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# The Securities Act of 1933: A Jurisdiction Puzzle

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# NOTES

# The Securities Act of 1933

## A JURISDICTIONAL PUZZLE

### INTRODUCTION

On February 1, 2012, the social network giant Facebook, Inc. filed for an initial public offering (IPO).[1] Although going public raised $16 billion for the company,[2] Facebook's first day of trading was plagued with problems and signaled the trouble that lay ahead.[3] "[T]echnical glitches on [NASDAQ] created confusion" as its systems were unprepared for the "massive volume of the highest-profile IPO of the year."[4] Despite the issues, demand for the shares was unprecedented. Within the first 30 seconds of trading, 80 million shares had changed hands.[5] By the end of the day, the stock reached a trading volume of 567 million shares, smashing the previous volume record of around 450 million by General Motors.[6]

However, the trading issues were not the company's only problems. Just days after the IPO, class-action lawsuits began to pour into courts across the country.[7] Some plaintiffs

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[1] *See* Facebook, Inc., Registration Statement (Form S-1) (Feb. 1, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm.

[2] *See* Evelyn M. Rusli & Peter Eavis, *Facebook Raises $16 Billion in I.P.O.*, N.Y. TIMES (May 17, 2012, 4:21 PM), http://dealbook.nytimes.com/2012/05/17/facebook-raises-16-billion-in-i-p-o/?hp.

[3] Facebook, Inc. set its final IPO price at $38, and the stock began trading on Friday, May 18, 2012. Julianne Pepitone, *Facebook Trading Sets Record IPO Volume*, CNN (May 18, 2012, 4:05 PM), http://money.cnn.com/2012/05/18/technology/facebook-ipo-trading/index.htm.

[4] Jenny Strasburg & Jacob Bunge, *Social Network's Debut on Nasdaq Disrupted by Technical Glitches, Trader Confusion*, WALL ST. J. (May 18, 2012, 9:19 PM), http://online.wsj.com/article/SB10001424052702303448404577412251723815184.html.

[5] *See* Pepitone, *supra* note 3.

[6] *See id*.

[7] *See, e.g.*, Complaint at 15, Brian Roffe Profit Sharing Plan v. Facebook, Inc., No. 12 CV 4081 (S.D.N.Y. May 23, 2012); Complaint at 16, Spatz v. Facebook, Inc., No. 12 CV 2262 (N.D. Cal. May 23, 2012).

asserted federal claims,[8] others brought class actions in state courts.[9] To consolidate some of these actions, Facebook removed the class actions from the Superior Court of California,[10] leaving the District Court for the Northern District of California to face an issue that has evaded an answer for many years: whether class actions alleging claims arising solely under the Securities Act of 1933 (Securities Act)[11] can be removed from state to federal court.

The landscape of federal securities law was created nearly 80 years ago. Franklin D. Roosevelt took office in 1933 while the country was still in the depths of the Great Depression.[12] With 13 million Americans unemployed, and the stocks listed on the New York Stock Exchange decimated, many pointed to corporate and stock market abuse as the cause of the crash.[13] President Roosevelt made clear that his New Deal would include comprehensive securities reform.[14] President Roosevelt turned to Felix Frankfurter, "a legendary Harvard law professor" and one of his most trusted advisors, to draft the securities laws.[15]

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[8] They brought claims under sections 11, 12, and 15 of the Securities Act of 1933. Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*, 77o (2012). *See* Complaint at ¶ 2, *Brian Roffe Profit Sharing Plan*, No. 12 CV 4081. The plaintiffs asserted that Facebook, Inc.'s registration statement and accompanying prospectus "contained untrue statements of material facts, omitted to state other facts necessary to make the statements made not misleading and were not prepared in accordance with the rules and regulations governing their preparation." *Id.* ¶ 20.

[9] *See* Complaint at ¶¶ 5-8, Lazar v. Facebook, Inc., No. 12-civ-03199 (Cal. Super. Ct. 2012) (asserting claims under sections 11 and 15 of the Securities Act of 1933).

[10] *See* Notice of Removal, Lapin v. Facebook, Inc., No. 12-civ-3195, 2012 WL2793338 (N.D. Cal. June 20, 2012); Notice of Removal, Stokes v. Facebook, Inc., No. 12-civ-3203, 2012 WL 2793305 (N.D. Cal. June 20, 2012); Notice of Removal, DeMois v. Facebook, Inc., No. 12-civ-3196, 2012 WL 2577293 (N.D. Cal. June 20, 2012).

[11] 15 U.S.C. § 77a (2012).

[12] *See* Norman S. Poser, *The Origins of the Securities Laws*, BERNSTEIN, LITOWITZ, BERGE, & GROSSMAN LLP INSTITUTIONAL INVESTOR ADVOCATE 1 (2004), http://www.blbglaw.com/news/publications/advocate/2004/04/_res/ id=sa_File1/adv2004Q4.pdf.

[13] *See id.*

[14] *See id.* "He called for legislation that would 'let . . . in the light on issues of securities, foreign and domestic, which are offered for sale to the investing public.'" *Id.* (quoting JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 19 (1982)). In his inaugural address, the president "denounce[d] the 'unscrupulous money changers who stand indicted in the court of public opinion, rejected in the hearts and minds of men.'" Poser, *supra* note 12, at 1 (quoting KENNETH S. DAVIS, FDR: THE NEW DEAL YEARS 1933–1937, 30 (1979)).

[15] Poser, *supra* note 12, at 2. Six years later, Professor Felix Frankfurter was appointed to the Supreme Court. *Id.* The actual drafting of the statutes was accomplished by two of Frankfurter's protégés. Benjamin Cohen was "a shy, soft-spoken religious idealist with a tough, practical lawyer's mind"; and Thomas "Tommy the Cork" Corcoran was an "exuberant Irishman of great personal charm, who liked to sing ballads, accompanying himself on the accordion." *Id.* Despite their conflicting personalities, both "shared a sophisticated approach to socio-economic problems and a capacity for hard, prolonged intellectual effort." *Id.* (citing SELIGMAN *supra* note 14, at 62-63 (1982)).

In the following years, two statutes were enacted: the Securities Act of 1933 (Securities Act),[16] which regulated the issuance and distribution of securities; and the Securities Exchange Act of 1934 (Exchange Act),[17] which "regulated the . . . trading markets—meaning the New York Stock Exchange—and which outlawed market manipulation."[18]

The Securities Act was designed to protect investors and increase investor confidence in the market[19] through a system of "full and fair disclosure of securities sold in interstate and foreign markets."[20] For further protection, the Securities Act created a private right of action and gave concurrent jurisdiction in both state and federal courts.[21] The statute also prevented the removal of these claims brought in state court.[22]

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[16] 15 U.S.C. § 77a (2012).

[17] Securities Exchange Act of 1934, 15 U.S.C. § 78a (2012).

[18] *See* Poser, *supra* note 12, at 2. The Pecora hearings before Congress helped "galvanize[ ] broad public support for the securities laws." *See id.* The hearings revealed that National City Bank (predecessor to Citicorp) "had aggressively pushed the sale of Peruvian bonds to the public," despite the bank's own representatives telling the bank that Peru was not likely to repay the interest or principal on the debt. *See id.* (citing JOHN KENNETH GALBRAITH, THE GREAT CRASH: 1929 171 (1955); SELIGMAN, *supra* note 14, at 27-28 (1982)).

The hearings revealed manipulation in the offering of securities. The public was informed that "J.P. Morgan & Co. . . had a 'preferred list' of influential individuals who received stock in securities distributions at a low price shortly before they went public at a much higher figure," enabling these individuals to sell the securities for "a sure profit." *See id.* at 2-3 (citing SELIGMAN, *supra* note 14, at 34-35 (1982)).

The Pecora hearings also disclosed that "the market abuses of the 1920s were continuing in full force during the opening months of the New Deal." *See id.* at 3 (citing KENNETH S. DAVIS, FDR: THE NEW DEAL YEARS 1933–1937 362 (1979)). Operators, including members of prestigious investment banks, company officers, specialists on the New York Stock Exchange, and even the father of president John Kennedy, Joseph Kennedy, created a "false effect of great activity and widespread buying that played on the gullibility and greed of the public." *See id.* at 3.

In light of these abuses, the legislation garnered large public support, and with the help of Sam Rayburn, then Chairman of the House Commerce Committee and later the Speaker of the House, the two laws passed through Congress. *See id.*

[19] *See* Denise Mazzeo, *Securities Class Actions, CAFA, and a Countrywide Crisis: A Call for Clarity and Consistency*, 78 FORDHAM L. REV. 1433, 1441 (2009).

[20] Michael Serota, *(Mis)Interpreting SLUSA: Closing the Jurisdictional Loophole in Federal Securities Class Actions*, 7 BERKELEY BUS. L.J. 162, 164 (2010). This was accomplished through the "filing of a registration statement with the Securities and Exchange Commission and providing prospective investors with detailed information" concerning the securities. *Id.*

[21] Securities Act of 1933, 15 U.S.C. § 77v(a) (1998) ("The district courts of the United States and United States courts of any Territory, shall have jurisdiction . . . concurrent with State and Territorial courts, of all suits . . . brought to enforce any liability or duty created by this subchapter.").

[22] *Id.* ("[N]o case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.").

However, investor protection "seems to ebb and flow with the market."[23] In times of economic troubles, like the Great Depression, investor protection increases, because investor confidence is a key to shifting a bear market to bull.[24] And until the 1990s, Section 22 of the Securities Act, the section concerning jurisdiction, remained largely untouched.[25] But in times of prosperity, "Congress seems to be less concerned with protecting investors, and more so with deregulating and preventing litigious abuses of the system."[26] And during the economic boom of the 1990s, Congress whittled away the broad investor protections built up by the Securities Act.[27]

In 1995, Congress "attempted to limit the number of securities class actions"[28] by passing the Private Securities Litigation Reform Act of 1995 (PSLRA).[29] The law purported to fight meritless class actions alleging fraud in the sale of securities (strike suits).[30] However, plaintiffs began to strategically circumvent the PSLRA by filing class actions in state court, where federal law did not apply and where the Securities Act enjoyed concurrent and non-removable jurisdiction.

To prevent the evasion of the protections the PSLRA provides against abusive litigation,[31] Congress enacted the Securities Litigation Reform Act of 1998 (SLUSA).[32] Originally, Section 22(a) of the Securities Act barred removal of Securities Act claims brought in a state court of competent jurisdiction.[33] SLUSA amended this provision by allowing the removal of certain covered class actions.[34] But federal courts have "struggled with [SLUSA's] application to class action removal for claims arising [solely] under the [Securities Act]."[35]

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[23] *See* Mazzeo, *supra* note 19, at 1436.

