It's Long Past Time to Say 'So Long' To State Court Securities Litigation. The Ball Is Now in Congress' Court.

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When Congress enacted the Securities Exchange Act of 1934, providing for federal regulation of securities traded on the public markets, it took the opportunity to consider conforming amendments to the sister statute regulating initial public offerings it had enacted the year before, the Securities Act of 1933. One such amendment would have done away with the '33 Act's concurrent jurisdiction and removal bar provisions, instead providing for exclusive federal jurisdiction like the new '34 Act did. An ABA Special Committee had advocated for the change, which was included in the original Senate bill, out of concern that concurrent jurisdiction "will inevitably result in varied interpretations of the Act."[1] The Special Committee warned that "in view of the ['33Act's] heavy liabilities," "the resulting uncertainty" of "varied [and inconsistent] interpretations" by state and federal courts "will almost certainly operate as a detriment to legitimate business."[2] Unfortunately, the amendments were not adopted and the prophecy has proved prescient.

As senior SEC officials, the Treasury Department, and stock exchange leaders have recognized, the threat of protracted and often frivolous securities class action litigation has contributed to a decades-long decline in IPOs. [3] Rather than risk becoming the target of vexatious securities litigation,

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[1] *Report of the Special Committee on Amendments to the Securities Act of 1933*, 59 A.B.A. REP. 565, 580-81 (1934). In the Senate version of the bill enacting amendments, the ABA's recommendation to do away with concurrent jurisdiction and the removal bar was adopted. S. 3301, 73d Cong. § 9 (1934) (proposing to strike out "concurrent with State and Territorial courts" from section 22(a)); 78 CONG. REC. 8703 (1934) (proposing to "insert[] before the word 'jurisdiction' the word 'exclusive' and . . . strik[e] out 'concurrent with State and Territorial courts'").

[2] 59 A.B.A. REP. at 580-81

[3] "The potential for class action securities litigation may discourage companies from listing their shares on public markets and encourage companies that are already public to 'go private' rather than face the cost and uncertainty of securities litigation." U.S. Dept. of Treasury, *A Financial System That Creates Economic Opportunities—Capital Markets* at 33 (Oct. 2017) ("2017 Treasury Report"), https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf. In 2018, only 190 companies went public, a precipitous drop from the 949 IPOs filed in 1996 and the continuation of a downward trend that has persisted for two decades. *See, e.g.*, Phil Brown, *SEC Dangles Arbitration as Latest IPO-Bait*, INTELLIGIZE, Feb. 8, 2018 ("SEC IPO-Bait"), https://www.intelligize.com/sec-dangles-arbitration-latest-ipo-bait/; Renaissance Capital, *2018 IPO Market Hits a Four-Year High Despite Bad Q4*, Dec. 17, 2018, https://zy226-894a70.pages.infusionsoft.net/. In that same period, the number of total public companies was reduced by almost half – from 8,000 to slightly more than 4,000. Louise Lee, *The Decline of the IPO*, STANFORD UNIVERSITY GRADUATE SCHOOL OF BUSINESS, Apr. 12, 2018, https://www.gsb.stanford.edu/insights/decline-ipo. While IPOs and the number of public companies were in decline, the number of class actions increased from 151 in 2012 to more than 300 filed in the first nine months of 2017. 2017 Treasury Report at 33. In light of these trends, the 2017 Treasury Report recommended "investigat[ing] means to reduce costs of securities litigation for issuers in a way that protects investors' rights and interests, including allowing companies and shareholders to settle disputes through arbitration." Soon after, "SEC chairman . . . Jay Clayton voiced a [similar] desire to reverse the long-term decline in IPOs." SEC IPO-Bait, *supra*; *see also, e.g.*, Ben Bain, *Trump's SEC Mulls Big Gift to Companies: Blocking Investor Suits*, THE WASHINGTON

companies increasingly choose private capital transactions or strategic combinations in lieu of going public, a phenomenon that has had significant detrimental effects on both the economy in general and small investors in particular.[4] Congress attempted to stem the tide when it adopted the Private Securities Litigation Reform Act ("PSLRA") in 1995.[5] However, since that time, the number of public companies has been halved and the number of IPOs has declined from 949 in 1996 to an average of less than 150 per year.[6]

