal in the trend of federalizing securities class actions is unlikely, the *Cyan* decision's preservation of the narrow class of pure 1933 Act state court class actions is nonetheless a victory for investors and their advocates; it faithfully maintains the original intent of the 1933 Act, which is to provide defrauded investors with a forum of their choosing.

I. ORIGINS

First enacted nearly ninety years ago, the federal securities laws have evolved through further legislation and numerous court decisions.[15] However, the fundamental disclosure-focused regulatory scheme envisioned by the drafters remains intact.

A. THE FEDERAL SECURITIES LAWS

The Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act") are the principal federal securities statutes.[16] These laws were enacted in the aftermath of the 1929 stock market crash, when the inadequacy of state blue sky laws to adequately protect investors from security fraud became apparent.[17] The political environment was charged, with the public perception of the

15. *See* Steinberg & Kirby, *supra* note 2, at 4–8.

16. *See* NAGY ET AL., *supra* note 3, at 2.

17. James Landis, a drafter of the 1933 Act, described the original "Thompson bill" which he was tasked with re-writing as "based . . . in large measure on the blue sky legislation of the states." James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 31 (1959).

investment banking industry at an all-time low and a newly elected president, who had campaigned on a promise to reduce the power and influence of Wall Street, pushing for reform.[18] Remarkably, the goal of heightened regulation of securities markets coincided with specific interests of the securities industry: Namely, restoring the confidence of the investing public and implementing rules that restricted dealing in fraudulent or high-risk securities, without excessively restricting the ability of the large investment banks to perform their underwriting function.[19] Thus, there was broad support for a federal anti-fraud-on-the-market law not only among the general public, but also from the leading underwriters of the day, who ultimately faced reduced competition as a result of the restrictions introduced by the 1933 Act.[20]

The 1933 Act imposed liability on issuers and underwriters for material misstatements, omissions, and fraudulent conduct in connection with public offerings of securities.[21] Companies offering securities to the public were required to make "full and fair disclosure" of relevant information, and the 1933 Act contained express private rights of action to supplement federal enforcement of those obligations.[22] Section 11 of the 1933 Act imposes strict civil liability for untrue or misleading statements or omissions in registration statements filed with the Securities and Exchange Commission (SEC), with the purpose of ensuring full and accurate disclosure by issuers.[23] Section 12(a)(2) gives purchasers an express right of rescission against sellers who make material misstatements or omissions by means of a prospectus or certain

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

19. *See* Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77, 92 nn.77–79 (2003). Mahoney finds that in the wake of the Securities Act, market share and profits for the "traditionally dominant wholesale underwriters" increased at the expense of integrated investment banks with their own retail outlets, who had emerged as serious competitors in the underwriting business in the years preceding the 1929 crash. *See* Mahoney, *supra* note 18, at 19–20, 27–28.

20. *See* Mahoney, *supra* note 18, at 30–31. Certain provisions of the 1933 Act went beyond what was necessary for full disclosure, instead serving to protect the leading underwriters of the time from competition by prohibiting public disclosures related to an offering prior to filing a registration statement with the SEC. *Id.* at 3 n.7. This requirement was later relaxed, but initially made it difficult for upstart underwriters to market their offerings. *Id.* at 31.

21. *See, e.g.*, 15 U.S.C. § 77(k).

22. Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061, 1066 (2018).

23. Barnes v. Osofsky, 373 F.2d 269, 272 (2d Cir. 1967).

oral communications.[24] Some overlap exists between the two sections, with both covering misleading statements made in connection with registered securities offerings, but while Section 11 covers the entire registration statement, Section 12(a)(2) covers only the prospectus and certain oral statements.[25] Neither section requires a showing of scienter or causation, a deliberate watering down of the traditional common law fraud elements meant to encourage compliance and enforcement of the law.[26]

Section 22(a) also includes a general bar on removal for cases brought under Section 11, stating that "no case . . . brought in any State court of competent jurisdiction shall be removed to any court of the United States."[27] This idiosyncratic provision of the 1933 Act, destined to become the central issue of *Cyan*, not only granted concurrent jurisdiction over private securities actions alleging 1933 Act claims to both federal and state courts, but took the unusual step of expressly barring removal from state to federal courts for such claims.[28]

As noted by James M. Landis, one of the drafters of the revised Securities Act, the documented legislative history of the 1933 Act is "scanty,"[29] but his recollections provide a basic outline of some of the considerations behind the 1933 Act's unique features. Requiring registration of certain offerings of securities, rather than registration of the securities themselves, was the major innovation of the 1933 Act over

24. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 564 (1995).

25. *See* NAGY ET AL., *supra* note 3, at 299.

26. *See id.* at 260, 299.

27. Securities Act of 1933, 15 U.S.C. §77(v).

28. *See* Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061, 1069 (2018); *see also* 15 U.S.C. §77(v).