[24] *Id.* at 1436-37. The traditional definition of a "bear market" is a decline in the average price of stocks by 20% or more from the most recent high point, while the traditional definition of a "bull market" is a 20% increase from the most recent low point. *See* Tom Lauricella, *Is This Bull Cyclical or Secular*?, WALL ST. J. (June 15, 2009), http://online.wsj.com/article/SB124501817200213499.html.

[25] *See* Mazzeo, *supra* note 19, at 1444.

[26] *Id.* at 1436.

[27] *See id.* at 1437.

[28] Serota, *supra* note 20, at 164.

[29] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

[30] Serota, *supra* note 20, at 164.

[31] *Id.* at 165.

[32] Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.).

[33] Securities Act of 1933, 15 U.S.C. § 77v(a) (1998).

[34] Securities Act of 1933, 15 U.S.C. § 77v(a) (2012).

[35] Serota, *supra* note 20, at 165.

Some district courts have construed the amendment narrowly, finding that the plain meaning of its text only allows for removal of state law claims. Thus, Securities Act claims, asserted without any corresponding state claims (pure Securities Act claims), are still barred from removal by Section 22(a). Other courts have construed it broadly, looking toward legislative intent to find that pure Securities Act claims are removable. The issue is further complicated by a lack of binding authority. For example, "[p]rocedural rules make it . . . difficult for federal appellate courts to review . . . [a district court's] decision[] to remand [Securities Act] class action claims [back to state court]," and other district courts only provide persuasive authority.[36]

Some courts, however, are beginning to look past SLUSA's amendment to the anti-removal provision of the Securities Act;[37] instead, they focus on SLUSA's amendment to the concurrent jurisdiction provision of the Securities Act.[38] These courts conclude that the amendment to the concurrent jurisdiction provision completely removed state court jurisdiction over pure Securities Act claims. The anti-removal provision only applies to claims brought in a "State court of competent jurisdiction."[39] Therefore it simply does not bar pure Securities Act claims from removal in the first place. Because this approach addresses the shortcomings of other interpretations, courts should apply this analysis when faced with the issue of removal of a class action asserting Securities Act claims.

The note proceeds in three parts. Part I provides background on the Securities Act and the two subsequent statutes amending its provisions: the PSLRA and SLUSA. Part II focuses on two of SLUSA's amendments to the Securities Act and the judicial confusion about whether pure Securities Act claims are removable from state to federal court. This part will explore the three approaches courts use in interpreting the effect that SLUSA and the PSLRA have had on the anti-removal and concurrent jurisdiction provisions of the Securities Act. Part III argues that an interpretation that allows for the removal of pure Securities Act claims not only serves the goals of the PSLRA and SLUSA, but also furthers the goals of the Securities Act. This Part concludes that innocent investors should be protected from the damage caused by meritless class actions.

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[36] *See id.* at 166.
[37] *See* 15 U.S.C. § 77v(a) (1998).
[38] *See id.*
[39] 15 U.S.C. § 77p (2012).

## I. STATUTORY BACKGROUND

### *A. General Removal Jurisdiction*

To understand the jurisdiction of federal securities law, one must begin with an understanding of basic federal jurisdiction.[40] As a general rule, "state and federal courts have concurrent jurisdiction to hear most cases that fall within Article III."[41] This rule gives plaintiffs the initial choice of forum, and a plaintiff may choose to bring a federal claim in state court.[42] While plaintiffs get the first choice, defendants are not without power of their own. Removal jurisdiction is the mechanism by which defendants can transfer a federal claim from state court to federal court.[43] But the power of removal is not absolute. Under the general removal statute, 28 U.S.C. 1441(a), a defendant may remove claims "[e]xcept as otherwise expressly provided by Act of Congress."[44] As noted by one court, this "'except' provision is 'clearly a reference to statutes such as the [Securities Act].'"[45]

### *B. Securities Act of 1933*

Congress expressly provided for such an exception to removal jurisdiction when it passed the Securities Act[46] in response to the Crash of 1929.[47] Securities fraud plagued the market in the 1920s and, despite many state securities

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[40] Federal jurisdiction "extend[s] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art. III, § 2.

[41] Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 145 (2001). The model of concurrent regulatory authority provide for removal statutes, which "create a right for some parties to be in federal court if they want to be, and most areas of concurrent jurisdiction exist at Congress's sufferance." *Id.*

[42] *See* 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, 1197-98 (2004).

[43] 28 U.S.C. § 1441(a) (2012) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

[44] *See id.*; *see also* Costa, *supra* note 42, at 1198 ("Congress has reserved the right to circumscribe removal in all cases in which they chose to do so in . . . 28 U.S.C. § 1441.").

[45] Farmers & Merch's Bank v. Hamilton Hotel Partners of Jacksonville Limited P'ship, 702 F. Supp. 1417, 1419-20 (D. Ark. 1988); *see* William B. Snyder, Jr., *The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court*, 85 N.C. L. REV. 669, 672 (2007).

[46] 15 U.S.C. § 77v.

[47] Serota, *supra* note 20, at 164.

statutes, "the public sustained severe losses at the hands of securities dealers and corporations."[48] With the clear need to restore investor confidence in the securities market in mind, President Roosevelt pushed for massive securities reform and the creation of the Securities Act.[49] In a comprehensive effort to regulate securities markets, the objective of the Securities Act was to require companies to provide "full and fair disclosure . . . by filing a registration statement with the Securities and Exchange Commission."[50] The Securities Act also created an express private right of action to "hold[] those who file the statements liable for any misstatements or omissions."[51]

Within this private right of action, Congress chose to enhance investor protection by giving class action plaintiffs the ultimate power to choose the forum.[52] Section 22(a) of the Securities Act contains two mechanisms to accomplish that goal.[53] The section's concurrent jurisdiction provision provides for concurrent state and federal jurisdiction,[54] and its anti-removal provision eliminates the defendant's ability to remove certain actions brought in state court.[55] The effect of these provisions is generally recognized as being pro-plaintiff.[56]

But the Securities Act is limited to regulating the initial distribution of securities.[57] One year after its passage, Congress enacted the Exchange Act to address a different type of harm: intentional misconduct in the manipulation of stock prices and trading of securities.[58] Noting the concurrent jurisdiction

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[48] Mazzeo, *supra* note 19, at 1440-42.

[49] *Id.* at 1441.

[50] Serota, *supra* note 20, at 164. The belief behind the Securities Act was that, "if companies and their underwriters were required to disclose all information to investors, shady deals would be impossible." Poser, *supra* note 12, at 3.

[51] Mazzeo, *supra* note 19, at 1442.

[52] Serota, *supra* note 20, at 164.

[53] *See* 15 U.S.C. § 77v(a) (1998).

[54] *See* Mitchell A. Lowenthal & Timothy M. Haggerty, *Jurisdictional Struggle Continues over 1933 Act Class Suits*, N.Y. L.J., June 14, 2010, at S4, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202462634140&Jurisdictional_Struggle_Continues_Over_1933_Act_Class_Suits&slreturn=20120825180339 [hereinafter Lowenthal & Haggerty, *Jurisdictional Struggle*]; *see also* 15 U.S.C. § 77v(a) ("The district courts of the United States and United States courts of any Territory, shall have jurisdiction . . . concurrent with State and Territorial courts . . . of all suits . . . brought to enforce any liability or duty created by this subchapter.").

[55] *See* Lowenthal & Haggerty, Jurisdictional Struggle, *supra* note 54, at S4 *see also* 15 U.S.C. § 77v(a) ("[N]o case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.").

[56] *See* Mazzeo, *supra* note 19, at 1444.

[57] *See* Snyder, Jr., *supra* note 45, at 673.

[58] *See* Mazzeo, *supra* note 19, at 1443 n.67 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194-95 (1976)); *see also* Snyder, Jr., *supra* note 45, at 673 ("The Exchange Act allows for the regulation of the secondary market and regulates all

provided by the Securities Act, Congress granted federal courts *exclusive* federal jurisdiction to hear claims arising under the Exchange Act.[59] Congress also considered amending the Securities Act to provide exclusive federal jurisdiction, "but expressly declined to do so"[60] for reasons that are still unclear.[61]

### *C. Private Securities Litigation Reform Act of 1995 (PSLRA)*

The anti-removal provisions of the Securities Act would prove to be particularly important after the passage of the PSLRA. Congress enacted the PSLRA in the face of a growing number of "'strike suits[;]' the 'meritless class actions that allege fraud in the sale of securities.'"[62] Title I of the PSLRA, titled "Reduction of Abusive Litigation," added Section 27 to the Securities Act[63] and it contained "some of the most sweeping amendments since the inception of federal securities law."[64] Most notably, Section 27 includes an automatic stay of discovery upon the filing of a motion to dismiss, as well as heightening the pleading standards for plaintiffs.[65] The goal of the PSLRA was to

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aspects of public trading of securities. Specifically, the Exchange Act extended federal regulation to stock manipulation, insider trading, and broker-dealer and stock exchanges as well as proxy solicitations." (internal quotation marks omitted)).

[59] *See* Mazzeo, *supra* note 19, at 1444; *see also* Securities Exchange Act of 1934, 15 U.S.C. § 78 (2012).

[60] *See* Mazzeo, *supra* note 19, at 1444 (citing 78 CONG. REC. 8571 (1934) (statement of Sen. Byrnes) (noting that the Senate's version of the bill provided for concurrent jurisdiction, while the House version of the bill granted exclusive federal jurisdiction)).

[61] *See* Snyder, Jr., *supra* note 45, at 673.

[62] Mitchell A. Lowenthal & Timothy M. Haggerty, *SLUSA's Elimination of State and Court Jurisdiction over Securities Class Actions*, CLEARY GOTTLIEB STEEN & HAMILTON LLP LITIGATION & ARBITRATION REPORT 20-21 (Dec. 2006) [hereinafter Lowenthal & Haggerty, *SLUSA's Elimination*].

[63] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

[64] Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 ALA. L. REV. 325, 334 (2004).

[65] *Id.* at 335 (footnotes omitted). The heightened pleading standard requires a plaintiff to "state with *particularity* facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (2012) (emphasis added). The automatic stay of discovery provides:

> In any private action arising under this sub-chapter, 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.

*Id.* § 77z-1(b)(1).