In part, this is because the PSLRA was primarily focused on claims under the '34 Act and thus did not squarely address the "heavy liabilities" and more lenient pleading standards under the '33 Act, a combination that makes newly public companies uniquely vulnerable to securities claims. Typical securities fraud claims under Section 10(b) of the '34 Act require proof of intentional or extremely reckless wrongdoing and must be brought in federal court[7] where the PSLRA imposes stringent pleading requirements and a stay of discovery until plaintiffs' claims are sustained.[8] In contrast, IPO-related claims under Sections 11 and 12 of the '33 Act impose liability for innocent or merely negligent misstatements.[9] Moreover, because the jurisdictional amendments to the '33 Act were not adopted, these IPO-related claims can be filed in either federal or state courts, the latter of which often lack familiarity with the complex federal securities laws and do not always adhere to the heightened scrutiny and protective procedures required by the PSLRA.[10]

POST, Jan. 26, 2018, https://www.washingtonpost.com/business/on-small-business/trumps-sec-mulls-big-gift-to-companies-blocking-investor-suits/2018/01/26/5318899e-0280-11e8-86b9-8908743c79dd_story.html?utm_term=.5dbef5d21456.

[4] The "[d]eath of the IPO . . . mean[s] that small investors are getting shut out of the most lucrative deals." Frank Partnoy, *The Death of the IPO*, THE ATLANTIC (Nov. 2018), https://www.theatlantic.com/magazine/archive/2018/11/private-inequity/570808/. Nasdaq's CEO, Adena Friedman, warned that if the trend continues, "job creation and economic growth could suffer, and income inequality could worsen as average investors become increasingly shut out of the most attractive offerings." *Id.* "[W]hen the highest-growth companies are private [and] aren't included in the funds that ordinary Americans hold, only the wealthiest members of society will enjoy the gains, intensifying inequality. . . . In his first major speech, [SEC Chair Jay Clayton] warned: 'The potential lasting effects of such an outcome to the economy and society are, in two words, *not good*.'" *Id.*

[5] 15 U.S.C. § 78u-4(b). In passing the PSLRA, Congress determined that in federal securities litigation, the "class-action device was being used to injure 'the entire U.S. economy.'" Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81 (2006) (quoting H.R. REP. NO. 104-369, at 31 (1995)).

[6] *See, e.g.*, SEC IPO-Bait, *supra* note 1; Lee, *supra* note 1.

[7] 15 U.S.C. § 78aa.

[8] In enacting the PSLRA, Congress noted that "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant" (Dabit, 547 U.S. at 81 (quoting H.R. REP. NO. 104-369, at 31)), as plaintiffs "abuse[d] . . . the discovery process to impose costs so burdensome that it [was] often economical for the victimized party to settle"—even if they had done nothing wrong (H.R. REP. NO. 104-369, at 31). "[T]hese abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors." Dabit, 547 U.S. at 81.

[9] Section 11 of the '33 Act imposes strict liability on the issuer for material misstatements in a registration statement while Section 12 imposes liability for misstatements in a prospectus. Directors and officers are afforded various due care or due diligence defenses but bear the burden of proof. 15 U.S.C. § 77a et seq.

[10] *See, e.g.*, Brief of Amicus Curiae Alibaba Holdings, et al. in support of Petition for Writ of Certiorari at 10-25, Cyan v. Beaver County Employees Retirement Fund, No. 15-1439 (Sept. 5, 2017), http://www.scotusblog.com/wp-content/uploads/2017/09/15-1439-tsac-alibaba.pdf (citing examples where state courts have employed more liberal