29. Landis, *supra* note 17, at 29 & n.1. In Landis's telling, the 1933 Act was drafted by himself, Benjamin V. Cohen, Thomas G. Corcoran (the latter two both members of President Roosevelt's "Brain Trust"), and House Legislative Counsel Middleton G. Beaman, working under the direction of then-Professor Felix Frankfurter. *See id.* at 33, 36. Their proposed legislation replaced the earlier version of the bill known as the "Thompson bill," based largely on the existing state blue sky laws and containing many deficiencies which the new drafters sought to rectify. *Id.* at 31. The bill was drafted in great secrecy, particularly from the scrutiny of Wall Street and underwriters. *Id.* at 38–39. However, at the insistence of Rep. Sam Rayburn, a "select group" of New York securities lawyers were allowed to see the draft bill and offer criticism before it went to the full House Committee, though no significant changes resulted from their input. *Id.* at 40. Landis freely admitted that his recollections, more than a quarter century old at the time of his writing, warranted some scrutiny. *Id.* at 29.

the blue sky laws that preceded it.[30] This disclosure-focused theory was inspired by the contemporaneous English Companies Act of 1929, which similarly emphasized public availability of accurate corporate information.[31] The original draft of the 1933 Act had copied the registration scheme used by the blue sky laws, but the final bill produced by Landis and others (working under future Supreme Court Justice Felix Frankfurter) focused on the initial sale and offering to the public rather than the security itself.[32] None of the preceding state blue sky laws had recognized such a distinction,[33] and it remains a defining feature of the 1933 Act.[34] The revised draft adopted this focus on the issuance of securities, rather than the underlying security itself, so as not to freeze dealing in outstanding securities.[35]

The fundamentally disclosure-oriented regulatory scheme of the 1933 Act had the additional advantage of limiting its requirements to full and fair disclosure of material facts relating to the offered security, without imposing judgment on the security's investment quality.[36] In conjunction with the mandatory waiting period before registration statements became effective, this structure permitted the SEC to suspend public offerings if disclosure obligations were not met or facts within the registration filings were misrepresented.[37] In the meantime, investors could scrutinize the filings, dealers could reach an estimate of the offered security's quality, and underwriters could have a degree of assurance that the SEC would not halt trading in the midst of an offering, leaving them holding a stack of unsaleable securities.[38]

Civil liability for corporate directors and officers was subject to the "bitterest struggle" between the House and Senate bills in the

30. *See id.* at 32.

31. *See id.* at 34 & n.9.

32. *See id.* at 32.

33. *See id.* at 31.

34. Like the blue sky laws, the 1934 Act also requires maintaining registration of securities in order to be eligible to trade on the stock exchanges. *See id.* at 32 n.8.

35. *See id.* at 31 ("[The original draft] did not exempt sales of outstanding securities . . . a factor that would have frozen dealing in securities inasmuch as registration was required regardless of whether [a non-public] offering of these securities was being made . . . .").

36. *See id.* at 34. This impetus is further evidenced by the 1933 Act's other name, the "truth in securities" law. *See The Laws That Govern the Securities Industry*, SEC, https://www.sec.gov/answers/about-lawsshtml.html [https://perma.cc/KDV9-5ZVY].

37. *See* Landis, *supra* note 17, at 34.

38. *See id.* at 35.

Conference Committee.[39] The House bill's interpretation, which held such fiduciary actors to a standard of due diligence, ultimately prevailed over the Senate's more extreme "insurer's liability" which would have imposed "an unjust and insurmountable burden on those who have the responsibility for the conduct of corporate enterprise."[40] Less controversial was the exemption for private offerings of securities, which recognized that sophisticated private investors and banks "who are shown to be able to fend for themselves" fell outside the 1933 Act's purposive scope of protecting the investing public.[41] The 1933 Act's disclosure scheme was aimed at such investors, not sophisticated private parties.

B. THE SECURITIES CLASS ACTION REFORM ERA

In the decades following the passage of the 1933 and 1934 Acts, securities litigation doctrine developed primarily in the federal courts through an era of judicial activism.[42] The intertwined nature of the 1933 and 1934 Acts became clear, with courts applying and interpreting these laws as "interrelated components of the federal regulatory scheme governing transactions in securities."[43] Most significantly, the courts recognized and upheld implied private rights of action under Rule 10b-5, mirroring the express private right of action under Section 11 of the 1933 Act.[44] Once the Supreme Court adopted the presumption of reliance for class actions brought under Rule 10b-5 through the "fraud-on-the-market" theory,[45] a significant hurdle to class certification was removed, making it significantly easier to bring securities class action

39. *Id.* at 48.

40. *Id.* The argument that excessive personal liability for directors and officers might dissuade qualified individuals from seeking such positions was resurrected by the Private Securities Litigation Reform Act's (PSLRA) House Conference Committee members in justifying the bill's heightening of protections for outside directors. *See* H.R. REP. No. 104-369, at 38 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 737.

41. SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

42. *See* NAGY et al., *supra* note 3, at 14–15.

43. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976).

44. *See* Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (recognizing the implied right of action under Section 10(b) and Rule 10b-5); 15 U.S.C. §77(v).

45. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 241–42 (1988).

suits.[46] In response to a perceived excess of class action suits in the wake of *Basic Inc. v. Levinson*, Congress soon undertook to reform the securities laws and the class action vehicle.[47] However, when the federal securities laws were amended, the 1933 and 1934 Acts were changed in substantially similar ways, which, due in part to their interconnectedness, led to statutory conflict where the statutes did not precisely mirror each other.[48]

1. The Private Securities Litigation Reform Act (PSLRA)

Congress enacted the Private Securities Litigation Reform Act (PSLRA) in 1995, amending both the 1933 and 1934 Acts.[49] The legislation was intended to limit the ability of lawyers to file abusive and unmeritorious "strike" suits alleging violations of the federal securities laws in pursuit of a settlement.[50] Though Congress recognized the importance of the private securities litigation system to maintaining the integrity of American capital markets, reform was necessary to protect the system from "those who seek to line their own pockets by bringing abusive and meritless suits."[51] Chief among the identified harms of such frivolous lawsuits was that the time and expense required to litigate them unnecessarily increased the cost of raising capital for companies.[52] Additionally, Congress expressed concern that the threat of litigation could exert a chilling effect on corporate disclosure of bad news, even where there was no evidence of actionable fraud.[53] Settlements to

46. *See* Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 HARV. L. REV. 1067, 1067 (2019) [hereinafter *The Rise of Securities-Fraud Class Actions*].