The PSLRA also includes several other important reforms to federal securities laws. A "lead plaintiff provision" rejects the race-to-the-courthouse method of

"provide protection . . . for investors, issuers, and all who are associated with the American capital markets."[66]

With the PSLRA, Congress reacted to concerns in the business community that class-action plaintiffs were abusing the anti-fraud provisions of securities laws.[67] "[W]henever a company's stock price declined, plaintiffs rushed to file class actions under the federal securities laws, even though there was, in fact, no evidence of fraud at the time of the suit."[68] Complaints generally charged deep-pocket defendants with cookie-cutter violations, such as allegedly issuing misleading public documents, thereby causing the price of the security to artificially climb or decline.[69] A cost-benefit analysis often forced the defendants to "settle even non-meritorious actions because the settlement amount would cost the defendant less than litigation expenses associated with discovery requests."[70] The PSLRA was enacted under the belief that "both investors and the national economy suffer when innocent parties are forced to pay exorbitant settlements in meritless lawsuits."[71]

The PSLRA sought to curtail these strike suits through a series of procedural and jurisdictional reforms, measures intended to make it more difficult to bring private securities-fraud actions under federal securities laws.[72] Congress hoped that the increased cost and difficulty in bringing these actions would "weed out non-meritorious actions at the pleading stage, thereby discouraging strike suits."[73] But the PSLRA had

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identifying the plaintiff, and instead presumes that the largest shareholder is the proper plaintiff, and is "entitled to control the private class action (and therefore appoint counsel) . . . ." O'Hare, *supra* note 64, at 336; *see also* 15 U.S.C. § 77z-1(a)(3) (2012). The court is also required to undertake an inquiry at the conclusion of each case to determine and impose mandatory sanctions on counsel for violations of Rule 11. *See id.* § 77z-1(c).

[66] Costa, *supra* note 42, at 1201 (citing H.R. REP. No. 104-369, at 32 (1995)) (internal quotation marks omitted).

[67] O'Hare, *supra* note 64, at 334.

[68] *Id.*

[69] *Id.* at 335; *see also* Mazzeo, *supra* note 19, at 1446 ("The systematic 'abusive' practices . . . embodied several characteristics: (1) routinely filing frivolous suits alleging cookie-cutter violations of the federal securities laws whenever there was a significant change in stock price, (2) targeting deep-pocketed defendants, and (3) abusing discovery practices in the hopes that the defendant would make a quick and sizeable settlement in order to avoid the expense of litigation.").

[70] O'Hare, *supra* note 64, at 335.

[71] Mazzeo, *supra* note 19, at 1446 (internal quotation marks omitted).

[72] O'Hare, *supra* note 64, at 335.

[73] *Id.* at 336. Additionally, "Congress hoped . . . [to] encourage[ ] companies to make projections, forecasts, and other kinds of forward-looking statements." *Id.* Companies could expect to be hit by a lawsuit alleging fraud whenever a forward-looking projection or statement failed to materialize. *Id.* Accordingly, businesses were discouraged from making such statements. *Id.* In addition to discouraging strike suits

unintended consequences that would play a large role in shaping the field of federal securities laws. Most significantly, there was a large increase in the number of securities class actions filed in state court.[74] After all, "[t]he restrictions added by [the] PSLRA . . . appl[ied] only to claims brought in federal court . . . ."[75] Due to the concurrent jurisdiction of the Securities Act, plaintiffs were able to strategically "exploit a jurisdictional loophole" by bringing suit under state law and in state court.[76] In attempts to circumvent the more stringent procedural requirements imposed by the PSLRA, such lawsuits were routinely filed contemporaneously with claims filed in federal court.[77]

The Exchange Act did not fare much better at avoiding strike suits than the Securities Act. While the Exchange Act's exclusive federal jurisdiction prevented plaintiffs from filing Exchange Act claims in state court, many states' securities laws, as well as common law fraud, provided remedies similar to those under the Exchange Act.[78] Thus, by filing state law claims in state court, plaintiffs simply avoided federal securities laws entirely.

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overall, Congress added a "safe-harbor [provision] for forward-looking statements." *Id.* A plaintiff could not then recover under the anti-fraud provisions if the statement was accompanied by a cautionary statement that identified "important factors that could cause actual results to differ materially from those in the . . . statement." 15 U.S.C. § 77z-2(c)(1)(A)(i) (2012); *id.* § 78u-5(c)(1)(A)(i).

[74] Mazzeo, *supra* note 19, at 1448 (citing OFFICE OF THE GEN. COUNSEL, UNITED STATES SEC. & EXCH. COMM'N, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 (1997), *available at* http//www.sec.gov/news/studies/lreform.txt.). The SEC Report was conducted at the request of President Clinton, "in an effort to measure the level of success the [PSLRA] had achieved in attaining its aforementioned goals." Costa, *supra* note 42, at 1201. The PSLRA did achieve its goal of decreasing the volume of securities class actions in federal court. *Id.* at 1202. There was also an "increased delay between the release of adverse information . . . and the filing of the action," evidencing "greater research and investigation" into class action complaints and the "conclusion that . . . meritorious claims were still developed and brought, [while] frivolous claims were not." *Id.* at 1202-03.

[75] Snyder, Jr., *supra* note 45, at 675.

[76] Serota, *supra* note 20, at 168. Under the Securities Act of 1933, class-action plaintiffs could generally avoid the heightened requirements of the PSLRA in two ways: first, plaintiffs could file claims arising under the Securities Act of 1933 directly in state court, where they enjoyed concurrent and non-removable jurisdiction; second, plaintiffs could file claims in state court based on a state law theory of securities or common law fraud. *See* Snyder, Jr., *supra* note 45, at 676.

[77] *See* Mazzeo, *supra* note 19, at 1449. In particular, plaintiffs could take advantage of more lenient discovery in state court, and use those facts to withstand a motion to dismiss. *Id.* Traditionally, state courts did not provide remedies as broad as federal remedies for securities fraud, but "other advantages [include] nonunanimous jury verdicts, punitive damages, and aiding and abetting liability." *Id.*

[78] *See* Snyder, Jr., *supra* note 45, at 676 (citing 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 7.17[2] (5th ed. 2005)).

### *D. Securities Litigation Uniform Standards Act of 1998 (SLUSA)*

Congress concluded that the concurrent jurisdiction and anti-removal provisions of the Securities Act prevented the PSLRA from accomplishing its goals.[79] In 1998, Congress passed SLUSA.[80] "SLUSA sought to cure this infirmity by enacting 'national standards' for securities class actions involving 'nationally traded securities.'"[81] SLUSA amended the Securities Act in order to make federal court the "primary venue for securities fraud class actions."[82] The ultimate result of the SLUSA amendment was to allow a defendant to remove certain preempted claims sounding in state and common law to federal court, where the claim would be dismissed.

A preempted claim under SLUSA is a "covered class action based upon the statutory or common law of any State" alleging a misrepresentation or use of a manipulative or deceptive device in connection with the purchase or sale of a covered security.[83] Preemption only applies to "[c]overed securities," securities "listed, or authorized for listing" on a national exchange such as the New York Stock Exchange or NASDAQ.[84] A preempted claim must also be a "covered class action," which is of a form similar but "not identical to a class action brought under Rule 23 of the Federal Rules of Civil Procedure."[85] If the claim is preempted, the class action cannot "be maintained in any State or Federal court by any private party."[86]

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[79] *See* Lowenthal & Haggerty, *Jurisdictional Struggle*, *supra* note 54, at S4.

[80] *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998). The bill was introduced by senators Phil Gramm, Christopher Dodd, Peter V. Domenici, and eleven others. S. REP. No. 105-182, at 1-2 (1998). It "passed by unanimous consent in the Senate, a vote of 319-82 in the House, and was signed into law by President Clinton." *See* Costa, *supra* note 42, at 1205.

[81] Mazzeo, *supra* note 19, at 1450.

[82] *See* Snyder, Jr., *supra* note 45, at 677.

[83] Securities Litigation Uniform Standards Act of 1998 § 101, 112 Stat. 3227, 3228 (codified as amended at 15 U.S.C. § 77p(b) (2012)); *see also* Kenneth I. Schacter & Mary Gail Gearns, *Removing '33 Act Class Actions Under SLUSA and CAFA: Not So Simple*, N.Y. L. J., Dec. 1, 2008, *available at* http://www.bingham.com/Publications/Files/2008/12/Removing-33-Act-Class-Actions-Under-SLUSA-and-CAFA (internal quotation marks omitted).

[84] *See* 15 U.S.C. § 77r(b) (defining "covered security"); *see also* Mazzeo, *supra* note 19, at 1450. ("Thus, securities traded over-the-counter on the Nasdaq Small Capital Market are not covered securities, and anti-fraud actions for these securities are not preempted."); O'Hare, *supra* note 64, at 339-40.

[85] O'Hare, *supra* note 64, at 340. A covered class action includes: "(1) actions brought on behalf of more than 50 persons, (2) actions brought on a representative basis, and (3) a group of joined or consolidated actions." *Id.*; *see also* 15 U.S.C. § 77p(f)(2); 15 U.S.C. § 78bb(f)(3)(B).

[86] *See* 15 U.S.C. §§ 77p(b), 78bb(f)(1); *see also* Costa, *supra* note 42, at 1205.

In order to facilitate bringing preempted claims to federal court for dismissal, SLUSA added corresponding removal provisions.[87] SLUSA amended Section 22(a) of the Securities Act to add for an exception to the removal bar, "as provided in [Section 16(c)]."[88] Section 16(c) provides that "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court . . . and shall be subject to subsection (b) of this section."[89] SLUSA also amended the concurrent jurisdiction provision of the Securities Act so that state court jurisdiction is still concurrent with federal jurisdiction "except with respect to . . . 'covered class actions.'"[90]

Supporters of this legislation argued that it was necessary for two reasons. First, preemption of state law-based securities fraud class actions, for certain nationally traded securities, was necessary to ensure the effectiveness of the PSLRA. Second, continued circumvention of the PSLRA could potentially be "exacerbated by a projected race-to-the-bottom, in which one or more states enact laws decidedly more favorable to plaintiffs than federal law."[91] The race-to-the-bottom would be further exaggerated because "companies with publicly traded securities cannot control where their securities are traded after an initial public offering; thus, issuers . . . cannot choose to avoid jurisdictions that present unreasonable litigation costs."[92]

## II. DISTRICT COURT INTERPRETATIONS

"[T]he SLUSA amendment is hardly a model of clarity."[93] There has been considerable judicial confusion about the removability of pure Securities Act claims filed in state court. Despite SLUSA's amendment and the attempt to create a uniform federal standard, "plaintiffs have continued to bring class claims under the Securities Act in state courts."[94] These plaintiffs argue that "SLUSA [has] failed to capture all securities class actions" because, by its plain language, SLUSA

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[87] *See* Securities Litigation Uniform Standards Act of 1998 §§ 101, 22(a), 28, 112 Stat. 3227, 3230 (amending Section 22(a) of the Securities Act of 1933, and Section 28 of the Securities Exchange Act of 1934); *see also* O'Hare, *supra* note 64, at 341.