Plaintiffs' lawyers took full advantage of the significant discrepancy between state and federal courts in adjudicating IPO-related claims.[11] After the PSLRA was passed, they flocked to the state courts in an attempt to avoid the new law's reforms, filing claims under state law challenging disclosures dictated by the federal securities laws for nationally traded securities.[12] Three years later, Congress was forced to close that loophole by effectively pre-empting state law securities class actions in the Securities Litigation Uniform Standards Act ("SLUSA").[13]

However, in closing that loophole, Congress left another. In 2011, a California appeals court held that while SLUSA effectively pre-empted securities claims under state law, it did not divest the state courts of concurrent jurisdiction to hear IPO-related claims under *federal* law.[14] With the floodgates once again opened, an increasing number of plaintiffs filed stand-alone federal IPO claims in state courts.[15] This tactic has had its desired effect: 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.[16]

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pleading standards and held that the PSLRSA discovery stay does not apply, including in cases where parallel federal court actions have been dismissed with prejudice).

[11] *Id.*

[12] "[S]ince passage of the [PSLRA], plaintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the [PSLRA's] procedural or substantive protections against abusive suits are available." H.R. REP. NO. 105-803, at 14-15. "Rather than face the obstacles set in their path," the PSLRA "prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether." Dabit, 547 U.S. at 82.

[13] SLUSA was enacted to prevent securities litigation plaintiffs from filing actions in state courts, thereby "prevent[ing the PSLRA] from fully achieving its objectives." Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, §§ 2(2)-(3), 112 Stat. 3227 (1998). "The purpose of [SLUSA is] to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, Court." H.R. REP. NO. 105-803, at 13.

[14] Luther v. Countrywide Fin. Corp., 125 Cal. Rptr. 3d 716, 721 (Cal. Ct. App. 2011). State and federal courts in other states had decided to the contrary (*see, e.g.*, Knox v. Agria Corp., 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009) (holding that state courts lack jurisdiction over such actions)), which is why the majority of state court IPO cases were filed in the safe haven provided by Countrywide in California.

[15] "In the five years [after] Countrywide, fifty class action lawsuits alleging claims under the ['33 Act were] filed in California state court" compared to the six class actions under the '33 Act that were filed in California state courts in the prior twelve years. Amicus Brief of Securities Industry and Financial Markets Association, et al. at 7, Cyan v. Beaver Cty. Emps.' Ret. Fund, No. 15-1439 (Sept. 2017), http://www.scotusblog.com/wp-content/uploads/2017/09/15-1439-tsac-securities-industry.pdf

While the number of state court cases dipped after the Supreme Court granted certiorari in Cyan, now that the case has been decided in plaintiffs' favor, the number of state court IPO claims is widely expected to increase, both in California and in other jurisdictions where courts had previously ruled that concurrent jurisdiction was eliminated by SLUSA. *See, e.g.*, Joseph Grundfest et al., *After Cyan: Potential Trends in Section 11 Litigation*, LAW360, Mar. 27, 2018 https://www.cornerstone.com/Publications/Articles/After-Cyan-Potential-Trends-In-Section-11-Litigation.

[16] *Id*. (noting that median settlements in all state court-filed Section 11 cases from 2011 to 2015 were more than twice the median for similar cases in federal courts); *see also* Brief of Amici Curiae Law Professors at 21, Cyan v. Beaver Cty. Emps.' Ret. Fund, No. 15-1439 (Sept. 5, 2017), http://www.scotusblog.com/wp-content/uploads/2017/09/15-1439-tsac-

Several newly-public companies have tried different legal approaches meant to stem the tide of state court IPO-related securities litigation. Unfortunately, two decisions in 2018 have thwarted these efforts, not on policy grounds but because of the courts' narrow construction of existing law.

First, in Cyan v. Beaver County Employees Retirement Fund, 138 S. Ct. 1061 (2018),[17] the U.S. Supreme Court narrowly construed SLUSA, agreeing with the California appeals court that while SLUSA's less-than-clear language prevented plaintiffs from bringing securities class actions under *state* law, it did not strip state courts of jurisdiction to entertain *federal* IPO-related claims.[18] The Cyan Court also rejected the argument – made *by the government* – that SLUSA overrode the "unusual" removal bar included in the '33 Act, thereby also closing that avenue to the federal courts for IPO-related claims.

