Law360
Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

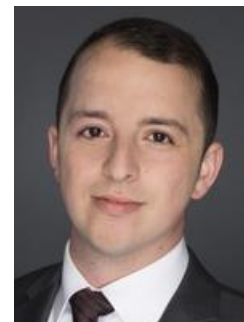
After Cyan: Creative Lawyering Can't Displace Clear Statute

By **Darren Robbins, James Jaconette and Michael Albert**
(March 26, 2018, 2:33 PM EDT)

In a win for the plaintiffs bar, the U.S. Supreme Court last week held that the Securities Litigation Uniform Standards Act did not strip state courts of jurisdiction to hear class actions alleging only Securities Act of 1933 violations. In this Expert Analysis series, attorneys explore the court's unanimous ruling in Cyan Inc. v. Beaver County Employees Retirement Fund, and what's next for plaintiffs and defendants.

Darren Robbins

James Jaconette


Michael Albert

The U.S. Supreme Court has now put to rest any notion that the Securities Act of 1933 means anything other than what it says. As expressly provided for by Congress, a plaintiff may choose to prosecute its 1933 Act claims in either state or federal court. And, when a plaintiff chooses to file a 1933 Act class action in a state court, defendants can no longer forum-shop by removing the case to federal court.

On March 20, 2018, the Supreme Court unanimously held in Cyan Inc. v. Beaver County Employees Retirement Fund that the amendments contained in the Securities Litigation Uniform Standards Act of 1998 did not alter the plain language of Section 22 of the 1933 Act, which provides for concurrent jurisdiction for 1933 Act claims and bars their removal when filed in a state court.[1] Justice Elena Kagan delivered the opinion of the court, which concludes that “SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did SLUSA authorize removing such suits from state to federal court.”[2]

Cyan is a victory for investors — no longer can defendants unilaterally override the statutory right of investors to prosecute a 1933 Act class action in a state court if they choose to do so.

Background and the Court’s Opinion

Cyan involves a securities class action brought under Section 11 of the 1933 Act by Beaver County Employees Retirement Fund, Retirement Board of Allegheny

County and Delaware County Employees Retirement System in San Francisco Superior Court. The pension funds allege that Cyan Inc., a supplier of hardware modules and software for communications networks, made false statements concerning its customer base and revenue prospects in the registration statement used in connection with its May 2013 initial public offering. By early 2014, Cyan's stock price declined to less than half of its IPO price as the truth about the company and its operations entered the market. Cyan moved to dismiss on jurisdictional grounds, asserting that SLUSA not only precluded certain state law class actions but also eliminated the ability of investors to bring federal law 1933 Act class actions in state courts.

The trial court rejected Cyan's contention, relying on an earlier California court of appeal decision holding that SLUSA did not preclude the ability of state courts to hear 1933 Act class actions — SLUSA's purpose, rather, was to thwart securities fraud class actions asserting violations of state law. Cyan challenged the trial court's ruling by filing a writ in a California court of appeal and a petition for review in the California Supreme Court. Both were denied.

On May 25, 2016, Cyan sought review before the U.S. Supreme Court. The petitioners argued that Section 22 of the 1933 Act, which, as amended by SLUSA, provides that state and federal courts shall have concurrent jurisdiction "except as provided in section 16 with respect to covered class actions" (the "except clause"), divests state courts of jurisdiction in 1933 Act class actions. On Oct. 3, 2016, the Supreme Court requested the views of the solicitor general on Cyan's petition. The solicitor general's amicus brief on behalf of the United States agreed with investors' reading that SLUSA did not divest state courts of jurisdiction. The solicitor general, however, also introduced the notion that notwithstanding the clear language of Section 22, SLUSA did authorize the removal of such suits to federal court.

The Supreme Court granted certiorari on June 27, 2017, and heard oral argument on Nov. 28, 2017. Justice Kagan authored the Supreme Court's unanimous opinion, which holds not only that plaintiffs can prosecute 1933 Act class actions in state courts, but also that defendants cannot remove such class actions from state court to federal court.

The Cyan opinion resolved the question of whether SLUSA eliminated the 1933 Act's bedrock principle of concurrent jurisdiction. Examining SLUSA's statutory language, the Supreme Court concluded that "[b]y its terms, [Section 22's] 'except clause' does nothing to deprive state courts of their jurisdiction to decide class actions brought under the 1933 Act."[3] The court also addressed Cyan's appeals to congressional intent and the statute's legislative history, ultimately determining that "[e]ven assuming clear text can ever give way to purpose, Cyan would need some monster arguments on this score to create doubts about SLUSA's meaning. The points Cyan raises come nowhere close to that level."[4]

Cyan's final argument that the "except clause" would be rendered meaningless under the respondent's interpretation appeared to gain more traction with the court, but was ultimately rejected by the court's conclusion that "[w]hatever questions remain as to the except clause's precise purpose — and we do not gainsay there are some — they do not give us permission to devise a statute (and at that, a transformative one) of our own."[5] The court's textualist approach in rejecting each of Cyan's arguments was foreshadowed by Justice Samuel Alito's repeated reference at oral argument to SLUSA's text as "gibberish," and may well explain the court's unanimous opinion.

The Supreme Court dealt another victory to investors by granting the solicitor general's request to address whether Section 16(c) of the 1933 Act, as amended by SLUSA, nonetheless authorizes defendants to remove class actions to federal court despite Section 22(a)'s clear removal ban, and then

holding that there was no such authorization. The court unanimously rejected the government's "proposed halfway-house position" rooted in legislative intent, recognizing that "this Court has no license to 'disregard clear language' based on an intuition that 'Congress must have intended something broader.'"[6]

The Implications of Cyan

Nearly a century ago, Congress made clear that investors can bring a 1933 Act class action in state court if they decide to do so. Last week, the Supreme Court underscored that point. Prior to Cyan, investors faced uncertainty as to whether they could proceed in state court when filing 1933 Act class actions. If investors selected a state court venue (as provided for by the statute), defense counsel often engaged in procedural maneuvering by interjecting jurisdictional challenges or removing cases to federal court. These challenges — at best — caused substantial delay in the ability of investors to secure a speedy resolution of the merits of their claims.

By making clear that claims under the 1933 Act can be brought in state court and cannot be removed, Cyan will eliminate wasteful and burdensome motion practice that has become commonplace in the context of 1933 Act class actions. While some in the business community speculate that Cyan will result in a "flood" of securities class actions in state court, those actually involved in 1933 Act class action litigation recognize that the aggregate number of 1933 Act class actions brought annually in federal and state courts is insubstantial. In fact, the frequency of 1933 Act state court filings bears more of a relationship to the number of IPO filings, the quality of the companies taken public, and the disclosures in those companies' registration statements than anything else. In the end, Cyan provides certainty and clarity, eliminating inconsistent interpretations and ensuring the more timely adjudication of 1933 Act class actions on their merits.

Darren J. Robbins and James I. Jaconette are partners at Robbins Geller Rudman & Dowd LLP. Michael Albert is an associate at the firm.

DISCLOSURE: Robbins Geller Rudman & Dowd is counsel to the plaintiffs/respondents in Cyan Inc. v. Beaver County Employees Retirement Fund.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] No. 15-1439, 583 U. S. ____ (2018).

[2] Id. (slip op. at 24).

[3] Id. (slip op. at 7).

[4] Id. (slip op. at 12).

[5] Id. (slip op. at 18).

[6] Id. (slip op. at 24) (quoting Michigan v. Bay Mills Indian Community, 572 U. S. ___ (2014) (slip op. at 11)).