47. *See id.* at 1070.

48. *See* Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061, 1068 (2018).

49. *See* Private Securities Litigation Reform Act of 1995, PUB. L. NO. 104–67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77–78).

50. *See* S. REP. No. 104-98, at 4 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 683.

51. *See* H.R. REP. No. 104-369, at 31.

52. *See* S. REP. NO. 104-98, at 4.

53. *See id.* In *Basic Inc. v. Levinson*, the Supreme Court endorsed the fraud-on-the-market theory presuming investor reliance on corporate misstatements, which eliminated the need to show individual reliance and became the dominant theory for Rule 10b-5 class actions. 485 U.S. 224, 241–42 (1988); *see also The Rise of Securities-Fraud Class Actions*, *supra* note 46, at 1070. The Court declined to overrule *Basic* in *Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*)*, noting that the academic critiques of the efficient capital markets hypothesis did not "refute[] the modest premise

unmeritorious suits required insurers to make settlement payments, pay lawyers' fees, and expend company time and resources defending against the meritless claims—costs that would ultimately be passed on to investors, the nominal beneficiaries of securities lawsuits.[54]

Taken to the extreme, this "circularity hypothesis" posits that sufficiently diversified investors, who are as likely to be on the winning side as the losing side of a securities fraud claim, derive no benefit from transfers of money under civil securities actions, especially in light of the high transaction costs surrounding securities class actions.[55] However, even proponents of the theory admit that the principle applies only to highly diversified traders with constant and relatively high turnover, leaving the less diversified investors comprising "roughly half of the . . . market"[56] without a means to obtain recovery.[57] Additionally, such criticisms completely ignore the animating purpose of the 1933 Act, which was to protect the general investing public, not sophisticated, large-volume investors.[58]

Indeed, the class action vehicle itself is often scrutinized as to whether it accomplishes the goals of the anti-securities-fraud laws: narrowly, compensating victims and deterring fraud, and more broadly, ensuring that the valuable information investors derive from securities markets is undistorted by managerial fraud.[59] However, the close privity between the buyer of the security and the issuer in a Section 11 action nullifies many of the critiques directed at class actions under the wealth transfer theory.[60] Specifically, material misstatements or omissions in a firm's registration statements cannot be attributed to superseding causes

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underlying the presumption of reliance," which is that public information affects stock prices. 573 U.S. 258, 272 (2014).

54. *See* H.R. REP. NO. 104-369, at 32.

55. *See* Thomas A. Dubbs, *A Scotch Verdict on "Circularity" and Other Issues*, 2009 WIS. L. REV. 455, 457 (2009).

56. *Id.* at 457–58; *see* ANJAN V. THAKOR, THE ECONOMIC REALITY OF SECURITIES CLASS ACTION LITIGATION 7 (2005), http://apps.olin.wustl.edu/faculty/Thakor/Website%20Papers/EconomicNavigantReality_10-26-05.pdf [https://perma.cc/7JJM-UANL].

57. *See* Dubbs, *supra* note 55, at 458.

58. *See* SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

59. *See The Rise of Securities-Fraud Class Actions*, *supra* note 46, at 1067.

60. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1556–57 (2006).

in the same way that a drop in stock price leading to a § 10(b) suit can, greatly decreasing the likelihood of frivolous litigation or strike suits.[61]

The final PSLRA bill, which passed over a presidential veto, extended "far beyond frivolous litigation . . . [containing] measures reflecting concerns raised by a number of different constituencies."[62] The final result was a "diverse assortment of measures . . . that significantly alter the treatment of meritorious claims, as well as frivolous ones."[63] Even though the "rhetoric of the litigation reform debate" often describes a broad range of cases as frivolous, the category includes cases that are merely marginal or speculative as well as those that are truly without merit.[64]

The measures of the PSLRA restricted actions brought under both the 1933 and 1934 Acts[65] with the goal of making it easier for courts to dispose of securities cases filed without a substantial factual or legal basis.[66] They included provisions governing the appointment of "most adequate" lead plaintiffs, limitations on lead plaintiffs' recoveries and attorney's fees, heightened requirements for giving notice of settlements to class members, and an automatic discovery stay until motions to dismiss were resolved.[67] Corporate defendants also benefited from heightened protections under the PSLRA, including a system of proportionate rather than joint and several liability for defendants, a statutory safe harbor for forward-looking statements, and mandatory sanctions for violations of Rule 11(b) of the Federal Rules of Civil Procedure.[68] Following the PSLRA, it became substantially more difficult for investors to maintain securities class actions in federal court, though such actions continued to surge.[69]

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61. *See, e.g.*, Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J. 181, 181 (2008).

62. John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 336 (1996).

63. *Id.* at 336.

64. *Id.* at 353.

65. *See* Wendy Gerwick Couture, Cyan, *Reverse*-Erie, *and the PSLRA Discovery Stay in State Court*, 47 SEC. REG. L.J. 21, 22 (2019).

66. *See* Avery, *supra* note 62, at 353–54.

67. *See* H.R. REP. NO. 104-369, at 32-37.

68. *See* Avery, *supra* note 62, at 336–37.

69. *See The Rise of Securities-Fraud Class Actions*, *supra* note 46, at 1071.