Second, just last month in the StitchFix/Roku case, the Delaware Chancery Court struck down forum selection charter provisions meant to ensure that IPO-related claims under the '33Act are filed in federal courts.[19] The Chancery Court determined that these federal forum selection provisions were not permitted because they did not seek to regulate disputes governed by Delaware law or related to the corporation's internal affairs.[20]

Law-Professors.pdf ("between 2011 and 2016, federal courts dismissed 31% of cases with only Securities Act claims" while "of the 47 such cases filed in California state courts, only *three* (or 6%) were involuntarily dismissed").

[17] https://www.supremecourt.gov/opinions/17pdf/15-1439_8njq.pdf.

[18] At least two commentators predicted this result even before Countrywide was decided, noting that "Congress appears to have reached the anomalous result of authorizing the removal and preemption of state law claims, while keeping federal 1933 Act claims in state court." Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 638 (2006) (citation omitted). "This created an 'upside-down effect': district courts were to remand class actions alleging 1933 Act violations back to state courts but retain jurisdiction over (and dismiss) precluded state-law class actions." Matthew O'Brien, *Choice of Forum in Securities Class Actions: Confronting "Reform" of the Securities Act of 1933*, 28 REV. LITIG. 845, 864 (2009). Cook asserted that SLUSA was inartfully if not mistakenly drafted, because although there is much in the legislative history referring to state versus federal courts, the stated "purpose" of the law described in the actual statute is "to limit the conduct of securities class actions under State law, and for other purposes." *Id.* (citation omitted). As O'Brien concludes, "While making federal courts the exclusive forum for all claims involving national securities might have been the intent of Congress, the end result was another loophole." *Id.* (citation omitted). Another commentator has suggested that "although SLUSA's legislative history indicates that some members of Congress supported removal of all 1933 Act claims, for political reasons these legislators 'may have balked at effectuating these intentions clearly in the statute' in order to assure passage." *Id.* at 864-65 (quoting Jordan A. Costa, *Removal of Securities Act of 1933 Claims After SLUSA: What Congress Changed, and What It Left Alone*, 78 ST. JOHN'S L. REV. 1193, 1196 (2004)).

[19] Sciabacchi v. Salzberg, C.A. No. 2017-0931-JTL (Del. Ch. Dec. 19, 2018), https://courts.delaware.gov/Opinions/Download.aspx?id=282830. The StitchFix decision has been appealed to the Delaware Supreme Court. However, the only reason that a federal forum selection provision of the kind at issue in StitchFix is necessary is that the '33 Act provides for concurrent jurisdiction. Moreover, even a victory in StitchFix on appeal will not solve the problem entirely – the decision would not be applicable to the almost 35% of public companies that are incorporated in states other than Delaware. As the SLUSA experience teaches, work-arounds do not always work. The only sure fire way to eliminate state court class action litigation of federal securities claims is to amend the '33 Act to provide for exclusive federal jurisdiction like the '34 Act does.

[20] The StitchFix/Roku decision, if not reversed on appeal, also effectively dooms an idea floated by SEC Chairman Clayton and Commissioner Pinowar as a possible means of encouraging more IPOs: Reconsideration of mandatory

The only realistic "fix" after StitchFix/Roku and Cyan, then, would appear to be an amendment to the '33 Act itself –a fix the Special Committee suggested eighty-five years ago and the Supreme Court itself alluded to in Cyan.[21] There is ample reason to require all federal securities class actions to be filed in federal court and little reason not to do so.

First, as noted above, securities litigation in non-expert state courts has resulted in a flood of cases being filed in state courts, often in parallel but with results inconsistent with nearly identical federal actions.[22] These state court IPO cases allow plaintiffs to evade the PSLRA, impose burdensome and expensive discovery before allegations are tested, and result in fewer claims being resolved at early stages of litigation and increasing settlements being extracted. [23] This state of affairs has provided even more disincentive for companies to consider going public, perpetuating the decline in IPOs that modern lawmakers and regulators have sought to reverse.

