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***Cyan*, Reverse-*Erie*, and the PSLRA Discovery Stay in State Court**

By Wendy Gerwick Couture*

I. Introduction

In this essay, I analyze an issue that is currently dividing courts and commentators: does the Private Securities Litigation Reform Act (“PSLRA”) discovery stay apply when Securities Act claims proceed in state courts? Last year, in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, the Supreme Court held that state courts have concurrent jurisdiction over Securities Act claims, whether asserted individually or as class actions, and that defendants do not have a right to remove these claims to federal court.¹ In the wake of *Cyan*, there has been an influx of Securities Act class actions filed in state courts, raising the question of which PSLRA provisions apply in state court. In particular, this fight has centered on the PSLRA discovery stay, which stays all discovery during the pendency of a motion to dismiss and which conflicts with many states’ permissive discovery rules.

In this essay, I seek to answer this question by applying the so-called “reverse-*Erie*” doctrine. First, I contend that the PSLRA does not expressly preempt states’ permissive discovery rules. Second, drawing from Supreme Court case law and scholarly commentary on the reverse-*Erie* doctrine, I identify the following considerations, which must be weighed to analyze whether federal law displaces a state procedure under an implied preemption or judicial choice-of-law analysis: (1) the state’s interest in applying its own procedure; (2) whether the state procedure applies to all like claims or singles out the federal claim; (3) whether the state procedure applies to both parties or singles out one party; (4) the degree to which the state procedure undercuts federal policy; (5) whether the federal procedure is internally-sourced or externally-sourced; (6) the degree to which the choice of procedure is potentially outcome-determinative; (7) if outcome-determinative, the risk of forum-shopping; and (8) if outcome-determinative, the risk of treating similarly situated parties differently based on access to different fora.

Although these considerations are mixed as applied to the

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PSRLA discovery stay, I contend that that they weigh against applying the PSLRA discovery stay in state court, especially in light of the presumption against preemption and the general rule that federal law takes state courts as it finds them.

II. Post-Cyan Uncertainty about the PSLRA Discovery Stay in State Court

In 1995, Congress enacted the Private Securities Litigation Reform Act (“PSLRA”),² in order to address perceived “abusive and meritless” securities lawsuits.³ According to the Joint Explanatory Statement of the Conference Committee, the PSLRA sought “to protect investors, issuers, and all who are associated with our capital markets from abusive securities litigation.”⁴ Among other perceived harms of abusive securities litigation, the Statement noted that “[i]nvestors always are the ultimate losers when extortionate ‘settlements’ are extracted from issuers” and that “the investing public and the entire U.S. economy have been injured by the unwillingness of the best qualified persons to serve on boards of directors and of issuers to discuss publicly their future prospects.”⁵

In order to accomplish this goal, the PSLRA added multiple restrictions applicable to litigation under the Securities Act and the Exchange Act, including appointment of lead plaintiff provisions,⁶ limitations on lead plaintiffs’ recovery,⁷ mandatory court review for violations of Federal Rule of Civil Procedure 11(b),⁸ and a safe harbor from liability for certain forward-looking statements.⁹ In addition, the PSLRA added a heightened scienter pleading requirement for securities fraud actions under the Exchange Act.¹⁰

Of particular relevance to this essay, the PSLRA added the following discovery stay to both Acts:

In any private action arising under this Act, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.¹¹

With this discovery stay, Congress sought to address the following two perceived abusive practices: (1) “the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without any regard to any underlying culpability of the issuer, and with only the faint hope that the discovery process might lead eventually to some plausible cause of action”; and (2) “the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle.”¹² In short, the discovery stay sought to prevent (1) fishing-expedition discovery

and (2) extortive discovery.

In the aftermath of the PSLRA, securities class actions migrated to state courts, usually asserting claims under state law.¹³ By asserting state securities claims in state court, litigants sought to avoid the strictures of the PSLRA.¹⁴ In response, in 1998, Congress enacted the Securities Litigation Uniform Standards Act (“SLUSA”) “in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995.”¹⁵ SLUSA added the following key provision to both the Securities Act and the Exchange Act:

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

- (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
- (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.¹⁶

In short, most securities class actions premised on state law were deprived of jurisdiction in either federal or state court.

Post-SLUSA, courts faced two interpretive questions: (1) whether SLUSA deprived state courts of jurisdiction to hear securities class actions premised, not on state law, but on the Securities Act; and (2) whether SLUSA granted defendants a right to remove Securities Act class actions from state court to federal court. Unlike Exchange Act claims, over which federal courts have exclusive jurisdiction, Securities Act claims are subject to concurrent federal and state jurisdiction.¹⁷ In addition, the Securities Act bars the removal of Securities Act actions from state to federal court.¹⁸ At issue was whether SLUSA affected one or both of these general rules to the extent that Securities Act claims were asserted as class actions in state court.

In *Cyan, Inc. v. Beaver County Employees Retirement Fund*, the Supreme Court answered both of these questions in the negative.¹⁹ First, relying on SLUSA’s text, which applies only to covered class actions “based upon the statutory or common law of any State,” the Court held that SLUSA does not deprive state courts of jurisdiction over securities class actions asserting Securities Act claims.²⁰ Thus, post-*Cyan*, both state and federal courts have jurisdiction over Securities Act class actions. In addition, for the same reason, the *Cyan* Court held that defendants do not have a right under SLUSA to remove Securities Act class actions that are filed in state court.²¹ Thus, if a plaintiff elects a state forum, the action will proceed in state court. The Court acknowledged that, if Securities Act class actions proceed in state court,

plaintiffs can evade some of the PSLRA's strictures, arguably contrary to the policy rationale underlying the enactment of SLUSA.²² Nonetheless, the Court held that the text of SLUSA neither deprived state courts of jurisdiction over these actions nor granted defendants a removal right: "The statute says what it says—or perhaps better put here, does not say what it does not say."²³

In *Cyan*, the Supreme Court parsed several of the PSLRA's provisions into substantive provisions, which apply in Securities Act class actions pending in state court, and procedural provisions, which do not:

Some of the Reform Act's provisions made substantive changes to the 1933 and 1934 laws, and applied even when a 1933 Act suit was brought in state court. For instance, the statute created a "safe harbor" from federal liability for certain "forward-looking statements" made by company officials. Other Reform Act provisions modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court. To take one example, the statute required a lead plaintiff in any class action brought under the Federal Rules of Civil Procedure to file a sworn certification stating, among other things, that he had not purchased the relevant security "at the direction of plaintiff's counsel."²⁴

Notably, however, the *Cyan* Court did not address whether the PSLRA discovery stay applies in Securities Act actions pending in state court, even though this issue was raised in multiple briefs filed in *Cyan*.²⁵

The few courts to have addressed whether the PSLRA discovery stay applies in Securities Act actions pending in state court are divided. The most recently decided cases have held that the PSLRA discovery stay does not apply.²⁶ Several state courts, however, have held that the PSLRA discovery stay applies to Securities Act actions pending in state court.²⁷

In this essay, I seek to answer the unsettled question of whether the PSLRA discovery stay applies to Securities Act actions pending in state court.

III. Application of the Reverse-*Erie* Doctrine to the PSLRA Discovery Stay

The so-called "reverse-*Erie* doctrine" governs the very issue posed here: "In state court, when does state law apply and when does federal law apply?"²⁸ The reverse-*Erie* doctrine is the converse of the classic *Erie* doctrine, which governs whether a federal court must apply state law or federal law.²⁹ As explained by Kevin M. Clermont in his seminal article, *Reverse-Erie*, this doctrine includes both preemption analysis and "judicial choice-of-law methodology similar to the *Erie* methodology."³⁰

When applying the reverse-*Erie* doctrine to potentially displace state rules that are procedural in nature, two presumptions weigh against that displacement. First, there is a “normal presumption against pre-emption.”³¹ Second, there is a “general rule, ‘bottomed deeply in belief in the importance of state control of state procedure,’ . . . that ‘federal law takes the state courts as it finds them.’”³² Indeed, this general rule against displacing state procedural rules is “at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts.”³³

And yet, pursuant to the reverse-*Erie* doctrine, federal law sometimes displaces state rules that are procedural in nature when federal claims are heard in state court.³⁴ This displacement can occur via express preemption of state procedure, via implied preemption of state procedure, or via judicial choice of law.³⁵ Below, I discuss these aspects of the reverse-*Erie* doctrine and then apply them to the question of whether the PSLRA discovery stay applies in Securities Act actions pending in state court.