2. The Securities Litigation Uniform Standards Act of 1998 (SLUSA)

The immediate effect of the PSLRA was creating an avenue through the state courts for securities class actions to avoid the PSLRA's new procedural and substantive protections.[70] Though some commenters argue that there is little empirical evidence to support that such a venue shift actually took place on a significant scale, Congress acted swiftly in enacting the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which restricted to federal court most securities fraud class actions.[71] The magnitude of the shift in venue is discussed in detail in Part II of this note.[72] Notably, due to the absence of an express provision in the federal securities laws specifying the choice of law, securities fraud class action lawsuits required state courts to apply a "reverse-*Erie* doctrine" to determine whether to apply state or federal procedural law.[73]

The two main prongs of SLUSA are first, to preclude certain class actions based on state statutory or common law from adjudication in state or federal courts; and second, to make all covered class actions of 50 or more plaintiffs pertaining to covered securities removable from state to federal court.[74] In accordance with this goal of keeping such actions out of state courts, SLUSA amended Section 22 of the 1933 Act, allowing removal to federal court for claims brought under the Act despite its removal bar.[75] Public offerings of securities under the 1933 Act result in nationally listed and traded securities that land squarely

70. *See* Michael S. Flynn, Paul S. Mishkin, and Edmund Polubinski III, *The Supreme Court's* Cyan *Decision and What Happens Next*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 3, 2018), https://corpgov.law.harvard.edu/2018/05/03/the-supreme-courts-cyan-decision-and-what-happens-next [https://perma.cc/LM7F-8WUD].

71. *See* Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 UNIV. CIN. L. REV. 349, 353–54 (2011). It is worth noting that litigating in state court does not necessarily favor the plaintiff in a shareholder dispute. For instance, Richard Jennings wrote in the mid-1970s that "no shareholder in his right mind will litigate a shareholder grievance [related to corporate mismanagement or shareholder abuse] in a Delaware state court if some other forum is available." Roe, *supra* note 6, at 615 (quoting Richard W. Jennings, *Federalization of Corporation Law: Part Way or All the Way*, 31 BUS. LAW. 991, 997 (1976)).

72. *See infra* Section II.B.

73. *See* Couture, *supra* note 65, at 24-25; *see also* Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 4 (2006).

74. *See* Johnson, *supra* note 71, at 354-55.

75. *See id.* at 358.

under SLUSA's definition of covered securities, leading to the conflict at the heart of *Cyan*.[76]

SLUSA also contained several exceptions, such as a "Delaware Carve-Out" preserving state court jurisdiction for covered class actions based upon the state law of the issuer's incorporation, as well as exemptions for actions brought by state regulators or state pension plans.[77] The Supreme Court subsequently construed SLUSA's provisions broadly in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, holding that such an interpretation properly followed the intent of Congress in enacting SLUSA to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of [SLUSA]."[78] Notably, SLUSA's amendments to the 1933 and 1934 Acts were "substantially identical."[79]

3. Continued Federalization of Class Actions under the Class Action Fairness Act (CAFA)

In 2005, Congress passed a third set of class action reforms, the Class Action Fairness Act (CAFA), which continued the trend of directing class action litigation to the federal courts. CAFA conferred federal jurisdiction over class actions with 100 or more claimants, an amount in controversy exceeding $5 million, and a new "minimal diversity" requirement, satisfied if any member of the plaintiff class was from a different state than the defendant.[80] However, CAFA contained numerous exceptions and carve-outs, including for covered securities as defined by SLUSA and class actions concerning internal corporate governance (dubbed the "Delaware Carve-Out").[81] The reforms introduced in CAFA thus had little impact on securities litigation in general.[82] Edward Sherman attributes this result to the fact that it took so long to pass the law that "court decisions, judicial oversight, and 2003 amendments to the federal rules" preempted many of the originally

76. *See id.* at 358–59.
77. *Id.* at 354; *see, e.g.*, 15 U.S.C. § 78bb(f)(3)(A).
78. 547 U.S. 71, 82 (2006); *accord* S. REP. No. 105–182, at 2 (1998).
79. *Dabit*, 547 U.S. at 82 n.6.
80. Johnson, *supra* note 71, at 356–57.
81. *See id.* at 354, 357.
82. *See id.* at 365 fig.1 (showing a steady rise in state securities class actions since 2005).

intended class-member-oriented reforms, leaving alleged forum-shopping as CAFA's ultimate target.[83]

Despite the decade-long effort by Congress to thwart unprincipled or opportunistic class-action lawsuits, the reforms had the effect of driving many smaller plaintiffs' firms out of the securities arena, while larger firms emerged strengthened.[84] The resulting securities class-action landscape thus resembled the securities industry in the wake of the 1933 Act, when dominant underwriters were able to regain market share from cost competitors due to heightened regulatory entry barriers.[85]

C. THE FEDERAL COURTS

In the years leading up to *Cyan*, the federal courts were split over whether 1933 Act claims could properly be brought in state courts in light of SLUSA reforms.[86] The split was "dramatic"—a majority of district courts in the U.S. Court of Appeals for the Second, Third, Fourth, Fifth, and Tenth circuits held that SLUSA divested state courts of their jurisdiction to hear 1933 Act cases, including class actions, while a majority of district courts in the First, Seventh, Ninth, and Eleventh circuits held that state court jurisdiction was unchanged by SLUSA and remanded the challenged cases.[87] Even as rulings on motions to remove or remand 1933 Act claims during this period acknowledged the lack of clarity in SLUSA's removal provision, absent further guidance from Congress, courts continued to reach conflicting results when attempting to resolve the discrepancy.[88]

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83. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1594–95 (2006).

84. *See* Johnson, *supra* note 71, at 350; *see also* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 UNIV. PA. L. REV. 1593, 1594 (2008) ("When past reforms targeted class action lawyers, however, some of those lawyers made out quite well, proving that as lawyers adapt, the fittest may not only survive but thrive.").