Second, as the Supreme Court recognized in Cyan, there is ample indication in the legislative history that SLUSA's supporters understood its purpose was "to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court."[24] Unfortunately, the Court found that SLUSA's implementing language was more

arbitration provisions such as those adopted by and later withdrawn by the Carlyle Group in response to objections from the SEC, Congress and investor advocates back in 2012. SEC IPO Bait, *supra* note 1. While the forum selection provisions at issue in StitchFix/Roku preserved a federal judicial forum and thus eliminated a major objection to the Carlyle arbitration provision, the Chancery Court's reasoning in StitchFix/Roku would preclude the inclusion of any forum selection provision – be it for federal court or private arbitration – for the adjudication of non-Delaware law disputes.

[21] Cyan, 138 S. Ct. at 1070.

[22] *See supra* notes 14 and 15.

[23] The increased exposure from state court litigation of IPO claims "has already translated into higher premiums for companies undertaking IPOs and it likely will affect premiums for IPO companies' D&O insurance renewals, at least in the companies' early years following their IPO. As actual claims experience accumulates in the coming months, and the actual costs of multi-jurisdiction litigation mounts, these D&O insurance-related impacts could be exacerbated." Kevin LaCroix, *What to Watch Now in the World of D&O*, THE D&O DIARY, Sept. 4, 2018, https://www.dandodiary.com/2018/09/articles/director-and-officer-liability/watch-now-world-2/.

[24] Cyan, 138 S. Ct. at 1072 (citing H.R. REP. NO. 105-803, at 13; H.R. REP. NO. 105-640, at 8-9; S. REP. NO. 105-182, at 3). As several former SEC Commissioners explained, in arguing that Cyan should have been decided differently:

> Statements of members of Congress during the debates further evidence this shared understanding that "[SLUSA] would in effect require that *every* large securities class action be brought into federal court." 144 Cong. Rec. S4778-03, S4797 (1998) (statement of Sen. Dianne Feinstein) (emphasis added); *accord* H. Subcomm. SLUSA Hearing at 1 (statement of Rep. Tom Bliley, Chairman, Comm. on Commerce) ("This legislation makes Federal court the exclusive venue for securities class actions. In this way, the trial bar will not be able to use State court as a means of evading the changes of the [PSLRA]."); *id.* at 4 (statement of Rep. Rick White) ("What [SLUSA] is all about is simply to realize the intent of the [PSLRA]. It does that by making sure that class action suits with securities that are traded on the three major securities trading exchanges in our country have to be subject to the rules that we passed last time [in the PSLRA] and have to go to Federal court.").

narrow than that purpose and prevented only state law, but not federal law, claims challenging IPO disclosures from being brought in state court.

Third, during the '33 Act's Congressional hearings, there was a significant emphasis on the need for expertise in interpreting and applying the Securities Act. Many felt that the D.C. Circuit Court of Appeals should have exclusive jurisdiction over disputes between securities regulators and issuers because the other *federal* courts lacked sufficient expertise and understanding of the markets to be trusted to adjudicate securities claims.[25] State courts were not even considered as an option; it was universally agreed that failed state regulation had contributed to the abuses that resulted in the crash of 1929, the very cataclysm which led to the enactment of the federal Securities Act and its entirely new federal securities regulatory regime.[26]

Finally, just one year later, the '34 Act unequivocally provided for exclusive federal jurisdiction.[27] Conforming amendments to the '33 Act would have done the same for IPO claims but were not adopted.[28] Why?

Brief For Former SEC Commissioners As Amici Curiae In Support Of Petitioners at 19-20, Cyan v. Beaver Cty. Emps.' Ret. Fund, No. 15-1439 (Sept. 5, 2017), http://www.scotusblog.com/wp-content/uploads/2017/09/15-1439-tsac-SEC-Commissioners.pdf (alterations in original).

