

# Emerging Issues In Securities Litigation:

Removal of Class Actions Filed in State Court  
Alleging Federal Securities Violations



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# Emerging Issues In Securities Litigation

## Removal of Class Actions Filed in State Court Alleging Federal Securities Violations

### Introduction

In recent years, Congress has passed legislation designed to bring the bulk of securities class actions back to federal court. After the passage of the Private Securities Litigation Reform Act (PSLRA)<sup>1</sup> in 1995, plaintiffs sought refuge from the new law's more onerous provisions—such as limitations on damages and attorneys' fees, heightened pleading standards, and an automatic stay of discovery—by styling their claims as state-law fraud claims and bringing them in state court, thereby avoiding PSLRA's strictures. One court noted that the number of securities case filings in California state courts “increased five-fold in the wake of PSLRA's passage.”<sup>2</sup>

In response,<sup>3</sup> Congress passed the Securities Litigation Uniform Standards Act (SLUSA), which, in relevant part, precludes state-law class action claims brought by investors who allege fraud in the manipulation of stock prices. It also explicitly allows for the removal to federal court of actions covered by the preclusion provision. Plaintiffs' state-law fraud claims were effectively transformed into questions of federal law, allowing defendants to remove the lawsuits to federal court, where PSLRA's standards apply.

The passage of SLUSA, however, did not end the jockeying for a favorable forum. Plaintiffs responded by asserting state-law claims that they believed fell outside SLUSA's preclusion provision. Plaintiffs have achieved varying degrees of success. For example, one plaintiff was able to avoid removal by decreasing the size of the putative class from 50 to 39, despite the defendants' protestations that the plaintiffs manipulated the class solely to escape federal jurisdiction.<sup>4</sup>

Accordingly, a number of courts have held that it is appropriate to “look behind” a complaint to determine whether state-law claims for breach of contract or breach of fiduciary duty, for example, merely disguise allegations of fraud or misrepresentation that should be subject to SLUSA's preclusion provision.<sup>5</sup> And in 2006, the Supreme Court of the United States dealt a significant blow to the plaintiffs' bar when it rejected the argument that mere “holders” (as opposed to purchasers and sellers) were not subject to SLUSA and endorsed an expansive view of the scope of the preclusion provision.<sup>6</sup>

In the meantime, Congress passed yet another law designed to redirect class-action litigation away from state court. The Class Action Fairness Act (CAFA) expands jurisdiction based on diversity of citizenship for certain class actions. Under CAFA, only one plaintiff need be diverse from one defendant, and the aggregate amount in controversy must be at least \$5 million. CAFA provides another outlet for defendants seeking to litigate in federal court, but the law includes exceptions that may limit its usefulness to defendants in securities class actions.

In light of SLUSA and CAFA, a new genre of securities class-action litigation has emerged: the state court Section 11 claim. This new breed of securities fraud case embodies plaintiffs' dual desires to (1) articulate claims that cannot be preempted by SLUSA and removed on that basis; and (2) escape the removal provisions of CAFA. Instead of risking preclusion under SLUSA, putative classes have brought their claims in *state court* under *federal law*. By invoking federal law, such plaintiffs intend to avoid SLUSA's removal provision, which, they say, allows removal only of claims preempted by the statute: that is, *state-law* fraud claims pertaining to securities transactions. These plaintiffs further argue that their claims of Section 11 violations are covered by CAFA's "securities exception" and are not removable under that statute.

It might seem that plaintiffs have found a way to litigate securities class actions in what may be perceived as the more friendly confines of state court. But in a small number of recent cases—with surely more to come—defendants have argued that neither SLUSA nor CAFA should be construed so narrowly as to prevent removal of federal securities cases to federal court. This memorandum—the second in our series of emerging issue papers—surveys the landscape of recent federal securities class actions filed in state court and explores the arguments for removal under the relevant statutes.