[88] 15 U.S.C. § 77v(a).

[89] Securities Litigation Uniform Standards Act of 1998 § 101(a)(3), 15 U.S.C. § 77p(c); *see also* Mazzeo, *supra* note 19, at 1444-50.

[90] 15 U.S.C. § 77v(a); *see also* Schacter & Gearns, *supra* note 83.

[91] *See* Costa, *supra* note 42, at 1204-05 (internal quotation marks omitted).

[92] Mazzeo, *supra* note 19, at 1451.

[93] *Id.*

[94] Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 20.

does not apply to class actions that "rais[e] claims exclusively under the Securities Act (without any state law claims)."[95] Advocating a narrow interpretation, these plaintiffs assert that removal is limited to "covered class action[s] based upon the *statutory or common law of any State*."[96] Accordingly, removal does not apply to federal claims—those that arise under the Securities Act—and thus, defendants continue to be prejudiced by the circumvention of the PSLRA's heightened federal standards.[97] District courts principally disagree about whether the amendment made by SLUSA limits removal to preempted state law securities class actions, or whether the amendment also allows for removal of claims arising solely out of the Securities Act.[98]

Thus far, federal district courts have reached inconsistent results. Initial disagreement rested upon conflicting interpretations of SLUSA's amendment to the anti-removal provision of the Securities Act. Some courts took a narrow approach and looked only to the "plain meaning" of the Securities Act.[99] Other courts, noting an inconsistency between the removal and pre-emption provisions, took a broad approach and looked to legislative intent to aid in deciphering the scope of removal.[100] However, an emerging trend has been to ignore SLUSA's amendment to the anti-removal provision and instead look to SLUSA's amendment to the concurrent jurisdiction provision of the Securities Act. These courts purport to align the "plain meaning" of the text with the legislative intent to create a uniform federal standard.

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[95] *Id.*

[96] Securities Litigation Uniform Standards Act of 1998 § 101, 112 Stat. 3227, 3228 (codified as amended at 15 U.S.C. § 77p(c)) (emphasis added).

[97] Snyder, Jr., *supra* note 45, at 670.

[98] Schacter & Gearns, *supra* note 83.

[99] *See, e.g.*, Irra v. Lazard Ltd., No. 05-3388, 2006 WL 2375472 (E.D.N.Y. Aug. 15, 2006); Pipefitters Local 522 and 633 Pension Trust Fund v. Salem Commc'ns Corp., No. CV-05-2730, 2005 U.S. Dist. LEXIS 14202 (C.D. Cal. June 28, 2005); Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp., No. 03-civ-0714, 2003 U.S. Dist. Lexis 15832 (S.D. Cal. Aug. 26, 2003); Nauheim v. Interpublic Group of Cos., No. 02-C-9211, 2003 WL 1888843 (N.D. Ill. Apr. 16, 2003); *In Re* Waste Mgmt., Inc., 194 F. Supp. 2d 590 (S.D. Tex. 2002).

[100] *See, e.g.*, Rovner v. Vonage Holdings Corp., No. 07-178, 2007 WL 446658 (D.N.J. Feb. 7, 2007); Alkow v. TXU Corp., No. 3:02-CV-2243-K, 2003 U.S. Dist. LEXIS 7900 (N.D. Tex. May 8, 2003); Brody v. Homestore, Inc., 240 F. Supp. 2d 1122 (C.D. Cal. 2003).

### *A. Courts Denying Removal: The Narrow Interpretation of SLUSA's Amendment to the Anti-Removal Provision*

Courts that have taken a narrow approach in interpreting SLUSA's amendment to the Securities Act focus on the effect of the "three cross-referencing provisions of the act" and, in doing so, purport to interpret the "plain meaning" of the statute.[101] "It is well settled that courts interpreting a statute should 'give effect, if possible, to every clause and word of the statute.'"[102] Thus, courts adopting a narrow approach ultimately conclude that pure Securities Act claims cannot be removed from the state court in which they are brought.

Courts begin this statutory interpretation by looking to Section 22(a) of the Securities Act. Section 22(a) provides for an exception to the anti-removal provision in Section 16(c).[103] Section 16(c) excepts from the removal bar "[a]ny covered class action brought in State court involving a covered security, *as set forth in subsection (b)* . . . ."[104] Finally, subsection (b), the preclusion provision, provides for preclusion from federal court of certain class actions "based upon the statutory or common law of any *State* or subdivision thereof . . . ."[105] Because Section

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[101] Lowenthal & Haggarty, *Jurisdictional Struggle*, *supra* note 54, at S4. *See, e.g.*, *In re* Waste Mgmt., Inc., 194 F. Supp. 2d at 591 (remanding a case alleging only violations of the Securities Act of 1933. The Court laid out a five-part test for removal of a claim under SLUSA: "(1) [that] the action is a 'covered class action' under SLUSA; (2) that the causes of action on their face are based on *state* statutory or common law; (3) that it involves a 'covered security' under SLUSA; (4) that it alleges defendants misrepresented or omitted material facts; and (5) that the alleged misrepresentation or omission was made 'in connection with' the purchase or sale of the covered security"); *Irra*, 2006 WL 2375472 (holding the plaintiff's claims based solely on the Securities Act were not removable under SLUSA); Pipefitters Local 522 and 633 Pension Trust Fund, U.S. Dist. LEXIS 14202, at *6-7; Haw. Structural Ironworkers Pension Trust Fund, 2003 U.S. Dist. Lexis 15832, at *5-6 (finding that the plain language of 77p(c) limits removal to class actions based on State claims); *Nauheim*, No. 02-C-9211, 2003 WL 1888843, at *11 (limiting removal to class actions complaints based on State statutory or common law).

[102] Costa, *supra* note 42, at 1213 (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 100 (1992)).

[103] 15 U.S.C. § 77v(a) (2012) ("Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.").

[104] Securities Litigation Uniform Standards Act of 1998 § 101, 112 Stat. 3227, 3228 (codified as amended at 15 U.S.C. § 77p(c) (2012)) (emphasis added) ("Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).").

[105] Securities Litigation Uniform Standards Act of 1998 § 101, 112 Stat. 3227, 3228 (codified as amended at 15 U.S.C. § 77p(b) (2012)) (emphasis added) ("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

16(c) specifically cites to the preclusion provision of subsection (b),[106] some courts have found that these three provisions must be coextensive and that "only actions precluded under [subsection (b)] are removable under [Section 16(c)], and the actions removable under [Section 16(c)] are the only actions removable under [Section] 22(a)."[107] Put another way, "if an action is not preempted by [subsection (b)], then it may not be removed under Section 22(a)."[108] But if the claim is an "entirely preempted state law action" or a Securities Act claim coupled with a preempted state law claim, then it may properly be removed under this interpretation.[109]

This approach seems to have gained some support from the United States Supreme Court in its decision in *Kircher v. Putnam Funds Trust*.[110] The Court, in rather "emphatic and expansive . . . dicta,"[111] stated that there was "no reason to reject the straightforward reading: removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)."[112] The Court continued, "If the action is not precluded [under subsection (b)], the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court . . . ."[113] However,

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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.").

[106] *See* Serota, *supra* note 20, at 169-70.

[107] Lowenthal & Haggarty, *Jurisdictional Struggle*, *supra* note 54, at S4 (internal quotation marks omitted); *see also* Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 23.

[108] Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 23.

[109] *See id.*

[110] *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006). The issue in this case was whether the Seventh Circuit had jurisdiction to review a district court's decision to remand a class action securities claim, based on state law, back to state court because the district court found that it lacked subject matter jurisdiction. *See* Kircher v. Putnam Funds Trust, No. 03-CV-0691, 2004 U.S. Dist. LEXIS 10327, at *31-32 (S.D. Ill. Jan. 27, 2004). The Supreme Court then tackled the issue of whether holders of mutual fund shares were within the section of SLUSA that "allows for the removal of claims that arise 'in connection with the *purchase or sale* of a covered security.'" *See* J. Tyler Butts, *Removal of Covered Class Actions Under SLUSA: The Failure of Plain Meaning and Legislative Intent as Interpretive Devices, and the Supreme Court's Decisive Solution*, 1 WM. & MARY BUS. L. REV. 169, 189-90 (2010). The ultimate holding was "procedural, not substantive, when it held that under federal law, the case should never have been heard on appeal at the federal level." *Id.* at 190. But after the "ultimate issue . . . had been decided, Justice Souter elaborated on the scope of SLUSA and removal generally." *Id.*; *see also* Kircher v. Putnam Funds Trust, 547 U.S. 633, 646-48 (2006).

[111] Lowenthal & Haggarty, *Jurisdictional Struggle*, *supra* note 54, at S5 (internal quotation marks omitted).

[112] Kircher, 547 U.S. at 643; *see also* Lowenthal & Haggarty, *Jurisdictional Struggle*, *supra* note 54, at S5.

[113] *Kircher*, 547 U.S. at 644. It must also be noted that the Supreme Court was dealing specifically with the "covered security" provision under subsection (b)(1), and

the Supreme Court was faced with a state law claim, not a pure Securities Act claim that district courts currently struggle with, and perhaps "did not fully explain its rationale."[114]

Critics point out that this interpretation of the "inartfully drawn"[115] statute "renders the exception to [Section] 22(a)'s anti-removal provision unnecessary, meaningless and not an exception at all."[116] "Section 22(a) creates a general rule against the removal of cases 'arising under' the Securities Act, but permits an exception 'as provided in Section 16(c).'"[117] "[T]o have meaning, [this section] must apply to some subset of cases that actually *arise under* the Securities Act,"[118] but a narrow interpretation of SLUSA would limit removal to preempted claims under subsection (b), i.e., claims arising under state law.[119] Noting this apparent inconsistency, these critics reason that state law claims obviously cannot "arise under" the Securities Act,[120] but rather, "arise under state law."[121] The amendments to Section 16(c) and subsection (b), standing alone, would accomplish the same result as the narrow interpretation. If Congress did in fact intend to limit removability to state law claims, SLUSA's amendment to Section 22(a) would be superfluous and unnecessary.[122]

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not to subsection (b) as a whole, which includes the state law limitation provision. *See* 15 U.S.C. § 77p(b)(1) (2012) ("in connection with the purchase or sale of a covered security"); *see also* 15 U.C. § 77p(b) ("based upon the statutory or common law of any State or subdivision thereof"). However, it would be internally inconsistent to allow one provision under subsection (b) to prohibit removal, while not applying the same interpretation to another provision (the state law limitation) within the same subsection. *See* Butts, *supra* note 110, at 192.