[25] Some in Congress were concerned about giving all *federal appellate courts* jurisdiction over appeals of regulatory decisions because of lack of expertise, preferring that the D.C. Circuit have exclusive jurisdiction over such claims. It was concern over forcing *an issuer* to travel to Washington, *not* concern for a private litigant wanting to sue the issuer in his home town state court, that prompted the only discussion of travel burdens and costs in the legislative history. *Committee on Banking and Currency: Hearing on S. 875 before the U.S. Senate*, 73d Cong. 239 (1933). Even then, it was asserted that the greater "cost" would be to have inconsistent decisions coming from non-expert courts:

> Senator ADAMS. Why should a man in Coos Bay in the Northwest have to come to the District of Columbia? We will say that he wants to put out an issue of securities on a lumber company, and he would have to come down here to Washington, a 4-day trip, with the expense of coming and time of his attorney, and so forth, when he has a circuit court of appeals nearby. I think it too far to come and too great an expense.
>
> Mr. HOLTZOFF. It may not be as great as the expense of reconciling various [inconsistent] decisions.

Id. (statement of Hon. Alexander Holtzoff, Special Assistant to the Att'y Gen. of the United States).

Today concerns about inconsistent decisions between federal and *state* courts is almost certainly greater while concerns about the cost of travel are largely non-existent. *See, e.g.*, *infra* note 33.

[26] Some latter-day commentators have also observed that the provision for concurrent jurisdiction was consistent with the deference given to state courts at the time – but that rationale is also absent from the legislative history and cannot be reconciled with the exclusive jurisdiction provisions of the '34 Act adopted one year later.

[27] 15 U.S.C. § 78aa.

[28] S. 3301, 73d Cong. § 9 (1934) (proposing to strike out "concurrent with State and Territorial courts" from section 22(a) of the Securities Act of 1933); 78 CONG. REC. 8703 (1934) (proposing to "insert[] before the word 'jurisdiction' the word 'exclusive' and . . . strik[e] out 'concurrent with State and Territorial courts'").

In Cyan, the Supreme Court observed: "We do not know why Congress [in enacting SLUSA] declined [explicitly] to require . . . that 1933 Act class actions be brought in federal court."[29] The same observation could be made as to why Congress provided for concurrent jurisdiction in the first place. There is nothing in the legislative history of the '33 Act demonstrating that Congress gave any thought whatsoever to whether state courts ought to be permitted to adjudicate federal securities claims.[30] Back in 1933, not a single mention was made concerning the fora in which private litigants could bring their claims in all of the Congressional debates, hearings and reconciliation processes surrounding the Securities Act. Somehow, both the concurrent jurisdiction and the "unusual" removal bar provisions of the Securities Act appeared late in the process in the House bill, were removed after reconciliation, and reappeared just days before the final vote – almost as if someone realized at the last minute that the jurisdictional issue had not been addressed and just put something in.

Some have speculated that the provision for state court jurisdiction was meant to address the burdens of travel for investors back in 1933.[31] However, as far as the legislative history shows, that argument was first raised post-hoc in 1934 and even then was rejected by the Special Committee as "not

[29] Cyan, 138 S. Ct. at 1073.

[30] A provision for concurrent jurisdiction and a removal bar with respect to private claims appeared in HR 5480 when it was passed on May 5, 1933. 77 CONG. REC. 2954 (1933). There is no commentary in the record concerning the rationale behind the provision; there is only a single observation by a single congressman about the existence, but not the reasons for, the provision. *Id.* at 2948 (statement of Rep. Walter Lambeth) ("[c]ases under the [1933] act may be brought in the State courts, and no such case may be removed from a State court of competent jurisdiction to a United States court."). There were no concurrent jurisdiction or removal bar provisions in the Senate version of the Securities Act of 1933, S875, but after reconciliation, the provisions were included – again with no discussion. 77 CONG. REC. 3891-3903 (1933) (House); 77 CONG. REC. 3879-3888, 3904 (1933) (Senate).