85. *See supra* Section I.A.; *see also* Mahoney, *supra* note 16, at 31.

86. *See, e.g.*, Knox v. Agria Corp., 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009), *abrogated by* Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018); *cf.* Fortunato v. Akebia Therapeutics, Inc., 183 F. Supp. 3d 326, 332 (D. Mass. 2016); Pipefitters Locals 522 & 633 Pension Tr. Fund v. Salem Commc'ns Corp., No. CV 05-2730 RGK MCX, 2005 WL 6963459, *3 (C.D. Cal. June 28, 2005).

87. *See* Brief of Amici Curiae Law Professors in Support of Petitioners at 4-5, Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018) (No. 15-1439), 2016 WL 3538388, at *11–12 [hereinafter Brief of Law Professors].

88. *See supra* note 86.

The main guidance offered by the Supreme Court in this period was *Kircher v. Putnam Funds Trust*, which addressed whether orders to remand certain cases to state court under SLUSA could be appealed.[89] However, some district courts chose to disregard this portion of the opinion as it was dicta, and instead performed their own analyses or distinguished *Kircher* in other ways, reaching the opposite result.[90] Thus, class actions alleging pure 1933 Act claims could be filed in state or federal court in some jurisdictions, while they could be filed only in federal court in other jurisdictions, "a phenomenon that Congress could not have . . . intended when it enacted SLUSA."[91] Of particular note was the split between courts in California and New York, specifically between the U.S. District Court for the Northern District of California—holding that 1933 Act class actions were not removable to federal court—and the U.S. District Court for the Southern District of New York—holding that SLUSA granted exclusive jurisdiction over such class actions to the federal courts.[92] The potential for forum shopping by aspiring Section 11 claimants in these jurisdictions was particularly concerning for high-tech firms based in Silicon Valley, many of which listed their initial public offerings (IPOs) on New York exchanges; indeed, filings of such cases in California state court increased rapidly between 2011 and 2018.[93]

Courts in the pre-*Cyan* era realized the inherent ambiguity in Congress's amendments to the 1933 Act.[94] However, despite the debate over the proper application of SLUSA and CAFA to 1933 Act claims, relatively few plaintiffs actually attempted to litigate such claims in state court.[95]

Two pre-*Cyan* decisions demonstrate the statutory interpretation that state and federal courts had to engage in to resolve 1933 Act forum

89. 547 U.S. 633, 648 (2006). Justice Scalia concurred in the judgment of an otherwise united Court, but did not join Part II of the opinion, which squarely addressed the scope of SLUSA's removal bar as it related to class actions brought pursuant to state law claims. *See id.* at 640-44, 648.

90. *See* Niitsoo v. Alpha Nat. Res., Inc., 902 F. Supp. 2d 797, 803–04 (S.D. W. Va. 2012) (holding that the 1933 Act only permitted removal of securities class actions alleging state law fraud claims under the § 77v(a) removal bar and remanded the case).

91. Brief of Law Professors, *supra* note 80, at 8.

92. *Id.*

93. *See id.* at 8–9; Michael Klausner et al., *State Section 11 Litigation in the Post-*Cyan *Environment (Despite* Sciabacucchi*)*, 75 BUS. LAW. 1769, 1775 fig.1 (2020).

94. *See Niitsoo*, 902 F. Supp. 2d at 804.

95. *See infra* Section II.B.

disputes. In *Knox v. Agria Corp.*, the U.S. District Court for the Southern District of New York directly addressed the division among district courts on the issue of whether the "anti-removal provision" applied to class actions raising solely 1933 Act claims.[96] Recognizing both the "jurisdictional anomaly" created by SLUSA's additions to Section 16, and the inherently "labyrinthine" nature of SLUSA's amendments, the court held that SLUSA's exemptions did not bar removal from state court and consolidation with the ongoing federal court case.[97] This reading purportedly "harmonize[d] with the rest of SLUSA."[98]

By contrast, in *Luther v. Countrywide Financial Corp.*, the California Court of Appeal held that 1933 Act claims were not "covered class actions" under the text of SLUSA.[99] Just because SLUSA had intended to bar certain class actions, it did not necessarily follow that the law was meant to prevent all class actions; the court accordingly preserved the 1933 Act's concurrent jurisdiction and bar on removal for actions brought in state court.[100] The *Luther* court dismissed the statutory interpretation of *Knox* as flawed and disagreed with its legislative intent argument, successfully anticipating the Supreme Court's analysis of the issue.[101]

II. *CYAN* AND AFTERMATH

In response to the heightened pleading and class certification standards resulting from class action reform in the PSLRA and SLUSA, 1933 Act class actions were increasingly brought in state courts.[102] In recent years, state court securities class action lawsuits are once again on the rise.[103] Part I described the development of the federal securities laws as they pertain to class actions; Part II now evaluates the *Cyan* decision and its impact on the securities class-action landscape at the state level.

96. 613 F. Supp. 2d 419, 422 n.1 (S.D.N.Y. 2009).
97. *Id.* at 423–25.
98. *Id.* at 425.
99. 125 Cal. Rptr. 3d 716, 717–18 (Ct. App. 2011).
100. *See id.* at 721–22.
101. *See id.*
102. *See* Flynn et al., *supra* note 70.
103. 138 S. Ct. 1061, 1066 (2018).