A. Express Preemption of State Procedure

If Congress has expressly provided that a federal procedure preempts a state procedure as applied to a federal claim in state court, then, under the Supremacy Clause, the federal procedure applies.³⁶ Because “[p]reemption fundamentally is a question of congressional intent, . . . when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.”³⁷

The PSLRA provisions in the Securities Act contain explicit statements about the scope of their applicability. Some of those provisions, including the certification requirement, the appointment of lead plaintiff provisions, and the limitation on lead plaintiffs’ recovery, apply only to “each private action arising under this Act that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.”³⁸ Thus, these provisions do not purport to apply in state court, where the Federal Rules of Civil Procedure do not apply.

Others provisions, however, have broader statements of scope. The discovery stay applies “[i]n any private action arising under this Act,”³⁹ and the safe harbor for forward-looking statements applies “in any private action arising under this title that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading.”⁴⁰ Thus, because the discovery stay is not limited to actions “pursuant to the Federal Rules of Civil Procedure,” some courts and commentators have concluded that the PSLRA discovery stay expressly applies in state court.⁴¹

There are several strong counterarguments to this interpretation of these statements of scope, however. First, a reasonable interpretation of the different scope language is that Congress intended for some provisions to apply only to class actions (*e.g.*, the appointment of lead plaintiff provisions) and other provisions to apply to both individual and class actions (*e.g.*, the discovery stay and the safe harbor). Indeed, all of the provisions preceded by the more restrictive scope language relate to procedures that only make sense in the context of class actions.⁴² Under this interpretation, the different scope language is not intended to differentiate between provisions that apply in state court and those that do not; rather, it is intended to differentiate between provisions that apply only in class actions and those that apply in both individual and class actions.

Second, one of the PSLRA provisions preceded by the broader “[i]n any private action arising under this Act” scope language is the provision related to sanctions for abusive litigation. That provision mandates that, upon final adjudication of the action, the court shall make specific findings in the record about each party’s and attorney’s compliance with “Rule 11(b) of the Federal Rules of Civil Procedure.”⁴³ In addition, if the court finds that any party or attorney violated Rule 11(b), “the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure.”⁴⁴ These explicit references to Rule 11 undercut the argument that, with this scope language, Congress intended for this provision to apply in state court.

Of note, some courts have offered other, less compelling reasons for not reading the discovery stay’s scope language as an express preemption provision. First, courts have noted that some states, including California, do not have “motions to dismiss”; rather, they have “demurrers.”⁴⁵ This argument unduly elevates form over substance as both procedures operate to test the plaintiff’s complaint.⁴⁶ Second, courts have reasoned that, if Congress thought that the PSLRA discovery stay already applied in Securities Act actions in state court, there would have been no reason to include within SLUSA a provision authorizing a federal court to stay state court discovery “as necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”⁴⁷ This argument fails to recognize, however, that this SLUSA provision can be used by a federal court to stay discovery in other types of state court litigation, including individual actions pending under state securities law and derivative suits.⁴⁸

In sum, I contend that Congress has not “made its intent known through explicit statutory language” that the PSLRA discovery stay expressly preempts state discovery rules. First, there is a presumption against preemption. Second, there is an alternative

reasonable interpretation for the differential scope language. Third, such a reading of the discovery stay's scope language would be incongruous as applied to the Rule 11 sanctions provision.

B. Implied Obstacle Preemption of State Procedure and Judicial Choice of Law

Even if Congress has not expressly preempted a state procedure, the state procedure might be impliedly preempted. There are three types of implied preemption: (1) field preemption where a state “regulates conduct in a field that Congress intended the Federal Government to occupy exclusively”;⁴⁹ (2) conflict preemption “where it is impossible for a private party to comply with both state and federal requirements”;⁵⁰ and (3) conflict preemption where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵¹ When a state procedure as applied to a federal claim is impliedly preempted, it is usually under the third strand of implied preemption, so-called “obstacle preemption.”

Several of the Supreme Court cases analyzing whether a particular federal procedure applies to a federal claim litigated in state court have framed the issue as one of obstacle preemption;⁵² however, in other cases, the Court has eschewed a preemption analysis for a judicial choice-of-law analysis based on a balancing of state and federal interests.⁵³ Indeed, the distinction between an obstacle preemption analysis and a judicial choice-of-law analysis is murky when applied to the question of whether a particular state or federal procedure applies to a federal claim litigated in state court. As explained by Professor Clermont, the two analyses intersect and inform each other:

In the middle zone of obstacle and field preemption, the accommodation of federal and state interests helps to concretize preemption: recall that whenever federal interests overcome state interests in an *Erie* sense, there should be such preemption. A benefit of this insight is to alleviate the difficulty of preemption's obscure bounds. The increasing attention to accommodation of federal and state interests in that middle zone moots the precise location of the outer boundary of preemption, as that boundary becomes an imperceptibly transitional zone in the middle of the broad subject of reverse-*Erie*.⁵⁴

Whether under an obstacle preemption analysis or a judicial choice-of-law analysis, the Supreme Court has addressed the question of whether a particular federal procedure applies to a federal claim in state court in five key cases over the past century: *Brown v. Western Railway of Alabama*,⁵⁵ *Dice v. Akron, Canton & Youngstown R. Co.*,⁵⁶ *Felder v. Casey*,⁵⁷ *Monessen Southwestern Railway Co. v. Morgan*,⁵⁸ and *Johnson v. Fankell*.⁵⁹ These cases involved either claims under the Federal Employers' Liability Act

("FELA"),⁶⁰ which provides employees of common carriers a cause of action against the carrier to recover damages for injuries caused by the carrier's negligence, or claims under 42 U.S.C. § 1983,⁶¹ which provides plaintiffs a cause of action to recover damages for civil rights violations against those acting under color of state law. FELA and § 1983 claims, like Securities Act claims, are subject to concurrent federal and state court jurisdiction.

In four of these cases, the Supreme Court held that federal law displaced state law that was procedural in nature. First, in *Brown*, the Court held that the more lenient federal pleading standard applied to a FELA claim pending in Georgia state court rather than Georgia's more stringent pleading standard.⁶² The Georgia trial court dismissed the FELA complaint under a Georgia rule of practice that construed pleading allegations "most strongly against the pleader."⁶³ The Georgia Court of Appeals affirmed, and the Georgia Supreme Court denied certiorari.⁶⁴ After granting certiorari, the U.S. Supreme Court determined that the allegations in the complaint were sufficient to state a claim under the federal pleading standard,⁶⁵ and the Court reversed and remanded because "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal law."⁶⁶

