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# INSIGHTS

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## Game-Changing Decision in IPO Litigation

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On September 1, 2020, the Superior Court in California's San Mateo County issued a game-changing opinion in *Restoration Robotics*: the dismissal of this Section 11 case for lack of jurisdiction due to federal forum provisions in the company's certificate of incorporation. This decision should change the trajectory of IPO D&O insurance pricing for the better.

Followers of this blog are familiar with the US Supreme Court decision in *Cyan* that caused a rush to state court houses by plaintiffs eager to file Section 11 suits against IPO companies.

The resulting frequency and severity of suits against IPO companies was catastrophic for D&O insurance carriers. It was also catastrophic in terms of the premiums IPO companies had to pay to obtain D&O insurance.

From the time of the *Cyan* decision in March 2018 through the second quarter of 2020, the average price for the first \$10 million of D&O insurance for an IPO company more than quadrupled, as did the size of the self-insured retention.

Woodruff Sawyer has long-advised IPO clients and others to insert federal forum provisions (aka the "Grundfest Solution") in their charter documents in the hope that this would be an effective way to keep Section 11 suits in federal court. The Delaware Chancery Court struck down such provisions as facially invalid in December of 2019. However, thanks in part to the funding group organized by Woodruff Sawyer, this decision was unanimously overturned by the Delaware Supreme Court in March of 2020.

As I wrote then, for insurance carriers to drop prices they need to see state courts agree that they have no jurisdiction to hear a Section 11 case against companies with federal forum provisions. The COVID-19 pandemic, however, caused courts to delay hearing and deciding such matters until now.

It is notable that this first dismissal was issued by Judge Weiner in San Mateo County given that her court has been regarded as the beginning of the Section 11 State Court phenomenon. Issuers, insurance carriers and brokers all look forward to other state courts coming to similar conclusions in cases brought before them.

The resulting decrease in D&O insurance pricing for companies doing a direct listing or an IPO will also make accessing the public markets much more affordable for companies.

Unfortunately, D&O insurance prices for mature public companies have also been on the rise, and that is likely to continue given carriers' views on the potential severity of the unusually large number of pending suits that have yet to be resolved.

Nevertheless, with the *Restoration Robotics* decision and others that will hopefully follow, the gap between pricing for mature public companies and IPO companies should begin to close, with IPO D&O insurance prices falling back to more reasonable levels.



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