## A Closer Look at SLUSA and CAFA

To best understand SLUSA, one must first understand the Securities Act of 1933 (1933 Act). In its original form the 1933 Act specified that federal and state courts have concurrent jurisdiction over actions brought under it and that "[n]o case" arising under the Act "and brought in any State court of competent jurisdiction shall be removed to any court of the United States."<sup>7</sup>

SLUSA amended the concurrent-jurisdiction and non-removal provisions in the 1933 Act. As amended, the statute provides for concurrent state and federal jurisdiction over civil actions "except as provided in section 77p of this title with respect to covered class actions," and the removal of claims under the Act brought in state court is prohibited "except as provided in section 77p(c) of this title."

The provisions of SLUSA codified at 15 U.S.C. § 77p preempt state-law fraud and misrepresentation claims and allow for the removal of certain securities class actions. Subsection (b), commonly known as the “preclusion provision,” states:

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.<sup>8</sup>

This preclusion provision clearly refers to state law claims. It is followed immediately by a removal provision stating:

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).<sup>9</sup>

Covered securities include those traded nationally and listed on a regulated national securities exchange.<sup>10</sup> And, generally speaking, a “covered class action” is a suit for damages on behalf of more than 50 class members in which common issues of law or fact are alleged to predominate.<sup>11</sup>

Unlike SLUSA, CAFA is aimed at all types of class action lawsuits. Enacted in 2005, CAFA amended the federal diversity jurisdiction statute to make it easier for class actions to qualify for federal jurisdiction. The amended class-action provision states:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interests and costs, and is a class action in which: (A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.<sup>12</sup>

Importantly, CAFA contains exceptions to this expansion of original jurisdiction. The most relevant for present purposes is the so-called “securities exception,” which states that the expanded diversity jurisdiction provision “shall not apply to any class action that solely involves a claim . . . concerning a covered security as defined under [the 1933 and 1934 Acts]” or “that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security.”<sup>13</sup> The new class of securities cases discussed in

this memorandum raises the question whether this exception will be construed narrowly (to allow removal of Section 11 claims, for example) or broadly (to require remand of such removed claims).

## Recent Cases

The cases currently testing the limits of the removal provisions discussed above involve class actions—often involving so-called “subprime” securities—filed in state court alleging violations of *federal* securities law. In these representative cases it is clear that plaintiffs have attempted to formulate allegations that will keep them in state court.

The first case to proceed to a decision on removability is *Luther v. Countrywide Home Loans Servicing, LP, et al.*, in the Central District of California.<sup>14</sup> In November 2007, class representative David Luther filed suit in the Superior Court of California, Los Angeles County, alleging violations of Sections 11, 12(a)(2), and 15 of the 1933 Act. The plaintiffs allege that the Registration Statements and Prospectus Supplements issued by a Countrywide subsidiary contained false and misleading statements and omitted material facts, causing the plaintiffs to buy mortgage-backed securities that experienced “unprecedented devaluation” shortly thereafter. The defendants removed the case to the United States District Court for the Central District of California, invoking CAFA as the sole basis of removal. Luther moved to remand the case to state court and on February 29, 2008, the district court granted the motion. The district court noted that the plaintiffs had engaged in “artful pleading” that “stretched every pleading limit to remain in state court.” Nevertheless, the court held that CAFA, as a general statute, could not control or nullify the specific concurrent jurisdiction and non-removal provisions of the 1933 Act. The court specifically declined to address the applicability of the securities exception.<sup>15</sup>

In January 2008, a class of plaintiffs filed suit in a New York state court alleging violations of Sections 11, 12(a)(2), and 15 of the 1933 Act stemming from the plaintiffs’ purchase of preferred stock in Wachovia based on an allegedly misleading Registration Statement.<sup>16</sup> The defendants removed the case to the United States District Court for the Eastern District of New York, asserting removability under both SLUSA and CAFA. As of this writing, the plaintiffs have moved to remand the case to state court, but the district court has not ruled on the removability of this class action.