Second, in *Dice*, the Supreme Court held that, pursuant to federal law, the jury should be the trier of fact on the issue of whether a release of a FELA claim was fraudulently induced, even though the case was pending in Ohio state court and, under Ohio law, the judge would have been the trier of fact.⁶⁷ Before the Ohio trial court, the defendant asserted that the plaintiff's FELA claim was released, and the plaintiff contended that the release was void because it was fraudulently induced.⁶⁸ Under Ohio law, which maintained a division between law and equity, the jury was the trier of fact on issues relating to negligence, but the judge was the trier of fact on the issue of whether a release of a negligence claim was fraudulently induced.⁶⁹ Applying Ohio law, the trial judge found that the release was not fraudulent and thus entered judgment for the defendant, notwithstanding the jury's verdict for the plaintiff.⁷⁰ The Ohio Court of Appeals reversed the trial court, and the Ohio Supreme Court reversed the Court of Appeals and sustained the trial court's action.⁷¹ After granting certiorari, the U.S. Supreme Court noted that, under federal law, there is a jury trial right on the question of whether a FELA claim release was fraudulent.⁷² The Court reversed the Ohio Supreme Court and remanded because "the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for

denial in the manner that Ohio has here used.”⁷³

Third, in *Felder*, the Supreme Court held that, where federal law does not impose a pre-suit notice-of-claim requirement on § 1983 claims, Wisconsin’s pre-suit notice-of-claim statute did not apply to § 1983 claims pending in Wisconsin state court.⁷⁴ The Wisconsin notice-of-claim statute barred actions against state government subdivisions, agencies, or officers unless the plaintiff provided a detailed written notice of the claim within 120 days of the alleged injury.⁷⁵ The plaintiff did not comply with the notice-of-claim requirements.⁷⁶ The Wisconsin trial court denied the defendants’ motion to dismiss the plaintiff’s § 1983 claim for failure to satisfy Wisconsin’s notice-of-claim statute, and the Wisconsin Court of Appeals affirmed.⁷⁷ The Wisconsin Supreme Court reversed, however, holding that the state’s notice-of-claim requirement was a procedural rule that applied to § 1983 claims pending in the state’s courts.⁷⁸ After granting certiorari, the U.S. Supreme Court reversed the Wisconsin Supreme Court and remanded because “application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts” and because “[s]tates may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts.”⁷⁹

Fourth, in *Monessen*, the Supreme Court held that, consistent with federal law, prejudgment interest was not recoverable by a prevailing plaintiff in a FELA action pending in Pennsylvania state court, even though Pennsylvania Rule of Civil Procedure 238 provided for prejudgment interest to accrue in personal injury actions.⁸⁰ Applying Rule 238, the Pennsylvania trial court assessed prejudgment interest, a three-judge panel of the Pennsylvania Superior Court affirmed, and the Pennsylvania Supreme Court affirmed, concluding that “neither the ‘worthy goal’ nor the specific provisions of Rule 238 contravened the purposes and provisions of the FELA.”⁸¹ After granting certiorari, the U.S. Supreme Court reversed the Pennsylvania Supreme Court and remanded because “prejudgment interest constitutes too substantial a part of a defendant’s potential liability under the FELA for this Court to accept a State’s classification of a provision such as Rule 238 as a mere ‘local rule of procedure.’”⁸²

In the most recent case, however, the Supreme Court held that state procedure governed, even though it was inconsistent with a particular federal procedure. In *Johnson*, the Supreme Court held that, because Idaho Rule of Appellate Procedure 11 did not provide the right to an interlocutory appeal of an order denying the qualified immunity defense in a § 1983 action, the defendants

in a § 1983 action pending in Idaho state court were not entitled to an interlocutory appeal, even though the defendants would have had such a right if the case were pending in federal court.⁸³ The Idaho trial court denied the defendants' motion for summary judgment on the defense of qualified immunity, and the defendants filed a notice of appeal to the Idaho Supreme Court.⁸⁴ The Idaho Supreme Court dismissed the appeal because, under Idaho procedural rules, an order denying a motion for summary judgment is not a final order or judgment that is appealable.⁸⁵ After granting certiorari, the U.S. Supreme Court affirmed, holding that "[w]e therefore cannot agree with petitioners that § 1983's recognition of the defense of qualified immunity pre-empts a State's consistent application of its neutral procedural rules, even when those rules deny an interlocutory appeal in this context."⁸⁶

Reviewing this precedent, several prominent scholars have sought to encapsulate the analysis—whether it be one of obstacle preemption or judicial choice of law. For example, Anthony J. Bellia Jr. summarized the analysis as follows: "Congress may require state courts to enforce federal procedural rules that are 'part and parcel' of a federal right of action; and Congress may, by implication, require state courts to follow federal procedural rules when application of a state procedural rule would unnecessarily burden a federal right."⁸⁷ As summarized by Professor Clermont, courts "balance the state's interests in having its legal rule applied in state court on this issue in this case against the federal interests in having federal law displace the rule of this particular state, while trying to avoid differences in outcome."⁸⁸ Professor Clermont further explained that, when applying the outcome-determinative test in the reverse-*Erie* context, courts should draw from the "'twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'"⁸⁹ Thus, as these twin aims are applied in the reverse-*Erie* context, courts should seek to avoid "shopping by plaintiffs or defendants between the two systems" and "unfairness in that certain classes of people have a choice of court systems," either vertically (federal-state) or horizontally (interstate).⁹⁰

Drawing from this Supreme Court precedent and scholarly commentary, I have identified eight key considerations applicable to the reverse-*Erie* analysis, absent express preemption: (1) the state's interest in applying its own procedure; (2) whether the state procedure applies to all like claims or singles out the federal claim; (3) whether the state procedure applies to both parties or singles out one party; (4) the degree to which the state procedure undercuts federal policy; (5) whether the federal procedure is internally-sourced or externally-sourced; (6) the degree to which the choice of procedure is potentially outcome-determinative; (7)

if outcome-determinative, the risk of forum-shopping; and (8) if outcome-determinative, the risk of treating similarly situated parties differently based on access to different fora.

Each of these considerations, and the interrelationship among them, is discussed further below and then applied to the conflict between permissive state discovery rules and the PSLRA discovery stay.

1. The State's Interest in Applying Its Own Procedure

As discussed above, the general rule is that “federal law takes the state courts as it finds them.”⁹¹ Thus, even when holding that a particular state procedure is displaced by a federal procedure, the Supreme Court has always at least acknowledged the state's interest in applying its own procedure.⁹² The state's interest in applying its own procedure can be overridden, however. Indeed, the dissenting opinions in *Brown*, *Dice*, and *Felder* criticized the majority opinions for failing to give due respect to the states' respective interests in “cherish[ing] formalities,”⁹³ “exercise[ing] a preference in adhering to historic ways of dealing with a claim of fraud,”⁹⁴ and “ensur[ing] that public officials will receive prompt notice of wrongful conditions or practices . . . [and] enabl[ing] officials to investigate claims in a timely fashion.”⁹⁵

Applied to states' permissive discovery rules, each state has adopted its own discovery rules,⁹⁶ which seek to address information asymmetries while not exacerbating cost asymmetries.⁹⁷ State judges and attorneys are familiar with those rules.⁹⁸ Thus, each state has both normative and administrative interests in applying its own rules of discovery, which, in many states, permit discovery while a motion testing the pleadings, like a motion to dismiss or demurrer, is pending. Thus, this consideration weighs against displacing state discovery rules. That said, states may already impose discovery stays in particular types of litigation or at the court's discretion; thus, imposing a discovery stay in Securities Act claims would not necessarily be anathema to the states.⁹⁹

2. Whether the State Procedure Applies to All Like Claims or Singles Out the Federal Claim

Federal law is less likely to displace a state procedure that applies to all like claims as opposed to singling out the federal claim. For example, in *Johnson*, where the Supreme Court affirmed the state's refusal to grant the defendants an interlocutory appeal, the Court stressed that the state's dismissal of the defendants' interlocutory appeal “rested squarely on a neutral state Rule regarding the administration of the state courts.”¹⁰⁰

The *Johnson* Court also distinguished the notice-of-claim rule in *Felder*, which was displaced by federal law, because that rule purportedly “target[ed] civil rights claims against the State.”¹⁰¹ Of note, the dissent in *Felder* and commentators have criticized this characterization of the state’s notice-of-claim rule, which applied to “all actions against municipal defendants, whether brought under state or federal law.”¹⁰²

While the neutrality of the state’s procedure is relevant, the Court has displaced state rules that applied to all like claims. The state pleading standard in *Brown* applied to all pleadings, not merely FELA pleadings.¹⁰³ The separation of law and equity in *Dice* applied in all negligence cases, not merely FELA cases.¹⁰⁴ The prejudgment interest in *Monessen* accrued in all personal injury actions, not merely FELA actions.¹⁰⁵

Applied to states’ permissive discovery rules, those rules apply broadly rather than singling out Securities Act claims or even securities claims. Thus, this consideration weighs against imposing the PSLRA discovery stay to Securities Act claims in state court.