[31] There is no evidence in the legislative history to support the lore that Congress may have wanted to protect the plaintiff who "lives deep in the heart of Texas." 1 LOUIS LOSS ET AL., FUNDAMENTALS OF SECURITIES REGULATION § 14.A.1 (7th ed. Supp. 2019).

valid." [32] That concern is certainly not valid today.[33] Perhaps the best explanation for the differing jurisdictional provisions in the '33 and '34 Acts offered by legal scholars is that they are a "myster[y]"[34] or mere "happenstance." [35]

Unfortunately, almost a century later, that "happenstance" is contributing to a shrinking IPO market. Given the absence of any apparent original purpose for granting concurrent jurisdiction over adjudication of IPO-related claims and Congress' more recent intent to prevent plaintiffs from evading the protections of the PSLRA by filing suit in state courts, it is time for Congress to finally and definitively close the remaining state-court loophole for adjudication of federal securities claims. As the Supreme Court suggested in Cyan, "If Congress . . . want[s] to deprive state courts of jurisdiction over [Securities] Act class actions, it ha[s] an easy way to do so: just insert . . . an exclusive federal jurisdiction provision (like [that included in the Securities Exchange Act]) for such suits." 138 S. Ct. at 1070. Eighty-five years after that very amendment was first proposed,[36] it is time for Congress to do exactly that.

[32] The first time Section 22's concurrent jurisdiction and removal bar provisions were explicitly addressed was a year later, in 1934, when Congress considered amendments to the hastily drafted 1933 Act in connection with the enactment of the Securities Exchange Act. The Report of the ABA Special Committee on Amendments to the Securities Act of 1933 recommended eliminating Section 22's concurrent jurisdiction and removal bar provisions stating there is "no validity" to the argument that the federal circuit courts should not have exclusive jurisdiction because of hardships of travel. *Report of the Special Committee on Amendments to the Securities Act of 1933*, 59 A.B.A. REP. 565, 580-81 (1934). Instead, as noted, the ABA was concerned that concurrent jurisdiction "will inevitably result in varied interpretations of the Act and in view of the heavy liabilities the resulting uncertainty will almost certainly operate as a detriment to legitimate business." *Id*. In the Senate version of the bill, the ABA's recommendation to do away with concurrent jurisdiction and the removal bar was adopted. S. 3301, 73d Cong. § 9 (1934) (proposing to strike out "concurrent with State and Territorial courts" from Section 22(a) of the '33 Act); 78 CONG. REC. 8703 (1934) (proposing to "insert[] before the word 'jurisdiction' the word 'exclusive' and . . . strik[e] out 'concurrent with State and Territorial courts'"). However, James Landis, a drafter of the '33 Act and the FTC Commissioner, who had said nothing on the issue in 1933, submitted a statement that the proposed amendment was "undesirable" because of "[t]he frequent inaccessibility, burdensome procedure and added expense of Federal court proceedings, as against State court proceedings." 78 CONG. REC. 8714, 8717 (1934) (statement of James Landis). It is unclear whether Landis' statement was the reason, or why he raised no such objection in 1933 or with respect to the exclusive jurisdiction provisions of the '34 Act, but the concurrent jurisdiction provisions of the 1933 Act were not amended as the ABA suggested and the original Senate bills had proposed.

[33] For example, the Santa Clara Superior Court where many post-Countrywide cases are filed, is .6 miles from the Northern District of California's San Jose Division and San Mateo Superior Court is virtually equidistant between the San Jose and San Francisco federal courts – a half-hour drive either way.

[34] Loss, *supra* note 32 (concluding that the "concurrent jurisdiction" provisions of Section 22(a) of the '33 Act are "one of the many mysteries in the SEC statutes.").

[35] AM. LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 183 (1969) ("[s]o far as the legislative history shows, th[e jurisdictional] difference in these two related statutes is pure happenstance").

[36] S. 3301, 73d Cong. § 9 (1934) (proposing to strike out "concurrent with State and Territorial courts" from Section 22(a)); 78 CONG. REC. 8703 (1934) (proposing to "insert[] before the word 'jurisdiction' the word 'exclusive' and . . . strik[e] out 'concurrent with State and Territorial courts'").