The dicta could fairly be interpreted to suggest that "if a claim fails to meet *any one* of the requirements of subsection (b), removal is not an option." *Id.* This is in line with the narrow approach, and if the claim is not based on state law, then it is not removable under SLUSA. This interpretation was adopted by the District Court for the Northern District of Georgia in *Unschuld*, which assumed that "[p]resumably, the [Supreme Court] was aware of the ongoing dispute about removal of such claims." Unschuld v. Tri-S Sec. Corp., No. 06-02931, 2007 U.S. Dist. LEXIS 68513, at *34 (N.D. Ga. Sept. 14, 2007).

114 *See* Snyder, Jr., *supra* note 45, at 693.

115 Schacter & Gearns, *supra* note 83.

116 *See* Lowenthal & Haggarty, *Jurisdictional Struggle*, *supra* note 54, at S4-S5.

117 *See* Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 23; *see also* 15 U.S.C. § 77v(a).

118 *See* Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 23.

119 *See id.*

120 *See* Lowenthal & Haggarty, *Jurisdictional Struggle*, *supra* note 54, at S5.

121 *See* Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 23.

122 *See id.* This argument was directly addressed in *Nauheim.* The defendants argued against removal, but the court found that the language was "made meaningful by . . . 77p(c)'s preemption of an expressly delineated category of state law class actions." Nauheim v. Interpublic Grp. of Cos., No. 02-C-9211, 2003 WL 1888843, at *5 (N.D. Ill. Apr. 16, 2003). As one author puts it, however, this assertion is "simply wrong," and the court "entirely fail[s] to justify this conclusion." Costa, *supra* note 42, at 1210.

Accordingly, a broader interpretation that includes removal for pure Securities Act claims gives meaning to the word "except" in Section 22(a).[123] The courts' narrow interpretation has led to the "somewhat bizarre and anomalous" result of putting state law claims in federal court but leaving federal claims in state court.[124]

However, as the Supreme Court has long acknowledged, "when the words of the statute are unambiguous[,] 'judicial inquiry is complete.'"[125] It is the "sole function of the courts," when presented with a law containing unambiguous language, "to enforce it according to its terms."[126] When a statute can be interpreted on its face, resorting to legislative history is inappropriate, and the court must presume the statute means what it says.[127] Courts taking a narrow interpretation often merely recite the words of the statute, followed by "conclusory summation[s]," as though the meaning is "so obvious that it needs no more explanation."[128] But such an unambiguous statute simply does not exist, or else courts would not be confronted with such widespread divergence of interpretation.

### *B. Courts Upholding Removal*

#### 1. The Broad Interpretation of SLUSA's Amendment to the Anti-Removal Provision

The courts that reject the "plain meaning" approach apply a much broader reading to determine whether SLUSA

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The court in *Hawaii Structural* recognized the aforementioned inconsistency within the statute, but concluded that when the "statute is clear" it is inappropriate to "modify it to effect Congress's likely intent." Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp., No. 03-CV-0714, 2003 U.S. Dist. Lexis 15832, at *5-6 (S.D. Cal. Aug. 26, 2003). However the district court "directly contradicted itself by calling the statute 'clear' and by simultaneously recognizing the 'inconsistency' in its language." Costa, *supra* note 42, at 1211.

[123] *See* Snyder, Jr., *supra* note 45, at 683-85.

[124] Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 23 (internal quotation marks and footnotes omitted).

[125] Costa, *supra* note 42, at 1213 (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (internal quotation marks omitted)).

[126] Costa, *supra* note 42, at 1213 (citing Caminetti v. United States, 242 U.S. 470, 485 (1917)).

[127] Costa, *supra* note 42, at 1213 (citing *Conn. Nat'l Bank*, 503 U.S. at 254).

[128] Butts, *supra* note 110, at 182 (citing No. 02-C-9211, 2003 WL 1888843, at *3 (N.D. Ill. Apr. 16, 2003). "[O]ne . . . gets the impression that the court had made up its mind before considering the . . . statute." Butts, *supra* note 110, at 183. While it is true that in their minds the statute may be clear and unambiguous, the courts should recognize that it is at least *arguably* "dense and potentially confusing" and they "would do well to explain more thoroughly how they reached their conclusion." *Id.*

permits removal of pure Securities Act claims.[129] They typically look beyond the text and focus on the purpose of SLUSA to supplement their interpretation of the otherwise confusing statute.[130] Accordingly, these courts believe that their interpretation is in line with Congress's decision to "remedy the PSLRA's failure to 'prevent abuses in private securities fraud lawsuits'" and Congress's perceived need to enact "national standards for securities class action lawsuits."[131] Thus, courts adopting a broad approach ultimately conclude that pure Securities Act claims are removable from state court.

"When statutory language is open to more than one reasonable interpretation, courts attempt to find the meaning 'which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'"[132] Congress enacted the PSLRA to curtail "strike suits," but it failed to achieve its goal because plaintiffs simply avoided filing in federal court.[133] Congress subsequently enacted SLUSA[134] "to realize the intent of the [PSLRA] . . . [and ensure] that class action suits for securities that are traded on the . . . major securities trading

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[129] *See, e.g.*, Rovner v. Vonage Holdings Corp., No. 07-178, 2007 WL 446658, at *4 (D.N.J. Feb. 7, 2007) (in deciding that pure Securities Act claims belong in federal court, the court stressed that the statute should be read in the context in which it was written); Alkow v. TXU Corp., No. 3:02-CV-2243-K, 2003 U.S. Dist. LEXIS 7900, at *6 (N.D. Tex. May 8, 2003) (holding that removal of a class action asserting pure Securities Act claims was proper under SLUSA); Brody v. Homestore, Inc., 240 F. Supp. 2d 1122, 1123 (C.D. Cal. 2003) (finding that SLUSA permits removal when a plaintiff alleges only Securities Act claims).

[130] Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 24; *see also TXU Corp.*, No. 3:02-CV-2243-K, 2003 U.S. Dist. LEXIS 7900, at *4-6 (where the court looked to legislative findings to support its interpretation of SLUSA).

[131] *See* Serota, *supra* note 20, at 170 (citing *Brody*, 240 F. Supp. 2d at 1124) (internal quotation marks omitted). Congress expressly set forth its goal in enacting SLUSA under the "Findings" section of the Act:

> The Congress finds that . . . 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, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2, 112 Stat. 3227, 3227 (codified as amended at 15 U.S.C. § 78a (2012)).

[132] Butts, *supra* note 110, at 186 (quoting Comm'r v. Engle, 464 U.S. 206, 217 (1984)).

[133] Lowenthal & Haggerty, *SLUSA's Elimination*, *supra* note 62, at 21.

[134] Thirteen senators co-introduced S. 1260, later enacted as SLUSA, on October 7, 1997. *See* 143 CONG. REC. S10475 (1997) (statements of Sen. Gramm).

exchanges . . . [are] subject to the rules that we passed last time [in the PSLRA] and . . . go to federal court."[135]

Senator Phil Gramm of Texas, one of the two chief co-sponsors of SLUSA, stated that "in the case of class-action suits, . . . if a stock is traded on the national market . . . then the class action-suit has to be filed in federal court."[136] The other chief co-sponsor, Senator Chris Dodd of Connecticut has commented that the "one development . . . that has the potential to undermine our good work and send us back to the days of litigation frenzy . . . is the significant increase in securities fraud class actions filed in State court."[137] Senator Dodd was also very concerned about having to subject foreign companies to not only "very tough Federal standards on securities fraud, but also the possibility of 50 constantly changing State standards."[138] In the view of courts interpreting SLUSA broadly, certain statements by some members of the legislature "prove conclusively that Congress *meant* to remove *all* securities claims from State court, and simply fell victim to sloppy or misleading drafting."[139]

These legislator's comments reflect the view that the problem under the PSLRA was not that plaintiffs were bringing state law claims, but rather that those claims were being brought in state court.[140] Congress enacted SLUSA in response to the perceived failings of the PSLRA, and, accordingly, "the goals of each are inextricably intertwined . . . ."[141] Thus, some argue, the only way to prevent circumvention of the PSLRA by plaintiffs asserting pure Securities Act claims is to interpret the SLUSA's removal amendment broadly.[142] As Thomas Bliley, Jr., U.S. Representative from Virginia, explained before the House of Representatives, "The premise of this legislation is simple: lawsuits alleging violations that involve securities that are offered nationally belong to Federal court."[143] It is clear that at least some

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[135] Lowenthal & Haggerty, *SLUSA's Elimination*, *supra* note 62, at 21 (quoting *Sec. Litig. Unif. Standards Act: Hearing on H.R. 1689 Before the Fin. and Hazardous Subcomm. of the House Commerce Comm.*, 105th Cong. 105-85 (1998) (comments of Rep. Rick White)).

[136] 143 CONG. REC. S10475-01, § 10475 (1997) (comments of Sen. Gramm).

[137] *Id.* § 10476 (comments of Sen. Dodd).

[138] *Id.*

[139] Butts, *supra* note 110, at 188.

[140] *See* Lowenthal & Haggerty, *SLUSA's Elimination*, *supra* note 62, at 24.

[141] Snyder, Jr., *supra* note 45, at 696.

[142] *See id.*, at 697.

[143] 144 CONG. REC. S11020 (1998) (comments of Rep. Bliley). Some courts have found this quote to assist in deciphering the text and purpose of the statute. *See* Butts, *supra* note 110, at 188 (citing Brody v. Homestore, Inc., 240 F. Supp. 2d 1122, 1124 (C.D. Cal. 2003)).

members of Congress sought to create federal uniformity and eliminate class action claims in state court.[144]

The Supreme Court offered its own guidance favoring a broad interpretation in *Merrill Lynch, Pierce, Fenner, & Smith Inc. v. Dabit*.[145] The Court specifically addressed whether SLUSA precluded state law holder claims, but language in the opinion "suggests that the Court would support the broad reading of [Section 16(c)] and extend removal authority to [pure] Securities Act claims."[146] The Court "purported to follow congressional intent"[147] and noted the "congressional preference for 'national standards for securities class action lawsuits.'"[148] The Court stated that the "magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."[149] The Court also recognized that the purpose of SLUSA was "[t]o stem this shift from Federal to State courts and prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of [the PSLRA]."[150] The narrow interpretation would certainly undercut the effectiveness of the PSLRA by permitting pure Securities Act class actions to remain in state court. While it seems clear that the Supreme Court's broad language in *Dabit* and its narrow language in *Kircher* are contradictory,[151] "the Court's broad policy language . . . may be more indicative of [its] view of securities laws [in general]" than its more narrow statutory analysis of a specific provision.[152] Thus it is possible that the Court could "abandon its dicta in *Kircher* and construe the

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144 *See* Lowenthal & Haggerty, *SLUSA's Elimination*, *supra* note 62, at 24.