3. Whether the State Procedure Applies to Both Parties or Singles Out One Party

Federal law is more likely to displace a state procedure that singles out one party rather than applying to both parties. For example, in *Felder*, where the Supreme Court displaced the state’s pre-suit notice-of-claim requirement, the Court characterized the requirement as “a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority.”¹⁰⁶ The Court emphasized that “[t]his defendant-specific focus of the notice requirement serves to distinguish it, rather starkly, from rules uniformly applicable to all suits, such as rules governing service of process or substitution of parties, which respondents cite as examples of procedural requirements that penalize noncompliance through dismissal.”¹⁰⁷ Similarly, in *Monessen*, the Court displaced the state’s rule allowing a plaintiff to recover prejudgment interest, where such a rule benefitted the plaintiff and harmed the defendant.¹⁰⁸ Finally, in *Johnson*, where the Court upheld the state’s dismissal of the defendants’ interlocutory appeal, the Court emphasized that the state rule “generally permits appeals only of ‘judgments, orders and degrees which are final,’ without regard to the identity of the party seeking appeal.”¹⁰⁹

On occasion, federal law has also displaced state procedures that, while theoretically applicable to both parties, in practice tend to harm one party. For example, in *Brown*,¹¹⁰ the Court displaced the state’s strict pleading standard, which in theory applied to both parties’ pleadings, where in practice the rule harmed

the plaintiff's ability to have his FELA case heard. In *Dice*,¹¹¹ the Court displaced the state's denial of a jury trial right on the issue of whether the claim release was fraudulent, which in theory could have inured to the benefit of both parties, where in practice the plaintiff was more likely to benefit from a jury trial.

Turning to state rules allowing permissive discovery, these rules permit discovery by both parties, rather than only permitting one party to engage in discovery. Thus, at least in theory, these rules apply to both parties rather than singling out one party. In practice, however, the plaintiff is far more likely to benefit from early discovery, both to enable the plaintiff to marshal facts in support of an amended pleading and to impose costs incentivizing the defendant to settle. Therefore, although this consideration weighs in favor of allowing states to apply permissive discovery rules, it does so only slightly.

4. The Degree to Which the State Procedure Undercuts Federal Policy

Consistent with both an obstacle preemption analysis and a judicial choice-of-law analysis, a key consideration is the degree to which the state procedure undercuts federal policy. The Supreme Court's analysis of this consideration is a bit of a moving target, however.

In *Brown* and *Felder*, the Court identified the applicable federal policy as one of providing plaintiffs a remedy under federal law and thus held that federal law overrode state procedures that undercut plaintiffs' ability to recover. In *Brown*, the Court displaced the state's strict pleading standard because, as pleaded by the plaintiff in the case, the allegations "if proven would show an injury of the precise kind for which Congress has provided a remedy" under FELA.¹¹² In *Felder*, the Court stated that "the central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors."¹¹³ Thus, the Court displaced the state's notice-of-claim requirement because it "undermines this 'uniquely federal remedy.'"¹¹⁴ The *Felder* Court even went so far as to suggest that "States may make litigation of federal rights as congenial as they see fit . . . because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals."¹¹⁵

Contrary to this dicta in *Felder*, however, the *Monessen* Court reframed the federal interest to include, not only the plaintiff's right to a remedy, but also the defendant's right to having that remedy limited to " 'the proper measure of damages' under the FELA."¹¹⁶ The Court thus displaced a state court rule that expanded the plaintiff's remedy under FELA by allowing for the recovery of prejudgment interest. Of note, the dissent in *Felder*

had criticized the majority for stating a rule that seemed to benefit only plaintiffs: “If the Court means the theory to be taken seriously, it should follow that defendants, as well as plaintiffs, are entitled to the benefit of all federal court procedural rules that are ‘outcome determinative.’”¹¹⁷

In *Dice*, rather than focusing on the overarching federal policy of providing plaintiffs a remedy under federal law or the scope of that remedy under federal law, the Court focused on the federal policy underlying the specific procedure at issue. In *Dice*, because “[t]he right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence” . . . that . . . is ‘part and parcel of the remedy afforded railroad workers under the Employers’ Liability Act,’”¹¹⁸ the Court displaced a state rule that disallowed a jury trial on the issue of whether a claim release was fraudulently induced.

Finally, in *Johnson*, the Court focused on the federal policy underlying the qualified immunity defense in § 1983 cases, which is “to protect the State and its officials from overenforcement of federal rights.”¹¹⁹ Thus, even though the state did not afford the defendants the right to an interlocutory appeal, the Court held that “application of the State’s procedural rules in this context is thus less an interference with *federal* interests than a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.”¹²⁰

How this consideration plays out in context of states’ permissive discovery rules depends on the applicable federal policy. First, drawing from *Brown* and *Felder*, the federal policy at issue could be affording plaintiffs the right to recover on meritorious claims under the Securities Act, which provides a “uniquely federal remedy.” States’ permissive discovery rules do not undercut this federal policy; rather, they merely make “litigation of federal rights as congenial” as these states see fit. Second, drawing from *Monessen*, the federal policy at issue could incorporate the defendant’s right to have the Securities Act remedy limited. The discovery stay is not a direct limitation on the plaintiff’s remedy; in practice, however, it bars any remedy where the plaintiff cannot state a claim without the benefit of discovery. Thus, at least arguably, permissive discovery undercuts the federal policy in only affording plaintiffs a remedy if they can state a claim without discovery. Finally, drawing from *Dice*, the relevant federal policies could be the policies underlying the discovery stay itself, which are preventing fishing-expedition discovery and extortive discovery in Securities Act litigation. As noted by the court in *Milano*, permissive state discovery frustrates these federal policies.¹²¹

I contend that the better approach, consistent with *Brown* and *Felder*, is to look at the policies underlying Securities Act claims writ large, rather than focusing on the unique policies underlying the discovery stay in particular. Permissive state discovery does not interfere with the plaintiffs' ability to recover on meritorious Securities Act claims. In addition, although permissive discovery might increase the likelihood that the plaintiffs' cases can proceed, it does not expand the defendants' liability beyond that which the facts ultimately support. Thus, I argue that this consideration weighs against applying the PSLRA discovery stay in state court.

5. Whether the Federal Procedure Is Internally-Sourced or Externally-Sourced

If the source of the federal procedure is internal to the federal statute creating the federal claim, the federal procedure is more likely to apply in state court than if it is externally-sourced.¹²² In *Johnson*, the Court emphasized that "it is important to focus on the precise source and scope of the federal right at issue."¹²³ The Court characterized the federal right to an interlocutory appeal as externally-sourced and thus inapplicable in state court: "In this case, . . . Congress has mentioned nothing about interlocutory appeals in § 1983; rather, the right to an immediate appeal in the federal court system is found in § 1291, which obviously has no application to state courts."¹²⁴ The *Johnson* Court differentiated *Dice*, where the Court held that the federal jury trial right applied in state court, by characterizing the right to a jury trial as internally-sourced: "In *Dice* we held that the FELA preempted a state rule denying a right to a jury trial. In that case, however, we made clear that Congress had provided in *FELA* that the jury trial procedure was to be part of claims brought under the Act."¹²⁵

On occasion, however, the Court has applied externally-sourced federal procedures in state court. For example, in *Brown*, the Court displaced a strict state pleading standard with a more lenient federal pleading standard, even though that federal standard was not specific to FELA cases.¹²⁶

The PSLRA discovery stay is internally-sourced. The stay is not an overarching federal procedure broadly applicable to federal claims; rather, it is a procedure specifically applicable to Securities Act claims. Thus, this consideration weighs in favor of applying the PSLRA discovery stay to Securities Act claims in state court.