A. THE *CYAN* DECISION

The Supreme Court ruled unanimously in *Cyan, Inc. v. Beaver County Employees Retirement Fund* that class actions brought under the 1933 Act as amended by SLUSA were: (1) permitted to be brought in state court; and (2) were not removable to federal court.[104] The opinion, authored by Justice Elena Kagan, upheld the bar on removal for actions alleging claims purely under the 1933 Act.[105] In its analysis, the Court distinguished the PSLRA's substantive changes to the 1933 and 1934 Acts, which applied to 1933 Act claims brought in state court, from procedural changes that only applied to suits brought in federal court.[106]

The relevant SLUSA amendments consisted of "two operative provisions, two associated definitions, and two 'conforming amendments'" to the jurisdictional section of the 1933 Act.[107] In addition to prohibiting certain "covered class action[s]" based on state law from being brought in any state or federal court, SLUSA also provided that covered class actions concerning securities fraud were removable to federal court,[108] where the case was subject to dismissal as a precluded action.[109] The intent of this removal provision was to ensure that even in the case where state courts refused to faithfully obey SLUSA's preclusion provisions, a federal court could properly make the preclusion determination.[110]

The two conforming amendments, intended to affect SLUSA's scheme of restricting certain class actions, applied SLUSA to both: (1) the 1933 Act's bar on removal for claims brought in state court; and (2) concurrent jurisdiction for state and federal district courts over cases brought under the 1933 Act with the exception of covered class actions under SLUSA.[111] This second amendment lay at the "heart of the parties' dispute," namely, whether lawsuits bringing claims solely under the 1933 Act could properly be brought in state court.[112]

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104. *Id.*
105. *Id.*
106. *Id.* at 1066–67.
107. *Id.* at 1067.
108. *See id.*; *see also* Kircher v. Putnam Funds Tr., 547 U.S. 633, 643 (2006).
109. *See Kircher*, 547 U.S. at 644.
110. *Cyan*, 138 S. Ct. at 1068.
111. *See id.* at 1068.
112. *See id.* Cyan, Inc. was a telecommunications company (subsequently acquired by Ciena Corp.) that sold shares to investors in an initial public offering. Press Release, Ciena Corp., Ciena Completes Acquisition of Cyan (Aug. 3, 2015),

The Court resolved the question on strictly textual grounds, finding that "[SLUSA] says what it says—or perhaps better put here, does not say what it does not say."[113] In the absence of a clear congressional intent to amend the 1933 Act to disallow concurrent jurisdiction for state courts, pure 1933 Act claims, including class actions, would remain within the state courts' purview.[114] In doing so, the Court applied the presumption in favor of concurrent jurisdiction for state and federal courts when interpreting federal law.[115] The "except clause" of § 77p(b) barred certain securities class actions based on state law from state court, but did nothing to deprive state courts of jurisdiction over class actions based on federal law, meaning that state courts retained the power to hear 1933 Act suits, including class actions.[116] The Court rejected the argument that the "except clause would serve no purpose at all" unless it was indeed intended to divest state courts of 1933 Act class actions.[117] Instead, the "except clause" was construed to bar "mixed" securities class actions containing claims under both the 1933 Act and state law.[118] Thus, state courts retained concurrent jurisdiction only over pure 1933 Act violations.

Additional policy considerations in support of the Court's decision were raised in amicus briefs, though left unaddressed by the Court, likely due to a desire to limit the scope of the decision to a narrow and

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https://www.ciena.com/about/newsroom/press-releases/Ciena-Cyan-Acquisition-Now-Closed_prx.html [https://perma.cc/V2VJ-NRT4]. The IPO was a failure, with shares opening down 9%. *Cyan Inc shares open below IPO price*, Reuters, (May 9, 2013), https://www.reuters.com/article/cyan-ipo/cyan-inc-shares-open-below-ipo-price-idUKL3N0DQ3QW20130509 [https://perma.cc/SL45-NJBL].

113. *Id.* at 1069.

114. *See id.*

115. *See id.* at 1069 n.2 (citing Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 378 (2012)). The amicus brief by scholars of federal jurisdiction and securities law clearly identified points that the Court found persuasive, particularly the presumption in favor of concurrent state court jurisdiction when interpreting federal law (set forth in Tafflin v. Levitt, 493 U.S. 455, 458 (1990)), but also the lack of an "explicit statutory directive" withdrawing state court jurisdiction in SLUSA. *See generally* Brief of Amici Curiae Federal Jurisdiction & Securities Law Scholars in Support of Respondents at 2–3, 9–10, Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018) (No. 15-1439), 2017 WL 4805224.

116. *See Cyan*, 138 S. Ct. at 1069.

117. *Id.* at 1073.

118. *See id.* at 1073–74.

summary statutory interpretation matter.[119] For one, the fact that state courts had possessed concurrent jurisdiction over 1933 Act claims for over six decades at the time SLUSA was passed provided hefty precedent in favor of retaining that jurisdiction, especially because Congress had not provided a clear indication of its intent to divest it when enacting SLUSA.[120] Additionally, SLUSA's "core purpose" was to limit class actions brought pursuant to state law securities claims by making "[f]ederal court the exclusive venue for securities *fraud* class action litigation."[121] One of the most irksome litigation tactics employed by plaintiffs' lawyers following the PSLRA was circumventing the heightened pleading requirements for 1934 Act § 10(b) fraud claims by bringing cases in state court.[122] However, the PSLRA did not heighten pleading standards on 1933 Act claims, undercutting a key argument for applying SLUSA's restrictions to such suits, as the pleading requirements for such claims remained the same in state and federal court.[123]

Due to its narrow focus on the proper construction of SLUSA as it pertained to the 1933 Act, *Cyan* left a number of questions unanswered. For one, the Court distinguished the PSLRA's substantive changes, applying to all cases brought under the 1933 and 1934 Acts, from its procedural changes, applying only to suits brought in federal court.[124] However, the Court did not explicitly address the question of whether the discovery stay mandated by the PSLRA applied in 1933 Act cases brought in state court, though the question was raised in several briefs.[125]

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119. It was, after all, Justice Kagan who famously proclaimed that "we're all textualists now." Harvard L. Sch., *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/Z75Y-NVZN].