145 Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Dabit, 547 U.S. 71 (2006).

146 *See* Snyder, Jr., *supra* note 45, at 683-85 (citing *Dabit*, 547 U.S. at 88-89). On the ultimate issue, the Court refused to limit preclusion of claims "in connection with the purchase or sale" to only claims involving a "purchase or sale." *Dabit*, 547 U.S. at 89; *see also* Snyder, Jr., *supra* note 45, at 690.

147 Snyder, Jr., *supra* note 45, at 691. "[T]he Court also appeared comfortable allowing policy to dictate statutory interpretation in this area of the law . . . [because it] had previously done so in *Blue Chip Stamps*." *Id.* (citing *Dabit*, 547 U.S. at 80, 84). The Court in *Dabit* noted that in *Blue Chip Stamps*, a rule 10b-5 case, it had "relied chiefly, and candidly, on 'policy considerations.'" *Dabit*, 547 U.S. at 84 (citation omitted); *see also* Snyder, Jr., *supra* note 45, at 691.

148 *Dabit*, 547 U.S. at 87 (quoting Securities Litigation Uniform Standards Act of 1988, Pub. L. No. 105-353, § 2(5), 112 Stat. at 3227, 3227 (codified as amended at 15 U.S.C. § 78(a) (2012)); *see also* Snyder, Jr., *supra* note 45, at 691.

149 *Dabit*, 547 U.S. at 78; *see also* Snyder, Jr., *supra* note 45, at 691.

150 *Dabit*, 547 U.S. at 82 (internal quotation marks omitted).

151 In *Kircher*, the Supreme Court stated in dicta that "removal jurisdiction under subsection (c) is understood to be restricted to precluded actions defined by subsection (b) . . . ." Kircher v. Putnam Funds Trust, 547 U.S. 633, 643-44 (2006).

152 *See* Snyder, Jr., *supra* note 45, at 693.

[anti-]removal provision . . . to cover [pure] Securities Act claims," especially when "[s]uch a reading is also more consistent with . . . congressional intent."[153]

Aside from statements by some legislators, opponents of this broad interpretation argue that actually effectuating Congress's purported intent "could not have been simpler."[154] If Congress really intended for removal of pure Securities Act claims, it could have easily added a sentence clarifying as such. While sporadic statements can be read as authorizing removal of pure Securities Act claims, "the issue is never addressed nor supported directly."[155] Perhaps, the legislative body as a whole did not agree entirely with some of the more vocal members.[156] In fact, proponents of a narrow interpretation can simply point to the first sentence of SLUSA, which states that SLUSA's purpose is "to limit the conduct of securities class actions *under State law*."[157] Because they see the legislative history as "murky,"[158] courts that interpret SLUSA narrowly find legislative history unreliable to the extent that any analysis into it would be superfluous.[159] As Judge Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, has said, "Consulting

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[153] *Id.*

[154] *See* Costa, *supra* note 42, at 1217.

[155] *See id.* at 1220.

[156] *See id.* at 1222. It is possible that the current legislation is merely a compromise, and "[h]ad SLUSA explicitly allowed removal of all class actions arising under the Securities Act, it may . . . have lacked the political support to pass the 105th Congress." *Id.* at 1122-23. The 105th Congress was controlled by a Republican majority in both houses and at the time "the Republican majority was generally concerned with federalism, and with 'returning authority to the states.'" *Id.* at 1123 (citing A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L.Q. 435, 435 (2000)). In the 105th Congress, the Senate was composed of 55 Republicans and 45 Democrats and the House was composed of 228 Republicans, 206 Democrats, and 1 Independent. *See* Costa, *supra* note 42, at 1223 n.203 (citing S. PUB. 105-20, at 2-3 (1997)).

For example, the Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. (1998), "stalled in the Republican-controlled legislature." Costa, *supra* note 42, at 1223 n.205. The Class Action Jurisdiction Act would have provided for removal of "any class action to federal court by any defendant or non-representative plaintiff whenever one member of the plaintiff class was a citizen of a different state than any defendant." *Id.* While it is true that "[t]he Class Action Jurisdiction Act was much broader in scope than SLUSA," because it applied to any class action, it is conceivable that SLUSA "may have met a similar fate" had it attempted to "expand the federal jurisdiction by allowing for removal of all class actions" under the Securities Act of 1933.

[157] Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (emphasis added); *see also* Butts, *supra* note 110, at 187.

[158] *See* Unschuld v. Tri-S Sec. Corp., No. 06-02931, 2007 U.S. Dist. LEXIS 68513, at *27 (N.D. Ga. Sept. 14, 2007).

[159] *See* Butts, *supra* note 110, at 187.

legislative history is like 'looking over a crowd of people and picking out your friends.'"[160]

It must also be noted that SLUSA amended both the Securities Act and the Exchange Act in an "almost identical fashion" with respect to their clauses, precluding state law claims.[161] Some interpret this symmetry to mean that Congress really must have intended for SLUSA to cover both state law claims and pure Securities Act claims.[162] Because the Exchange Act granted exclusive federal jurisdiction to claims arising under it, the only method plaintiffs could use to circumvent the PSLRA was to allege state law claims in state court.[163] Accordingly,

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[160] *See* Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998). Judge Kozinski was quoting the words of Judge Harold Leventhal, who served on the District of Columbia Circuit Court of Appeals from 1965 to 1979; *see also* Butts, *supra* note 110, at 186 n.100.

[161] Snyder, Jr., *supra* note 45, at 688. Section 16 of the Securities Act of 1933, 15 U.S.C. § 77p (b)–(c) (2012), provides:

> (b) Class action limitations: 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.
>
> (c) Removal of covered class actions: Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

Section 29(f) of the Securities Exchange Act of 1934, 15 U.S.C. 78bb(f), provides:

> (1) Class action limitations: 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-
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (2) Removal of covered class actions: Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

[162] *See* Snyder, Jr., *supra* note 45, at 688-90 ("The broad reading . . . gives purpose to the amendment to the Securities Act by interpreting it to extend removal authority to [pure] Securities Act claims . . . .").

[163] 15 U.S.C. § 78aa ("The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have *exclusive jurisdiction* of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce

SLUSA's amendment to the Exchange Act was perfectly tailored to allow removal of these state law claims into federal court, thus making it the exclusive venue for claims that, in substance, alleged violations of the Exchange Act. Because Congress intended all federal and state law securities fraud claims relating to the Exchange Act to be in federal court, it could also be argued that they intended the same result for the Securities Act—that both state law securities fraud claims and pure Securities Act claims should be removable to federal court.[164]

Yet this reasoning does not *necessitate* the conclusion that Congress intended federal court to be the exclusive forum for all class action securities fraud claims arising under the Securities Act or the Exchange Act. SLUSA's amendment to the Exchange Act applies only to removal of state law claims because the Exchange Act lacks a concurrent jurisdiction provision, and hence, "pure" Exchange Act claims already enjoy exclusive federal jurisdiction.[165] Because there was no need to address removal for pure Exchange Act claims, the anti-removal provision simply does not apply to them. A consistent application of almost the same statutory language lends support to the argument that SLUSA's amendment to the anti-removal provision of the Securities Act also applies to claims solely alleging state law securities fraud.

### 2. SLUSA's Amendment to the Concurrent Jurisdiction Provision

There is still the possibility that Congress intended to limit SLUSA's removal amendment only to state law claims, as a narrow reading of the amendment would suggest, and yet still intended to make federal courts the exclusive venue for class action securities fraud claims. While much of the focus in recent years has been on the effect of SLUSA's amendment to the Securities Act's anti-removal provision, an emerging trend among district courts has been to focus on another one of SLUSA's amendments: the amendment to the concurrent jurisdiction provision of the Securities Act.[166] Although the end result is the same as the broad interpretation of SLUSA's amendment to the anti-removal provision (that pure Securities Act claims are removable), courts adopting this emerging concurrent jurisdiction

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any liability or duty created by this chapter or the rules and regulations thereunder." (emphasis added)).

164 *See* Snyder, Jr., *supra* note 45, at 688-90.

165 *See* 15 U.S.C. § 78aa.

166 15 U.S.C. § 77v(a) (emphasis added).

approach have found that this method is "rooted in both the text *and* the congressional findings underlying the SLUSA amendments."[167] Relying on the plain meaning of SLUSA's amendment to the concurrent jurisdiction provision, these courts have concluded that state courts are no longer "court[s] of *competent* jurisdiction"[168] for claims arising under the Securities Act. Therefore, the removal bar does not apply to them at all so that they can be removed just like any other federal claim.

While some courts had commented in dicta on SLUSA's change to the concurrent jurisdiction provision of section 22(a),[169] it was not until the District of New Jersey handed down two rulings in 2007 that a court explicitly found that SLUSA's amendment to the concurrent jurisdiction provision, not the anti-removal provision, allowed for removal of pure Securities Act claims.[170] Section 22(a) of the Securities Act provides for federal jurisdiction that is "concurrent with State and Territorial courts, *except as provided in [Section 16] with respect to covered class actions*, of all suits . . . brought to enforce any liability or duty created by this subchapter."[171] Thus, the amendment provides for an exception to the general rule of concurrent jurisdiction if the suit: (1) is brought to enforce the rights and liabilities created by the Securities Act, and (2) is a covered class action as provided in Section 16.[172]

The scope of the exception to concurrent jurisdiction can therefore be found in Section 16 of the Act.[173] Subsections (b), (c), and (d) to this provision refer to state law claims and thus, by definition, are not "brought to enforce the rights and liabilities created by the Securities Act."[174] Subsection (f),

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[167] Serota, *supra* note 20, at 171.

[168] 15 U.S.C. § 77v(a) (emphasis added).

[169] *See* Rubin v. Pixelplus Co., No. 06-CV-2964, 2007 WL 778485, at *3-4 (E.D.N.Y. Mar. 14, 2007); *see also* Securities Act of 1933, 15 U.S.C. § 77v(a).

[170] In *Rovner v. Vonage Holdings Corp.*, No. 07 Civ. 178, 2007 WL 446658 (D.N.J. Feb. 7, 2007), and *Pinto v. Vonage Holding Corp.*, No. 07 Civ. 0062, 2007 WL 1381746 (D.N.J. Jan. 4, 2007), Judge Freda Wolfson was the first to focus on the jurisdictional amendment as the basis for denying remand, instead of the anti-removal provision. *See* Lowenthal & Haggerty, *Jurisdictional Struggle*, *supra* note 54, at S5. She found that "there exists exclusive federal jurisdiction over claims which (i) are brought to enforce the rights and liabilities created by the Securities Act; and (ii) are covered class actions." *Id.* Judge Wolfson ultimately concluded that pure Securities Act claims are removable, not because the SLUSA amendment provides for removal, but because "state courts lack[ ] jurisdiction over [pure] Securities Act claims in the first place." *See id.*

[171] 15 U.S.C. § 77v(a) (emphasis added).