6. The Degree to Which the Choice of Procedure Is Potentially Outcome-Determinative

Federal law is much more likely to displace a state procedure if

the choice of procedure is potentially outcome-determinative. Of course, “[p]rocedure invariably changes the entitlements and values of the claims that implicate them,” including by imposing costs to comply with various procedures and by “altering the probability of recovery on a claim.”¹²⁷ However, in *Johnson*, the Court clarified that, by using the term “outcome,” the Court is referring “to the ultimate disposition of the case.”¹²⁸

Thus, in *Brown*, *Felder*, and *Monessen*, the Court applied federal law where application of the state procedure would have changed the ultimate disposition of the case. In *Brown*, the state’s stringent pleading standard resulted in the dismissal of a FELA case that would have proceeded in federal court.¹²⁹ In *Felder*, the state’s notice-of-claim requirement barred a § 1983 case that would have proceeded in federal court.¹³⁰ In *Monessen*, the state’s award of prejudgment interest significantly increased the plaintiff’s recovery beyond what the plaintiff would have recovered in federal court.¹³¹

Likewise, in *Johnson*, the Court refused to displace a state procedure that barred a defendant’s interlocutory appeal on the defense of qualified immunity because that right affected the timing of disposition, not the ultimate disposition itself:

If petitioners’ claim to qualified immunity is meritorious, there is no suggestion that the application of the Idaho rules of procedure will produce a final result different from what a federal ruling would produce. Petitioners were able to argue their immunity from suit claim to the trial court, just as they would to a federal court. And the claim will be reviewable by the Idaho Supreme Court after the trial court enters a final judgment, thus providing petitioners with a further chance to urge their immunity. Consequently, the postponement of the appeal until after final judgment will not affect the ultimate outcome of the case.¹³²

And yet, in *Dice*, the Court displaced a state procedure that did not affect the ultimate disposition of the case, at least not directly. In that case, the Court required the state to afford a jury trial right on the question of whether a FELA claim release was fraudulently induced.¹³³ Under state law, the trier of fact would have been the trial court. At least theoretically, the identity of the trier of fact should not affect the trier of fact’s findings. Indeed, the dissenting opinion in *Dice* criticized the majority for proceeding “on the theory that Congress included as a part of the right created by the Employers’ Liability Act an assumed likelihood that trying all issues to juries is more favorable to plaintiffs.”¹³⁴ In practice, however, the identity of the trier of fact likely does result in different outcomes.

Applying this consideration here, the availability of permissive discovery is less outcome-determinate than the procedures in *Brown*, *Felder*, and *Monessen*; is more outcome-determinative

than the procedure in *Johnson*; and has a similarly indirect outcome-determinative effect as in *Dice*. The availability of permissive discovery indirectly affects the ultimate disposition of a Securities Act case only if the plaintiff uncovers facts in discovery that enable the plaintiff to amend an otherwise deficient complaint in such a way that the complaint survives a motion testing the pleadings. Unlike the outcome-determinative state procedures in *Brown*, *Felder*, and *Monessen*, the availability of discovery while a motion to dismiss is pending does not necessarily permit certain cases to proceed in state court that would fail in federal court. Unlike the non-outcome-determinative procedure in *Johnson*, the availability of discovery does not merely affect the timing of disposition. Some complaints that would be dismissed absent the plaintiff's ability to engage in discovery will proceed. Like in *Dice*, the availability of discovery during the pendency of a motion to dismiss could indirectly affect the ultimate disposition of some cases. Notably, other state procedures, including permissive state pleading standards and pleading amendment standards, are even more likely to affect the ultimate disposition of the case than the availability of discovery during the pendency of a motion to dismiss. On balance, I contend that the availability of permissive discovery could affect the ultimate disposition of some subset of Securities Act cases.

7. If Outcome-Determinative, the Risk of Forum-Shopping

As explained by Professor Clermont, the outcome-determinative nature of a state procedure should not be considered in the abstract; rather, it should be considered in light of the “twin aims of the *Erie* rule,” one of which is the “discouragement of forum-shopping.”¹³⁵ Although the Supreme Court has not directly discussed forum shopping in its reverse-*Erie* precedent, the goal of discouraging forum-shopping is implicit in the Court's focus on whether the choice of procedure affects the ultimate disposition of the case. Thus, in light of my above conclusion that the availability of permissive discovery could, at least indirectly, affect the ultimate disposition of some subset of cases, I will consider whether states' permissive discovery rules contribute to forum-shopping.

Post-*Cyan*, there has been an increase in state-court filings of Securities Act claims.¹³⁶ Cornerstone Research found as follows:

In 2018, the combined number of federal Section 11 filings and state 1933 Act filings was 41. This comprised 13 parallel filings, 17 state-only filings, and 11 federal-only filings. Overall, these filings in federal and state courts increased by 52 percent compared to 2017 due to the rise in state filing activity.

Consistent therewith, “Section 11 claims decreased in federal

courts as a portion of filing activity moved to state court.”¹³⁷

But, there are multiple reasons for Securities Act plaintiffs to elect to proceed in state court, only one of which is the potential to avoid the PSLRA discovery stay. First, it is extremely unlikely that the various class action-specific procedures of the PSLRA, which by their very terms purport to apply only to “each private action arising under this Act that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure,”¹³⁸ apply in state court. Indeed, the *Cyan* Court stated that one of those procedures, the sworn certification requirement, does not apply in state court.¹³⁹ Further, commentators have noted that “plaintiffs in state court are much more likely to survive defendants’ efforts to dismiss the case, even with relatively weaker pleadings.”¹⁴⁰ Consistent with this assessment, Cornerstone Research found that “[o]nly 33 percent of state Section 11 filings were dismissed in 2010–2017 compared to 48 percent of Section 11-only federal filings.”¹⁴¹ Finally, some state courts “have a reputation for . . . a receptive judiciary when it comes to securities class action suits.”¹⁴²

Thus, if states’ permissive discovery rules contribute to forum-shopping, it is likely only in a marginal fashion.

8. If Outcome-Determinative, the Risk of Treating Similarly Situated Parties Differently Based on Access to Different Fora

Again, as explained by Professor Clermont, the outcome-determinative nature of a state procedure should be considered in light of the “twin aims of the *Erie* rule,” one of which is the “avoidance of inequitable administration of the laws.”¹⁴³ This consideration potentially applies in two scenarios: (1) if the party harmed by the state procedure is the one who elected to proceed in state court, perhaps this undercuts the argument that federal procedure should apply in state court; and (2) if the party harmed by the state procedure does not have the option of proceeding in federal court, perhaps this enhances the argument that federal procedure should apply in state court.

On several occasions, the Supreme Court has rejected this consideration under the first scenario. The *Brown*, *Dice*, and *Felder* plaintiffs could have avoided the stringent state procedures at issue by filing their cases in federal court, yet the Court nonetheless displaced the state procedures. Indeed, the dissenters in these cases made just this point.¹⁴⁴ The *Felder* Court, however, explicitly rejected “this bitter-with-the-sweet argument” as applied to plaintiffs who elect to proceed in state court.¹⁴⁵ In *Johnson*, however, the defendant could have avoided the state’s disallowance of interlocutory appeals by removing the case to federal

court, yet the defendant did not do so. Although the Court did not rely on a “bitter-with-the-sweet argument” in its opinion refusing to override the state procedural rule, Justice Ginsburg mentioned it during oral argument: “But you could have removed—in any case, wouldn’t one factor, if one wants—if a Federal court is going to tell—if this case is going to tell the State, change your procedure for these cases only, that the defendant who is asking for that could have gotten himself into the Federal forum.”¹⁴⁶

The Supreme Court has not addressed this consideration under the second scenario, where the party harmed by the state procedure does not have access to federal court. This scenario was implicated in *Monessen* because the state’s allowance of prejudgment interest harmed the defendant¹⁴⁷ and FELA defendants do not have a removal right,¹⁴⁸ but the Court did not discuss this consideration in its opinion.