In another case of note, a pension fund brought a class action against Nomura Asset Acceptance Corporation.<sup>17</sup> In the complaint, which the plaintiffs filed in state court, the fund alleges that the Registration Statements and Prospectuses issued in connection with an offering of mortgage pass-through certificates contained false and misleading statements.

The claims are predicated on Sections 11, 12(a), and 15 of the 1933 Act. Relying on CAFA, the defendants removed the case to the United States District Court for the District of Massachusetts. As of this writing, the plaintiffs have not moved to remand the case.

## Arguments for Removal

The arguments that have been made for and against removal in these representative cases are numerous. Some are based on Congressional intent, others on the plain language of the statutes, and still others on canons of statutory interpretation. In this section, we discuss the various arguments in favor of removal.

### [Legislative history for both SLUSA and CAFA suggests that these statutes should be read to effectuate the return of securities class actions to federal court.](#)

The legislative history of both SLUSA and CAFA supports bringing securities class-action cases into federal court, whether through original or removal jurisdiction. SLUSA's very purpose was to end attempts to circumvent PSLRA through state court filings. The Senate committee report remarks on the need to curb "the disturbing trend" embodied by the "noticeable shift in class action litigation from federal to state courts."<sup>18</sup> The House committee reported that "the purpose of this title 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."<sup>19</sup> These statements did not distinguish between *state-law* and *federal-law* class actions.

To accomplish their stated goal, Members of Congress explained that they intended to make federal court the "exclusive venue" for securities class actions.<sup>20</sup> Contemporaneous statements from individual members of Congress support the view that those responsible for SLUSA intended to prevent plaintiffs from bringing securities class actions in state court, without distinguishing among actions grounded in state or federal law. For example, one Senator remarked that SLUSA would stop the "circumvention" of PSLRA, "creating a national standard for class action suits involving nationally traded securities."<sup>21</sup>

Notably, none of the committee reports discussing the operation of SLUSA's major provisions, including the exceptions to preemption and removability, even hints that federal securities class actions brought in state court are outside SLUSA's purview. Indeed, after SLUSA's passage, the Senate Committee on Small Business wrote in its year-end report that SLUSA "permits *any* class action brought in state court involving a 'covered security' to be removable to federal district court."<sup>22</sup>

The Supreme Court's opinion in *Dabit*, which invoked some of SLUSA's legislative history, further supports the proposition that SLUSA should be broadly construed. The Court recognized that SLUSA's stated purpose is "to 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 Reform Act.”<sup>23</sup> In keeping with this purpose, the Court interpreted SLUSA broadly to preclude claims by “holders” of securities as well as buyers and sellers.<sup>24</sup>

The legislative history of CAFA also supports an expansive interpretation of federal jurisdiction over class actions. The “Findings and Purposes” section of the Bill reports that state courts are “keeping cases of national importance out of Federal court” and that CAFA is aimed at “providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.” Congress once again expressed frustration with plaintiffs’ lawyers for “gaming procedural rules.”<sup>25</sup>

With respect to the securities exception in CAFA, the legislative history supports a narrow interpretation of the types of securities-related cases that are not removable under CAFA. The Senate Judiciary Committee reported: “The purpose of this provision is to avoid disturbing in any way the federal vs. state court jurisdictional lines already drawn in the securities litigation class action context by the enactment of the Securities Litigation Uniform Standards Act of 1998 (P.L. 105-353). The Committee intends that this exemption be narrowly construed.”<sup>26</sup> This statement suggests that CAFA should be read to harmonize with and support the goals of SLUSA, not to undermine them. And surely it would be inconsistent with this legislative history to use CAFA to narrow the types of cases that could be removed under SLUSA.

#### SLUSA’s removal provision is not limited to claims under state law.

Courts have divided over whether SLUSA’s removal provision applies to class actions that only raise claims under the 1933 Act. In a number of cases, district courts have denied motions to remand to state court after the defendants removed the case under SLUSA.<sup>27</sup> These courts recognized that SLUSA’s removal provision could be read to allow removal only of class actions “based upon the statutory or common law of any State or subdivision thereof.” However, they have concluded that the anomalous results that would ensue from remanding cases based only on the 1933 Act are so inconsistent with the Congressional intent behind SLUSA that the result cannot be correct.