[172] *See* Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 22; Lowenthal & Haggarty, *Jurisdictional Struggles*, *supra* note 54, at S5.

[173] 15 U.S.C. § 77v(a).

[174] *Id.* § 77p. *See* Lowenthal & Haggarty, *Jurisdictional Struggles*, *supra* note 54, at S14; *see also* Knox v. Agria Corp., 613 F. Supp. 2d 419 (S.D.N.Y. 2009). The plaintiffs

however, is the definition section and sets forth the meaning of a "covered class action" as:

> [A]ny single lawsuit in which . . . one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members.[175]

On its face, a "covered class action" seems to apply to "any single lawsuit" that meets the definition, and therefore includes pure Securities Act claims. As Judge William Pauley concluded, "Section 16 . . . does not add a substantive limitation to the exception to concurrent jurisdiction in Section 22(a)."[176] Thus the effect of SLUSA's amendment is to replace "concurrent jurisdiction with exclusive federal jurisdiction over 'covered class actions . . . brought to enforce any liability or duty created by [the Securities Act].'"[177]

As Judge Pauley points out, the anti-removal provision of Section 22(a) provides that "no case arising under [the Securities Act] and *brought in any State court of competent jurisdiction* shall be removed to any court of the United States."[178] Because SLUSA's amendment to the concurrent jurisdiction provision of Section 22(a) replaced concurrent jurisdiction with exclusive federal jurisdiction, state courts are

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in *Knox* filed their putative class action in the New York Supreme Court asserting pure Securities Act claims, while there were three federal securities class actions simultaneously in the District Court for the Southern District of New York. *Id.* at 421. The plaintiff explicitly stated in his complaint that the state court had subject-matter jurisdiction, and could not be removed. *Id.* at 421. The defendants, however, removed the action, and the district court denied the motion to remand, finding that (1) the class actions asserting pure Securities Act claims were removable to federal court, and (2) state courts lacked jurisdiction over such claims, insomuch that the state court must dismiss any claims that were not removed for lack of subject-matter jurisdiction. *See id.* at 421; *see also* Serota, *supra* note 20, at 171. This issue arose again in the Southern District of New York in *Kramer v. Fannie Mae*, 2009 U.S. Dist. Lexis 109888 (S.D.N.Y. 2009). The court, faced with a class action asserting pure Securities Act claims, rejected the plaintiffs' arguments that the action should be remanded, stating that *Knox*'s conclusion that "no state court has subject matter jurisdiction over covered class actions raising 1933 Act claims" is the proper interpretation of SLUSA's amendments to the Securities Act. *Id.* at *10 (citing *Knox*, 613 F. Supp. 2d 419, 423 (S.D.N.Y. 2009)).

[175] 15 U.S.C. § 77p(f)(2)(A)(i)(II).

[176] Knox, 613 F. Supp. 2d at 423. It is still clear, however, that SLUSA's amendments do not reach *individual actions* brought in state court. *See* Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc., 368 F.3d 86, 98 (2d Cir. 2004) ("SLUSA did not in any way alter Section 22(a)'s bar on removal of *individual* Securities Act claims[.]"); *see also* Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 22.

[177] Lowenthal & Haggarty, *SLUSA's Elimination*, *supra* note 62, at 21 (citing 15 U.S.C. § 77v(a)).

[178] 15 U.S.C. § 77v(a) (emphasis added).

no longer courts of competent jurisdiction. Therefore, pure Securities Act claims are no longer covered by the anti-removal provision at all.[179] As a result, defendants are no longer limited by the "[e]xcept as otherwise expressly provided by Act of Congress"[180] provision, and they may successfully remove pure Securities Act claims as they would any other federal claim, through the general removal mechanism of Section 1441(a).[181]

Some have been critical of this recent approach, finding that it lacks sufficient support from other courts.[182] It appears, however, that this interpretation is becoming more of an emerging trend, as more courts are adopting it.[183] One of the most recent decisions to address the removal of pure Securities Act claims was *Lapin v. Facebook, Inc.*,[184] where the United States District Court for the Northern District of California was faced with several putative class actions asserting pure Securities Act claims against Facebook. Despite authority in other California districts finding that SLUSA's amendment does not provide for removal of pure Securities Act claims,[185] Judge Maxine Chesney reached the opposite conclusion.[186] She found that "federal courts alone have jurisdiction to hear covered class actions raising [pure Securities Act] claims."[187]

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[179] *See* Lowenthal & Haggarty, *Jurisdictional Struggles*, *supra* note 54, at S14.

[180] *See* 28 U.S.C. § 1441(a); *see also* Costa, *supra* note 42, at 1198 ("Congress has reserved the right to circumscribe removal in all cases in which they chose to do so in . . . 28 U.S.C. § 1441.").

[181] *See* 28 U.S.C. § 1441(a).

[182] *See* Butts, *supra* note 110, at 195-96. Butts is also critical of the *Knox* court's dismissal of *Kircher* as "inapplicable and 'not to the contrary.'" *Id.* at 196. Butts argues that *Knox* misunderstood the meaning of dicta, and even though *Kircher* "did not have to explicitly decide the federal law removal question in its decision, . . . [d]icta are statements made in a decision that . . . are nonetheless important to the deciding court." *Id.* Thus the *Knox* court should have accorded the Supreme Court's decision "more respect than . . . [a] cursory dismissal." *Id.*

[183] Lapin v. Facebook, Inc., No. C-12-3195, 2012 WL 3647409, at *3 (N.D. Cal. Aug. 23, 2012).

[184] *Id.*

[185] *See, e.g.*, W. Palm Beach Police Pension Fund v. Cardionet, Inc., No. 10-cv-711-L(NLS), 2011 WL 1099815, at *2 (S.D. Cal. Mar. 24, 2011) (holding SLUSA limits removal to class actions alleging securities fraud under state law, and remanding a class action asserting pure Securities Act claims).

[186] *See* Lapin v. Facebook, Inc., No. C-12-3195, 2012 WL 3647409 (N.D. Cal. Aug. 23, 2012) (finding the reasoning of *Knox* to be persuasive, and adopting its conclusion).

[187] *Lapin*, 2012 WL 3647409, at *2 (quoting Knox v. Agria Corp., 613 F. Supp. 2d 419 (S.D.N.Y. 2009)). Following this decision, motions were made pursuant to 28 U.S.C. § 1407 before the United State Judicial Panel on Multidistrict Litigation to transfer the numerous actions relating to the Facebook IPO to the United States District Court for the Southern District of New York. *See* Notice of Hearing Session, *In re* Facebook, Inc., IPO Securities and Derivative Litigation, MDL No. 2389 (S.D.N.Y. Aug. 8, 2012). The motion sought to consolidate 15 actions from the Northern District of California, as well as actions from the Middle District of Florida and Western District of Missouri, with the 26 pending actions in the Southern District of New York

Relying on SLUSA's amendment to the concurrent jurisdiction provision of the Securities Act, the Court found that "the [anti]-removal provision in [Section 22(a)] . . . no longer applies to 'a covered class action' alleging [pure Securities Act claims], and, consequently, [they are] removable pursuant to 28 U.S.C. § 1441(a)."[188] The court noted that SLUSA's legislative history, with its focus on correcting and strengthening the PSLRA[189] and its goal of "national standards for securities class action lawsuits involving nationally traded securities,"[190] supports the "plain meaning" interpretation of the concurrent jurisdiction provision.[191]

Only months later, the District Court for the Northern District of California was given an opportunity to reinforce its decision in *Lapin*.[192] On August 1, 2012, a class action against Zynga, Inc., a provider of social game services, commenced in California state court. Defendants subsequently removed the case to the District Court for the Northern District of California.[193] On October 25, 2012, the plaintiff, Robert Reyes, filed a motion to remand the case back to state court.[194] Despite Judge Chesney's recent ruling in *Lapin*, Judge White for the Northern District of California granted the plaintiff's motion to remand the case.[195] Noting the "divided district courts within this district and around the country," the court concluded that the narrow approach was more persuasive.[196] While the defendants "raise[d] valid

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for pre-trial proceedings. *Id.* The motion included the Lapin, Spatz, Lazar, Stokes, and DeMois actions mentioned *supra*. *See supra* notes 7, 9, 10 and accompanying text.

On October 4, 2012, the United States Judicial Panel on Multidistrict Litigation transferred the actions pursuant to 28 U.S.C. § 1407 to Judge Robert. W. Sweet, District Court Judge for the Southern District of New York, for coordinated or consolidated pretrial proceedings. *See* Transfer Order, *In re* Facebook, Inc., IPO Securities and Derivative Litigation, No. 12-MDL-2389 at 3 (S.D.N.Y. Oct. 4, 2012). In addition, several of the actions originally filed in California state court filed notices of voluntary dismissal. *See, e.g.*, Notice of Voluntary Dismissal, Lapin v. Facebook, Inc., No. 12-Civ-7543-RWS (S.D.N.Y. Oct. 16, 2012); Notice of Voluntary Dismissal, Lazar v. Facebook, Inc., No. 12-Civ-7546-RWS (S.D.N.Y. Oct. 16, 2012).

188 *Lapin*, 2012 WL 3647409, at *3.

189 *See id.* at *2.

190 *Id.* (citing Pub. L. No. 105-353, § 2(5), 112 Stat. 3227 (1998) (codified as Note to 15 U.S.C. § 78a (2012))).

191 *See id.* at *3 (citing H.R. REP. 105-802, at 13 (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.")).

192 *Id.*

193 Notice of Removal ¶ 1, Reyes v. Zynga, Inc., No. 12 Civ. 5065 (N.D. Cal. 2013).

194 *See* Plaintiff's Motion to Remand at 1, Reyes v. Zynga, Inc., No. 12 Civ. 5065 (N.D. Cal. 2013).

195 *See* Order Granting Motion to Remand, Reyes v. Zynga, Inc., No. 12 Civ. 5065 (N.D. Cal. 2013).