Applying this consideration here, the availability of permissive discovery in state court, like in *Monessen*, implicates the second scenario. Permissive discovery potentially harms the defendant by permitting fishing-expedition discovery, which can potentially affect the outcome of the case, and extortive discovery, which can potentially force the defendant to settle an unmeritorious case in order to avoid the costs of discovery, but the defendant does not have a removal right.¹⁴⁹ Thus, this consideration weighs in favor of applying the PSLRA discovery stay in state court. However, because the Supreme Court has not relied on this consideration in this scenario, even in *Monessen* where it was directly implicated, it is unclear how much weight to afford this one of *Erie*’s twin aims in the reverse-*Erie* context.

C. Recommendation

In sum, the following considerations weigh against applying the PSLRA discovery stay in state court: (1) each state has both normative and administrative interests in applying its own discovery rules, which are at the core of state procedure; (2) states’ permissive discovery rules apply to all like claims and do not single out Securities Act claims; (3) states’ permissive discovery rules apply to both parties, rather than singling out one party, although they admittedly are more likely to benefit Securities Act plaintiffs in practice; and (4) states’ permissive discovery rules do not undercut the federal policy of providing a remedy for meritorious Securities Act claims, although they do admittedly undercut the specific policies supporting the PSLRA discovery stay of preventing fishing-expedition discovery and extortive discovery.

The following considerations weigh in favor of applying the PSLRA discovery stay in state court: (1) the PSLRA discovery stay is internal to the Securities Act rather than externally-

sourced; (2) the application of states' permissive discovery rules to Securities Act claims has the potential, in practice, to indirectly affect the ultimate disposition of a subset of cases where the plaintiff uncovers facts in discovery that enable the plaintiff to amend an otherwise deficient complaint so as to avoid dismissal; (3) the outcome-determinative impact of states' permissive discovery rules in these cases has the potential to contribute to forum-shopping, although that impact is marginal in light of the other reasons that plaintiffs might elect to proceed in state court; and (4) the defendant, which is the party potentially harmed by the outcome-determinative impact of states' permissive discovery rules, does not have the right to remove the case to federal court.

On balance, although these considerations are mixed, I contend that they weigh against applying the PSLRA discovery stay in state court, especially against the backdrop of the presumption against preemption and the general rule that federal law takes state courts as it finds them.

IV. Conclusion

Thus, I contend that the PSLRA discovery stay does not apply to Securities Act claims pending in state court. The PSLRA does not expressly preempt states' permissive discovery rules, and the considerations informing an obstacle preemption analysis and a judicial choice-of-law analysis weigh against applying the PSLRA discovery stay in state court. Finally, even though I argue that the PSLRA discovery stay does not apply in state court, there are other means whereby discovery could be stayed in Securities Act cases pending in state court. First, state courts may have the discretion under state law to stay discovery under certain circumstances.¹⁵⁰ Second, if there is a parallel federal action, the federal court can stay discovery in the state case "as necessary in aid of its jurisdiction, or to protect or effectuate its judgments."¹⁵¹

NOTES:

¹*Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1066 (2018).

²Private Securities Litigation Reform Act of 1996, Pub. L. 104-67, 109 Stat. 737 (Dec. 22, 1995).

³H.R. Conf. Rep. No. 104-369, 1995 U.S.C.C.A.N. 730.

⁴*Id.*

⁵*Id.* at 730–31.

⁶15 U.S.C.A. §§ 77z-1(a)(3), 78u-4(a)(3).

⁷15 U.S.C.A. §§ 77z-1(a)(4), 78u-4(a)(4).

⁸15 U.S.C.A. §§ 77z-1(c), 78u-4(c).

⁹15 U.S.C.A. §§ 77z-2, 78u-5.

¹⁰15 U.S.C.A. § 78u-5(b)(2).

¹¹15 U.S.C.A. §§ 77z-1(b)(1), 78u-4(b)(3)(B). Note that the discovery stay provision in the Exchange Act omits commas around the phrase “upon the motion of any party,” but that difference does not appear to affect the meaning.

¹²H.R. Conf. Rep. No. 104-369, 1995 U.S.C.C.A.N. 730.

¹³Securities Litigation Uniform Standards Act of 1998, Pub. L. 105-353, 112 Stat. 3227, § 2(2) (Nov. 3, 1998).

¹⁴*Id.* at § 2(3).

¹⁵*Id.* at § 2(5).

¹⁶15 U.S.C.A. §§ 77p(b), 78bb(f).

¹⁷15 U.S.C.A. § 77v(a).

¹⁸*Id.*

¹⁹*Cyan*, 138 S. Ct. at 1066.

²⁰*Id.* at 1069.

²¹*Id.* at 1075.

²²*Id.* at 1072.

²³*Id.* at 1069.

²⁴*Id.* at 1066–67 (internal citations omitted).

²⁵*E.g.*, *Brief for Petitioners, Cyan, Inc. v. Beaver County Employees Retirement Fund*, No. 15-1439, 2017 WL 3773872, at *27 (U.S. Aug. 28, 2017) (“In addition, some state courts in 1933 Act suits have refused to stay discovery pending a motion to dismiss, on the view that the Reform Act’s automatic-stay provision does not apply in state court either.”); *see also* Brief of Institutional Investors as Amici Curiae Supporting Respondents, *Cyan*, No. 15-1439, 2017 WL 4770980, at *16 (U.S. Oct. 20, 2017); Brief of Alibaba Group Holding Limited et al. as Amici Curiae in Support of Petitioners, *Cyan*, No. 15-1439, 2017 WL 4483907, at *27–30 (U.S. Sept. 5, 2017); Brief for Business Roundtable and the Society for Corporate Governance as Amici Curiae Supporting Petitioners, *Cyan*, No. 15-1439, 2017 WL 3948180, at *14–15 (U.S. Sept. 5, 2017); Brief of the Securities Industry and Financial Markets Association et al. as Amici Curiae in Support of Petitioners, *Cyan*, No. 15-1439, 2017 WL 3948181, at *10 (U.S. Sept. 5, 2017); Brief of Washington Legal Foundation As Amicus Curiae in Support of Petitioners, *Cyan*, No. 15-1439, 2017 WL 3913760, at *21–23 (U.S. Sept. 5, 2017); Brief of Amici Curiae Law Professors in Support of Petitioners, *Cyan*, No. 15-1439, 2016 WL 3538388, at *11–12 (U.S. June 27, 2016).

²⁶*E.g.*, *Order Denying Defendants’ Motion to Stay Further Discovery Pending Ruling on Demurrer, Switzer v. W.R. Hambrecht & Co.*, Nos. CGC-18-564904, CGC-18-565324, 2018 WL 4704776, at *1 (Cal. Super. Ct. Sept. 19, 2018) (“The Court finds that the PSLRA’s provision for a discovery stay is of a procedural nature, and therefore only applies to actions filed in federal court, not state court. Therefore, the motion is denied.”); *Order Denying Defendant’s Motion to Stay Proceedings, In re Pacific Biosciences of Cal. Inc.*, No. CIV 509210, 2012 WL 1932469 (May 25, 2012) (“Defendants argue that this case involving 1933 Securities Act claims is a ‘private action’ subject to the automatic stay. Although a creative argument, it is not persuasive.”).

²⁷*E.g.*, *Milano v. Auhill*, No. SB 213 476, 1996 WL 33398997, at *4 (Cal. Super. Ct. Oct. 2, 1996) (“The amendments of 1995 to the federal Securities Act

of 1933 apply to an action brought in a state court under the act, alleging a private action under the 1933 Act . . ."); Notice of Ruling, *Shores v. Cinergi Pictures Entm't Inc.*, No. BC149861 (Cal. Super. Ct. Sept. 5, 1996) ("The court ruled that the automatic stay provision in Section 27(b) of the Securities Act applies to all cases filed under the Securities Act, whether in state or federal court.").

²⁸Kevin M. Clermont, *Reverse-Erie*, 82 *Notre Dame L. Rev.* 1, 4 (2006).

²⁹*Erie R. Co. v. Tompkins*, 304 U.S. 64, 76 (1938).