120. *See* Brief of Institutional Investors as Amici Curiae Supporting Respondents at 4, Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018) (No. 15-1439), 2017 WL 4770980 [hereinafter Brief of Institutional Investors].

121. *Id.* at 11, 14 (quoting H.R. REP. NO. 105-640, at 10 (1998)).

122. *See id.* at 12.

123. *See id.* at 12–13.

124. *See* Couture, *supra* note 65, at 24.

125. *See id.* at 24 (citing Brief for Petitioners at 27, *Cyan*, 136 S. Ct. 1061 (No. 15-1439), 2017 WL 3773872); *see also* Brief of Institutional Investors, *supra* note 113, at 16; Brief of the Securities Industry & Financial Markets Association et al. as Amici Curiae in Support of Petitioners at 10, *Cyan*, 136 S. Ct. 1061 (No. 15-1439), 2017 WL 3948181; Brief of Law Professors, *supra* note 80, at 11–12. Couture contends that the reverse-*Erie* doctrine applies to the PSLRA discovery stay, and, in the absence of an express preemption of state discovery rules in the statute, that the discovery stay should

Michael Klausner identifies two additional procedural issues of primary importance that arise in Section 11 cases: pleading standards for complaints to survive motions to dismiss, and whether and how parallel state and federal cases are coordinated or consolidated.[126] How state courts choose to handle these issues will have a far more significant impact on where investors choose to bring 1933 Act suits in the future than any perceived advantages of forum-shopping. Though these questions remain unsettled, some argue that the PSLRA discovery stay does not apply, leaving state courts to apply local discovery rules, and perhaps judicial discretion.[127]

B. FILING AND SUCCESS RATES FOR STATE SECURITIES CLASS ACTIONS BEFORE AND AFTER *CYAN*

In the aftermath of the *Cyan* decision, critics predicted a new wave of forum-shopping by class-action litigators and "inconsistent, unpredictable standards across multiple jurisdictions."[128] Worth noting is that this was, of course, the same situation that preceded *Cyan*.[129] The intervention of the *Cyan* decision provides a useful lens to evaluate the claim of whether securities class actions should be restricted to the federal courts.

The two primary sources of data for this section are articles describing empirical studies spanning the period from 1995–2010[130] and 2011–2019,[131] respectively. Johnson's 2011 study of securities class action suits brought in state court provides highly detailed data on class-action filings during and after the class-action reform era.[132] The data demonstrate that the reform acts were initially quite successful, reducing state securities class-action filings from 50–100 per year in the immediate aftermath of the PSLRA and SLUSA to less than 50 per year

not apply to 1933 Act claims brought in state court. *See* Couture, *supra* note 65, at 24-26.

126. *See* Klausner et al., *supra* note 93, at 1771.
127. *See* Couture, *supra* note 65, at 31.
128. Flynn et al., *supra* note 70.
129. *See supra* Section I.D.
130. *See generally* Johnson, *supra* note 71.
131. *See* Klausner et al., *supra* note 93, at 1771.
132. *See generally* Johnson, *supra* note 71.

from 2001–2003.[133] However, from 2004 onwards, state securities class actions rose steadily, exceeding 250 filings annually by 2010 and actually exceeding the amount of federal security class-action filings.[134] Whether an intended consequence or an unintended byproduct of congressional reform, the worst fears of the drafters of the PSLRA and SLUSA had come to pass.

However, the data presented in figures one and two of the Johnson article include *all* securities-related class actions brought in state court. The specific data on Section 11 and 12 class-action filings demonstrates that plaintiffs rarely pursue IPO claims in state court, bringing between zero and three such cases per year from 1999–2010.[135] The main drivers of state-level securities class actions during this period were Merger & Acquisition (M&A) objection class action suits, which took advantage of SLUSA's Delaware carve-out to bring state court actions that had the added advantage of exerting enormous pressure on defendants to settle in order to be able to complete their transaction swiftly.[136]

Klausner's study of state-level Section 11 litigation in the post-*Cyan* environment picks up in 2011, leaving no gap in the data set.[137] The data shows an increase in state court filings of IPO suits, even in the years preceding *Cyan* compared to the previous decade, but the spike in such filings following *Cyan* is remarkable.[138] IPO claims brought exclusively in state court comprise 22 percent of 1933 Act cases in the post-*Cyan* years, as opposed to 18 percent in the four years preceding the decision.[139] Based on this empirical filing data, Klausner concludes that "unless Congress intervenes, the days of Section 11 cases being filed largely in federal court are over."[140] The New York courts in particular are now a popular forum for Section 11 cases, with 40 percent of post-*Cyan* state cases filed in a forum that had heard *no* Section 11

133. *Id.* at 365–66 figs.1 & 2. Johnson notes that a contributing cause of the drop in state level filings could also have been the bursting of the dot-com bubble and a concomitant spike in federal class-action filings in 2001, as shown in Figure 2. *See id.* at 366.

134. *See id.* at 366 & n.96.

135. *See id.* at 376 figs.9 & 10.

136. *See id.* at 378, 384–85.

137. *See* Klausner et al., *supra* note 93, at 1775 fig.1.

138. *See id.*

139. *Id.* at 1775 fig.2.