196 *Id.* at 3-5.

arguments about inconsistencies between Section [22(a)] and Sections [16(b)] and [16(c)]," the court also found that "there are plausible ways to construe Section [22(a)] to avoid any such inconsistencies."[197] Given the "lack of clear authority from the Supreme Court or Ninth Circuit on this issue," as well as the split among district courts, the court followed the principle "that any doubt about the propriety of removal should be resolved in favor of remand."[198] To further add to the inconsistency among district courts, Judge White admitted that "given the intent of SLUSA[,] it just makes no sense to prohibit the removal of federal securities class actions to federal court."[199]

Because the concurrent jurisdiction approach aligns the plain meaning of the SLUSA amendment with congressional intent, district courts should continue to adopt it when analyzing the removal of pure Securities Act claims. Following this trend is all the more important because federal appellate courts have yet to address the removability of pure Securities Act claims, despite the significant split authority on the issue among district courts.[200] And even with the emerging prominence of the concurrent jurisdiction approach, it appears that no conclusive answer can be expected. District court decisions are persuasive, not binding, authority on each other, "even in the same district, and the district judges are free to resolve legal questions like these unless there is controlling circuit or Supreme Court authority."[201] These problems are exacerbated because district court decisions ordering remand are "not reviewable on appeal,"[202] as "[f]ederal appellate courts can

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[197] *Id.* at 5. The Court also concluded that while the legislative history does suggest that "SLUSA was amended to make federal courts the exclusive venue for *most* class actions alleging securities fraud, . . . the legislative history is, itself, murky insofar as it suggests an answer to the question before the Court." *Id.* at 5-6.

[198] *Id.* at 6 (citing Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)).

[199] *Id.* at 6 (citing Unschuld v. Tri-S Sec. Corp., No. 6 Civ. 2931, 2007 WL 2729011, at *8-9 (N.D. Ga. 2009)).

[200] *See Plaintiff's Motion to Remand 1933 Act Claims Denied: Court Holds Only Federal Courts Have Jurisdiction Over Such Claims*, MILBANK, TWEED, HADLEY & MCCOY LLP 3 (Feb. 24, 2009), http://www.milbank.com/images/content/8/4/840/022409-SLUSA-and-1933-ACT-Claims.pdf. Though the United States Court of Appeals for the Second Circuit has stated that 77p(c) excepts "'class actions brought in state court' from . . . the [anti-]removal provision and provides that those class actions '*shall* be removable to the Federal court for the district in which the action is pending.'" Cal. Pub. Employees' Retirement Sys. v. WorldCom, Inc., 368 F.3d 86, 97 (2d Cir. 2004) (quoting 15 U.S.C. § 77p(c)) (arguably in dicta).

[201] MILBANK, TWEED, HADLEY & MCCOY LLP 3, *supra* note 200. *Compare* Irra v. Lazard Ltd., 2006 WL 2375472 (E.D.N.Y. Aug. 15, 2006) (remanding pure Securities Act claims), *with* Rubin v. Pixelplus Co., No. 06-CV-2964, 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007) (denying remand).

[202] MILBANK, TWEED, HADLEY & MCCOY LLP 3, *supra* note 200 (citing 28 U.S.C. § 1447(d)) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .").

hear appeals from only final decisions, and denials of remand are not considered final."[203] This leaves parties who wish to appeal the decision to remand a removed case with two options: (1) a mandamus or interlocutory appeal, or (2) the issue must be raised on direct appeal at the case's end.[204] The former is a highly discretionary device, while the latter rarely arises because "most securities actions are dismissed or settled . . . ."[205] Absent congressional action on the issue, plaintiffs will be able to continually forum shop for jurisdictions where federal judges are likely to remand to the state courts.

## III. INVESTOR PROTECTION

Regardless of the approach taken, allowing removal of pure Securities Act claims to federal court aligns with congressional intent and furthers the goal of investor protection, which lies at the heart of the Securities Act. Only by interpreting SLUSA to permit removal of covered class actions asserting pure Securities Act claims can the PSLRA fully accomplish its goal of "decreasing [the] vexatious strike suits" that harm investors.[206]

"The private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits."[207] The "in terrorem" effect of plaintiffs bringing groundless claims encourages massive settlements to avoid the potential for more devastating judgments.[208] If the trend from the first half of 2013 continues, there will be approximately 222 new securities class actions filed in 2013, each with an average settlement value of $78 million, which is more than double the six-year average of $35 million.[209] Because strike suits have such a high settlement value, without regard to actual culpability, the ultimate effect is to harm not only the innocent corporation, but its owners as well, the investors.

Permitting removal of pure Securities Act claims will prevent the meritless harassment of corporations by plaintiffs

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[203] *Id.*

[204] *See id.*

[205] *See id.*

[206] Snyder, Jr., *supra* note 45, at 698.

[207] H.R. REP. No. 104-369, at 31, *reprinted in* 1995 U.S.C.C.A.N. 730, 730-31 (comments of the PSLRA Conference Committee Report); *see also* Snyder, Jr., *supra* note 45, at 698.

[208] *See* Snyder, Jr., *supra* note 45, at 699.

[209] *See* Kobi Kastiel, *2013 Mid-Year Securities Litigation Update*, HLS FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, (Aug. 4, 2013, 10:21 AM), http://blogs.law.harvard.edu/corpgov/2013/08/04/2013-mid-year-securities-litigation-update/.

that sidestep the safeguards of the PSLRA, the cornerstone of Congress's fight against abusive securities litigation. By enacting the PSLRA, Congress hoped to protect the innocent investors from the greedy ones, those who exploit meritless claims into large settlements. Through a number of procedural and jurisdictional reforms, the PSLRA made it increasingly difficult to bring securities class actions under federal securities laws.[210] For example, under the new rules imposed by the PSLRA, covered class actions brought in federal court could take three years to arrive at the same point in litigation that a comparable case brought in state court would reach in only a few days.[211] The ultimate benefit of permitting removal of pure Securities Act claims will be to decrease the number of vexatious strike suits, which in turn "protect[s] investors, who are 'always the ultimate losers when extortionate "settlements" are extracted from issuers.'"[212]

SLUSA and the PSLRA also work to encourage individual action by institutional investors.[213] Neither SLUSA nor the procedural protections of the PSLRA apply to individual suits in state court.[214] Institutional investors, such as large stakeholders, can file their own individual suits in state court and "avoid the costly and time-consuming burdens of PSLRA."[215] Furthermore, individual suits do not pose the same risk of harassment because the individual will bear the cost of litigation himself, including the cost of losing.[216] An interested institutional investor is also much more likely to be looking out for the interests of smaller investors than a "'professional plaintiff's' lawyer,"[217] and permitting pure Securities Act claims to be remanded back to state court may encourage these institutional investors to once again become

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[210] *See supra*, part I.C.

[211] *See* Snyder, Jr., *supra* note 45, at 698 (citing Jonathan F. Mack, *PSLRA and SLUSA: Laws with Unintended Consequences*, WALLSTREETLAWYER.COM: SEC. ELEC. AGE 1 (Nov. 2003)) (internal quotation marks omitted).

[212] Snyder, Jr., *supra* note 45, at 700 (quoting H.R. REP. No. 104-369, at 31-32).

[213] *Id.*

[214] State causes of action in general are not prohibited, rather covered class actions asserting such claims are preempted. *See* Merrill Lynch, Pierce, Fenner, & Smith Inc. v. Dabit, 547 U.S. 71 (2006). "This . . . reflects Congress's additional concern for the class action's potential for abuse." Snyder, Jr., *supra* note 45, at 701.

[215] Snyder, Jr., *supra* note 45, at 701. "[T]he combined effect . . . has been that nearly every major class action securities fraud case is now accompanied by intensely litigated individual actions by institutions that never brought such suits ten years ago." *Id.* (citing Jonathan F. Mack, *PSLRA and SLUSA: Laws with Unintended Consequences*, WALLSTREETLAWYER.COM: SEC. ELEC. AGE 1 (Nov. 2003)).

[216] *See id.*

[217] *See id.* (quoting Keith L. Johnson, *Deterrence of Corporate Fraud Through Securities Litigation: The Role of Institutional Investors*, LAW & CONTEMP. PROBS. 155, 155 (Autumn 1997)).

"satisfied to quietly wait on the sidelines and take a modest check as a class member."[218] Thus a narrow reading of SLUSA's amendments "would deprive the market of the benefit of more active participation of institutional investors."[219]

## CONCLUSION

For almost 80 years, the Securities Act and the Exchange Act have worked to protect investors from the misdeeds of corporations. They remained largely untouched until the 1990s, when Congress saw fit to protect investors from a new harm: the vexatious strike suits initiated and maintained by fellow investors. Congress enacted the PSLRA under the assumption that "both investors and the national economy suffer when innocent parties are forced to pay 'exorbitant settlements' in meritless lawsuits."[220] When plaintiffs began to circumvent the PSLRA, Congress responded by enacting SLUSA and established national standards for securities class actions involving nationally traded securities.[221] SLUSA bolstered the effectiveness of the PSLRA by making federal court the exclusive venue for certain class actions.

These efforts were hampered, however, because of the poor and confusing drafting of the amendment. SLUSA's amendment to the anti-removal provision of the Securities Act resulted in conflicting broad and narrow interpretations. Both interpretations have received support from the Supreme Court, but both ultimately have large flaws that prevent either from gaining traction among federal district courts. The narrow interpretation attempts to find the plain meaning of the statute, but it does so in a conclusory fashion. It fails to acknowledge the confusion that the poorly written statute creates. The broad interpretation acknowledges the confusion and instead looks to the legislative intent for clarity. While certain statements of members of the legislature certainly support the notion that SLUSA was meant to make federal court the exclusive venue for class actions, these statements alone have been insufficient to persuade many district courts. The result of this district court split has enabled the continued circumvention of the PSLRA and the continued use of vexatious

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[218] *Id.* n.217 (citing Mack, *supra* note 215 (internal quotation marks omitted).

[219] *Id.* at 702. The PSLRA also encourages the appointment of such institutional investors as lead plaintiff, who have an incentive to maximize recoveries in class action lawsuits. *Id.* at 702-03.

[220] Mazzeo, *supra* note 19, at 1446.

[221] *Id.* 1450-51.

strike suits by plaintiffs to harass innocent defendant-corporations into settlements. The conflicting approaches also encourage forum shopping by plaintiffs, and the persuasive nature of district court authority makes litigation even more unpredictable and expensive for all parties involved.

As this note demonstrates, a third interpretation of SLUSA's amendment to the Securities Act has garnered some support among the district courts. By addressing SLUSA's amendment to the concurrent jurisdiction provision, this interpretation looks to *both* the plain meaning of the text and the legislative history in concluding that class actions asserting pure Securities Act claims are excluded from federal court. Instead, these claims are trusted to the federal courts, as Congress intended. District Court judges should continue to adopt this analysis because allowing removal of purely federal claims avoids the paradox of keeping federal claims in state court[222] and furthers the goals of investor protection by allowing the protections of the PSLRA to take full effect.

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[222] Serota, *supra* note 20, at 175.

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