³⁰Clermont, *supra* note 28, at 20.

³¹*Johnson v. Fankell*, 520 U.S. 911, 918 (1997).

³²*Id.* at 919 (quoting Hart, *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489, 508 (1954)).

³³*Id.* at 922.

³⁴*See, infra*, text accompanying notes 61–81.

³⁵Clermont, *supra* note 28, at 20–21.

³⁶*Id.* at 20. A different question is posed if Congress seeks to preempt a state procedure as applied to a state-law-claim. *See Bellia Jr.*, *Federal Regulation of State Court Procedures*, 110 *Yale L.J.* 947, 952 (2001) ("It is therefore appropriate to analyze the constitutional question raised here—whether Congress may regulate state court procedures in state law cases—with reference to conflict-of-law principles. Under traditional conflicts principles, I argue, Congress has no authority to prescribe procedural rules for state courts to follow in state law cases.").

³⁷*English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

³⁸15 U.S.C.A. § 77z-1(a).

³⁹15 U.S.C.A. § 77z-1(b)(1).

⁴⁰15 U.S.C.A. § 77z-2(c)(1).

⁴¹Israel David & Samuel P. Groner, *State Court Securities Lawsuits And the PSLRA in a Post-'Cyan' Era*, *N.Y.L.J.*, vol. 259, no. 85 (May 3, 2018) ("Because these provisions apply to any actions brought under the 1933 Act and are not limited to actions brought pursuant to the Federal Rules, they should be applicable even in state court actions asserting 1933 Act claims."); *Milano v. Auhill*, No. SB 213 476, 1996 WL 33398997, at *2–3 (Cal. Super. Ct. Oct. 2, 1996) ("In other words, an intention appears on the part of Congress to apply section 27(a) of the amendments only to class actions in federal court, but to apply section 27(b) to all private actions based on alleged violations of the 1933 Act, regardless of whether they were brought in state or federal court. Significantly, the provisions for stay of discovery are contained in section 27(b). It appears to this court that Congress intended the provisions creating a new right on the part of defendants, to put plaintiffs to the burden of pleading and offering to prove specific allegations under the 1933 Act, and to a stay of discovery until plaintiffs meet the burden, to be applied to all cases in state as well as federal courts if at least one cause of action is within these amendments.").

⁴²15 U.S.C.A. § 77z-1(a).

⁴³15 U.S.C.A. § 77z-1(c)(1).

⁴⁴15 U.S.C.A. § 77z-1(c)(2).

⁴⁵Order Denying Defendant's Motion to Stay Proceedings, *In re Pacific*

Biosciences of Cal. Inc., No. CIV 509210, 2012 WL 1932469 (May 25, 2012) (“Further Section 27(b)(1) hinges the discovery stay upon the pendency of a ‘motion to dismiss’, which is the title of a motion in federal court attacking the sufficiency of the complaint. Motion to dismiss is not the nomenclature used in California state court, but rather it is demurrers and motions to strike which challenge the adequacy of pleadings.”).

⁴⁶See *Milano v. Auhill*, No. SB 213 476, 1996 WL 33398997, at *1 (Cal. Super. Ct. Oct. 2, 1996) (“Defendants respond that the terminology may be federal, but the substance is universal. They emphasize that there is no substantive difference between California’s general demurrer and the federal motion to dismiss for failure to state a claim: both operate to test the ability of a plaintiff to allege specific facts essential to the plaintiff’s case, in the absence of which the complaint must be dismissed.”).

⁴⁷15 U.S.C.A. § 77z-1(b)(4); Order Denying Defendant’s Motion to Stay Proceedings, *In re Pacific Biosciences of California Inc.*, No. CIV 509210, 2012 WL 1932469 (May 25, 2012) (“Third, the legislative history of PSLRA and SLUSA demonstrates interpretation contrary to that asserted by Defendants. Indeed, if Section 27(b)(1), pursuant to the PSLRA of 1995, already provided for an automatic stay of discovery in related state court securities cases, there would have been no need to enact Section 27(b)(4) under SLUSA of 1998 to give federal courts the power to stay discovery in related state court securities cases.”).

⁴⁸*E.g.*, *In re Cardinal Health, Inc.*, 365 F. Supp. 2d 866, 876 (S.D. Ohio 2005) (“In sum, upon consideration of these factors, the Court concludes that the circumstances herein are such that a stay of discovery in the state derivative action is appropriate.”).

⁴⁹*English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

⁵⁰*Id.*

⁵¹*Id.*

⁵²*E.g.*, *Johnson v. Fankell*, 520 U.S. 911 (1997); *Felder v. Casey*, 487 U.S. 131 (1988); see also Clermont, *supra* note 28, at 23 (explaining that *Felder* and *Johnson* “sound[] in preemption”).

⁵³*E.g.*, *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988) (relying on *Dice* and *Brown*); *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 259 (1952); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949); see also Clermont, *supra* note 28, at 23 (explaining that *Brown* and *Dice* “sound[] in judicial choice of law”).

⁵⁴Clermont, *supra* note 28, at 44–45.

⁵⁵*Brown*, 338 U.S. 294.

⁵⁶*Dice*, 342 U.S. 259.

⁵⁷*Felder*, 487 U.S. 131.

⁵⁸*Monessen*, 486 U.S. 330.

⁵⁹*Johnson*, 520 U.S. 911.

⁶⁰45 U.S.C.A. §§ 51 et seq.

⁶¹42 U.S.C.A. § 1983.

⁶²*Brown*, 338 U.S. 294.

⁶³*Id.* at 295.

⁶⁴*Id.*

- ⁶⁵*Id.* at 297.
- ⁶⁶*Id.* at 298.
- ⁶⁷*Dice*, 342 U.S. 259.
- ⁶⁸*Id.* at 360.
- ⁶⁹*Id.*
- ⁷⁰*Id.*
- ⁷¹*Id.* at 360–61.
- ⁷²*Id.* at 363.
- ⁷³*Id.*
- ⁷⁴*Felder*, 487 U.S. 131.
- ⁷⁵*Id.* at 136.
- ⁷⁶*Id.*
- ⁷⁷*Id.* at 137.
- ⁷⁸*Id.*
- ⁷⁹*Id.* at 141.
- ⁸⁰*Monessen*, 486 U.S. 330.
- ⁸¹*Id.* at 332–333.
- ⁸²*Id.* at 336.
- ⁸³*Johnson*, 520 U.S. 911.
- ⁸⁴*Id.* at 913–14.
- ⁸⁵*Id.* at 914.
- ⁸⁶*Id.* at 922–93.
- ⁸⁷*Bellia*, *supra* note 36, at 962.
- ⁸⁸*Clermont*, *supra* note 28, at 33.
- ⁸⁹*Id.* at 36 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).
- ⁹⁰*Id.*
- ⁹¹*Johnson*, 520 U.S. at 919 (quoting Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).
- ⁹²*E.g.*, *Monessen*, 486 U.S. at 336 (“The Pennsylvania courts cannot avoid the application of federal law to determine the availability of prejudgment interest under the FELA by characterizing Rule 238 as nothing more than a procedural device to relieve court congestion.”); *Felder*, 487 U.S. at 143 (“Thus, however understandable or laudable the State’s interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation, as are the means the State has chosen to effectuate it.”).
- ⁹³*Brown*, 338 U.S. at 108 (Frankfurter, J., dissenting).
- ⁹⁴*Dice*, 342 U.S. at 367 (Frankfurter, J., concurring for reversal but dissenting from the Court’s opinion).
- ⁹⁵*Felder*, 487 U.S. at 2316 (O’Connor, J., dissenting).
- ⁹⁶8A Am. Jur., *Pleading & Practice Forms, Depositions and Discovery* § 1.
- ⁹⁷*See* Erickson, *Heightened Procedure*, 102 Iowa L. Rev. 61, 67–74 (2016).