140. Michael Klausner et al., *State Section 11 Litigation in the Post-Cyan Environment*, BUS. LAW. (2020) (unpublished manuscript at 7) (on file with author).

cases prior to the decision.[141] Additionally, the study found that state courts are less likely than federal courts to grant motions to dismiss[142] and that Section 11 cases are marginally more likely to settle when brought in state court.[143] However, settlement data shows no significant relationship between settlement size and venue choice, particularly when large outlier settlements from federal court cases are excluded.[144]

C. FURTHER DEVELOPMENT OF SECTION 11 SUITS

Because *Cyan* was resolved purely on questions of statutory interpretation, the tasks of filling in policy justifications and making sense of unanswered procedural questions was left to the courts below.[145] *In re Everquote, Inc. Securities Litigation* discussed the split among state courts on whether the PSLRA's discovery stay applies in state court, both at the concurrent New York level and in other states.[146] Noting the "undesirable . . . and absurd incentive" that would be created by inconsistent discovery regimes in state and federal courts, and following an extensive reverse-*Erie* interpretation of the 1933 Act as amended, the court concluded that the PSLRA's stay did apply to "*any private action* arising under [the] subchapter," including a Section 11 case.[147]

A novel question of corporate governance briefly arose when *Cyan* was applied in the Delaware courts, leading to a surprising result that was soon overturned. The case of *Salzberg v. Sciabacucchi* centered on a Section 11 class action resulting from alleged misstatements in the registration statements of two Delaware corporations.[148] The issue, one of first impression in Delaware, was whether the federal forum provisions (FFPs) contained in the corporate charters were enforceable

141. Klausner et. al, *supra* note 93, at 1779.

142. *See id.* at 1777 tbl.1. Between 2011 and 2019, state courts granted motions to dismiss in 28% of all cases, compared to 39% in federal courts. *Id.*

143. *See id.* at 1778 tbl.2. Between 2011 and 2019, 67% of Section 11 cases brought in state court settled, compared to 65% of such cases brought in federal court. *Id.*

144. *See id.* at 1780-81.

145. *See supra* Section II.A.

146. *See* 106 N.Y.S.3d 828, 828–30 (Sup. Ct. 2019).

147. *See id.* at 834–35, 837 (emphasis in original).

148. No. 2017-0931-JTL, 2018 WL 6719718, at *7 (Del. Ch. Dec. 19, 2018), *rev'd*, Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020).

under the Court's upholding of the 1933 Act's removal bar in *Cyan*.[149] Surprisingly, the Delaware Chancery Court held that shareholders could not be bound to a particular forum when "the claim [did] not involve rights or relationships that were established by or under Delaware's corporate law."[150]

The Delaware Supreme Court soon intervened and reversed. Describing FFPs as a "relatively recent phenomenon designed to address the post-*Cyan* difficulties presented by multi-forum litigation of Securities Act claims," the court found that such provisions fell within the plain meaning of § 102(b)(1) of the Delaware General Corporation Law (DGCL).[151] Additionally, the court stated that FFPs advanced the DGCL's policy goals of "predictability, uniformity, and prompt judicial resolution to corporate disputes," a familiar argument to advocates of moving all class-action disputes to the federal courts.[152] This result clearly demonstrates the limit of *Cyan*'s influence on matters outside the narrow statutory grounds on which the case was decided.

III. ANALYSIS

Cyan and subsequent cases highlight the importance of enacting federal legislation with consistent standards in federal and state court, particularly where the enacted law affects claims that can be brought in state courts. The PSLRA applied substantive reforms to the 1933 and 1934 Acts that apply in state and federal courts. The fact that certain procedural reforms only applied to actions brought in federal court due to the idiosyncrasies of the 1933 Act created a new way for plaintiffs to make end-runs around SLUSA in the same way that the gaps in the PSLRA incentivized lawyers to bring actions in state courts.

Empirical data on securities class action filings demonstrates that in the wake of *Cyan*, investors are eager to bring Section 11 suits in state court.[153] However, it is too early to say whether this is a permanent increase in litigation, or merely a temporary bump resulting from litigators testing the waters in state courts. The year after the PSLRA passed also saw a massive spike in state-level securities class-action filings that receded almost immediately as plaintiffs' lawyers realized

149. *Id.* at *15.
150. *Id.* at *3.
151. Salzberg v. Sciabacucchi, 227 A.3d 102, 137 (Del. 2020).
152. *Id.*
153. *See supra* Section II.B.

the forums were not as hospitable as Congress had led them to believe.[154] Deciding whether state or federal procedural law applies to such actions will likely be far more determinative in whether this trend becomes permanent, particularly in the unlikely scenario that state courts apply more permissive discovery rules to securities class actions and the Supreme Court does not return to the issue. As demonstrated by the swift reversal of *Salzberg v. Sciabacucchi*, it is hard to imagine that such a significant asymmetry in discovery rules can persist.

In starker terms, the decision is the latest iteration in the long-running battle between investors and corporations, fought over the past 25 years in Congress, federal and state courts, and increasingly now in front of the Supreme Court. Advocates for aggressive securities fraud litigation and the class action vehicle should not be excessively bullish about a holding that affirmed a procedural advantage for a small subset of securities class actions related to initial securities offerings, particularly because the result was reached strictly through statutory interpretation rather than on any policy grounds. Still, the ruling marks a narrow but significant victory for shareholders and their advocates, who may avail themselves of state law forums where appropriate; particularly, the Delaware courts, in Section 11 cases where no federal forum provision in the corporate charter mandates removal. Investors and plaintiffs' lawyers alike can take comfort that nearly 90 years after the institution of the federal securities regulation scheme, courts continue to honor Congress' original intent of compensation for all injured investors in the absence of transparent and honest disclosure in the securities markets.

154. *See* Johnson, *supra* note 71, at 365–66 figs.1 & 2.