⁹⁸See *Dice*, 342 U.S. at 367 (Frankfurter, J., concurring for reversal but dissenting from the Court's opinion) ("The State judges and local lawyers who administer the Federal Employers' Liability Act in State courts are trained in the ways of local practice; it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of State and Federal practice in the State courts as to a single class of cases.").

⁹⁹E.g., *Milano v. Auhill*, No. SB 213 476, 1996 WL 33398997, at *4 (Cal. Super. Ct. Oct. 2, 1996) ("No fundamental rule of California law, nor any fundamental public policy of the state, is offended by the [discovery stay] restrictions imposed by Congress.").

¹⁰⁰*Johnson*, 520 U.S. at 918.

¹⁰¹*Id.* at 918 n.9.

¹⁰²*Felder*, 487 U.S. at 2318 (O'Connor, J., dissenting); see also Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System*, 7th ed., 445 (Foundation Press 2013) (stating that *Felder* "appears to have invalidated a nondiscriminatory rule, although the Court's opinion included an unconvincing contention that the state rule was discriminatory").

¹⁰³See *Brown*, 338 U.S. at 301 (Frankfurter, J., dissenting) ("The crucial question for this Court is whether the Georgia courts have merely enforced a local requirement of pleading, however finicky, applicable to all such litigation in Georgia without qualifying the basis of recovery under the Federal Employers' Liability Act or weighting the scales against the plaintiff.").

¹⁰⁴*Dice*, 342 U.S. at 367–68 (Frankfurter, J., concurring for reversal but dissenting from the Court's opinion) ("So long as all negligence suits in a State are treated in the same way, but the same mode of disposing equitable, non-jury, and common law, jury issues, the State does not discriminate against Employers' Liability suits nor does it make any inroad upon substance.").

¹⁰⁵*Monessen*, 486 U.S. at 333 (Rule 238 applied to "personal injury actions").

¹⁰⁶*Felder*, 487 U.S. at 141.

¹⁰⁷*Felder*, 487 U.S. at 145.

¹⁰⁸*Monessen*, 486 U.S. at 335.

¹⁰⁹*Johnson*, 520 U.S. at 918 n.9.

¹¹⁰*Brown*, 338 U.S. at 297.

¹¹¹*Dice*, 342 U.S. at 363.

¹¹²*Brown*, 338 U.S. at 297.

¹¹³*Felder*, 487 U.S. at 141.

¹¹⁴*Id.*

¹¹⁵*Felder*, 487 U.S. at 151.

¹¹⁶*Monessen*, 486 U.S. at 335 (quoting *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 491 (1916)).

¹¹⁷*Felder*, 487 U.S. at 161 (O'Connor, J., dissenting).

¹¹⁸*Dice*, 342 U.S. at 363 (quoting *Bailey v. Central Vermont Ry. Inc.*, 319 U.S. 350, 354 (1943)) (internal quotations omitted).

¹¹⁹*Johnson*, 520 U.S. at 920.

¹²⁰*Id.*

¹²¹*Milano v. Auhill*, No. SB 213 476, 1996 WL 33398997, at *4 (Cal. Super.

Ct. Oct. 2, 1996) (“The intent of Congress to provide a broad and effective method of weeding out frivolous and unsupported suits, analogous to the purpose of the California Legislature in enacting Code of Civil Procedure section 425.16, would be frustrated if plaintiffs could evade the new restrictions simply by filing in state courts.”).

¹²²See Tarpley, Note, The Doctrine in the Shadows: Reverse-Erie, Its Cases, Its Theories, and Its Future With Plausibility Pleading in Alaska, 32 Alaska L. Rev. 213, 225 (2015) (“[B]y applying a source text-asking whether the procedure originated internally or externally to the substantive federal claim—the case law can be sorted into two relatively clear categories, each espousing a different Reverse-Erie theory.”).

¹²³*Johnson*, 520 U.S. at 921.

¹²⁴*Id.* at 921 n.12.

¹²⁵*Id.*

¹²⁶*Brown*, 338 U.S. 294.

¹²⁷Tidmarsh, Procedure, Substance, and Erie, 64 Vand. L. Rev. 877, 885–86 (2011).

¹²⁸*Johnson*, 520 U.S. at 921.

¹²⁹*Brown*, 338 U.S. at 294 (“Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.”).

¹³⁰*Felder*, 487 U.S. at 153 (“A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court within the same State is obviously inconsistent with this federal interest in intrastate uniformity.”); see also *Johnson*, 520 U.S. at 920 (discussing *Felder*) (“The failure to comply with the Wisconsin statute in *Felder* resulted in a judgment dismissing a complaint that would not have been dismissed—at least not without a judicial determination of the merits of the claim—if the claim had been filed in a federal court.”).

¹³¹*Monessen*, 486 U.S. at 335 (“[P]rejudgment interest may constitute a significant portion of an FELA plaintiff’s total recovery. Here, for example, the trial court’s award of \$26,712.50 in prejudgment interest under Rule 238 increased appellee’s total recovery by more than 20 percent.”).

¹³²*Johnson*, 520 U.S. at 921.

¹³³*Dice*, 342 U.S. 259.

¹³⁴*Id.* at 367–68 (Frankfurter, J., concurring for reversal but dissenting from the Court’s opinion).

¹³⁵Clermont, *supra* note 28, at 36 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

¹³⁶Cornerstone Research, Securities Class Action Filings: 2018 Year in Review, at 21 (“State 1933 Act filings have increased since the Cyan decision.”).

¹³⁷*Id.* at 10.

¹³⁸15 U.S.C.A. § 77z-1(a).

¹³⁹*Cyan*, 138 S. Ct. at 1066–67.

¹⁴⁰Priya Cherian Huskins et al., Guest Post: IPO Companies, Section 11 Suits, and California State Court, The D&O Diary (April 28, 2016), at <https://www.dandodiary.com/2016/04/articles/securities-litigation/guest-post-ipo-compani>

[es-section-11-suits-and-california-state-court/](#).

¹⁴¹Cornerstone Research, Securities Class Action Filings: 2018 Year in Review, at 23.

¹⁴²Priya Cheria Huskins et al., Guest Post: IPO Companies, Section 11 Suits, and California State Court, The D&O Diary (April 28, 2016), at <https://www.dandodiary.com/2016/04/articles/securities-litigation/guest-post-ipo-companies-section-11-suits-and-california-state-court/>.

¹⁴³Clermont, *supra* note 28, at 36 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

¹⁴⁴*Dice*, 342 U.S. at 367–68 (Frankfurter, J., concurring for reversal but dissenting from the Court’s opinion) (“The fact that Congress authorized actions under the Federal Employers’ Liability Act to be brought in State as well as in Federal courts seems a strange basis for the inference that Congress overrode State procedural arrangements controlling all other negligence suits in a State, by imposing upon State courts to which plaintiffs choose to go the rules prevailing in the Federal courts regarding juries.”); *Brown*, 338 U.S. at 108 (Frankfurter, J., dissenting) (“If a litigant chooses to enforce a Federal right in a State court, he cannot be heard to object if he is treated exactly as are plaintiffs who press like claims arising under State law with regard to the form in which the claim must be stated—the particularity, for instance, with which a cause of action must be described . . . After all, the Federal courts are available.”).

¹⁴⁵*Felder*, 487 U.S. at 150.

¹⁴⁶*Transcript of Oral Argument, Johnson v. Fankell*, No. 96-292, 1997 WL 92111, at *16 (U.S. Feb. 26, 1997).

¹⁴⁷*Monessen*, 486 U.S. 330.

¹⁴⁸28 U.S.C.A. § 1445(a).

¹⁴⁹*Cyan*, 138 S. Ct. at 1075.

¹⁵⁰*E.g., Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.*, 15 Cal. App. 4th 800, 804 (1993) (“It is black letter law that, when a federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action.”).

¹⁵¹15 U.S.C.A. § 77z-1(b)(4); *see* Mustokoff, Shareholder Discovery, The PSLRA And SLUSA In Parallel Securities And Derivative Actions, 35 Sec. Reg. L.J. 143 (2007).