In addition, these courts have favorably received the argument that reading § 77p(b) and (c) to disallow removal of class actions based on violations of federal securities law would render meaningless another aspect of SLUSA, namely, the amendment to the broad non-removal provision in § 77v(a). That provision allows for the removal of cases “arising under” the federal Securities Act as provided in § 77p(c). The “arising under” phraseology would appear to be meaningless if only state-law claims are removable under subsection (c), as no state-law claims “arise under” the 1933 Act. Under this logic, Section 11 class actions were rendered removable by SLUSA, while individual actions continued to be governed by the non-removal provisions of the Act.



The district courts that have come down in favor of removal have found further support from a Supreme Court decision construing SLUSA in another context. In *Kircher v. Putnam Funds Trust*,<sup>28</sup> the Court addressed the appealability of removal orders. In that opinion, the Court discussed the removal provision of § 77p(c), commenting that the language “as set forth in subsection (b)” in that provision “has no apparent function unless it limits removal to *covered class actions involving claims like untruth or deception*.” By not including a qualifier such as “brought under state law,” the Court suggests that removal under SLUSA is not limited to state-law claims, but simply to covered class actions that involve deceptive practices.

Other courts have held that SLUSA does *not* allow the removal of federal securities class actions from state court, reasoning that this result is based on SLUSA’s “plain language.”<sup>29</sup> These courts cite the phrase from SLUSA’s removal provision: “as set forth in subsection (b).” Recall that the removal provision (§ 77p(c)) states: “Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable . . . and shall be subject to subsection (b).” The courts disallowing the removal of federal securities class actions have concluded that the phrase “*as set forth in subsection (b)*” modifies the entire phrase “any covered class action brought in any State court involving a covered security.” A covered class action as set forth in subsection (b), they say, refers to those claims “based upon the statutory or common law of any State.” The defendants seeking removal in these cases have argued, unsuccessfully, that only “covered security” is modified by “as set forth in subsection (b).”

The courts that have disallowed removal of federal securities class actions brought in state court have not been persuaded by the argument that the amendment to the non-removal provision in § 77v(a) is meaningless if only state-law claims are removable. These courts appear ready to chalk up this anomaly to careless drafting rather than to an expression of Congressional intent. The legislative history of SLUSA that appears to support the argument that Congress intended for federal courts to be the default forum for securities class actions gives these courts some pause, but does not change the result. Instead these courts have criticized Congress for its inability to enact a law giving effect to its apparent intent to shepherd securities class actions into federal court.

Finally, it is interesting to note that the courts remanding federal class actions have also invoked the *dicta* of the Supreme Court in *Kircher*. In fact, one court labeled those *dicta* the “tiebreaker” in its decision to grant remand.<sup>30</sup> In *Kircher*, the Court observed that SLUSA’s removal provision applies only to precluded claims, creating a jurisdictional issue for courts facing motions to remand. The Court stated: “If the action is not precluded, the federal court . . . has no jurisdiction to touch the case on its merits, and the proper course is to remand to the state court that can deal with it.” The district court interpreted this sentence to mean that “a federal district court has no removal jurisdiction . . . unless the action being removed is precluded under federal law—that is, unless it is a class action based on state law.”<sup>31</sup>

The federal courts of appeals have yet to decide the removability of federal securities class actions under SLUSA. This is due at least in part to the apparent lack of immediate appellate jurisdiction over the remand issue.<sup>32</sup> This may well encourage continued removals until the law is resolved in one direction or the other.

### CAFA’s “securities exception” does not apply to claims of violations of federal securities law and does not preclude their removal.

The debate over the scope of the securities exception to CAFA removal centers on what it means for a claim to “relate to” rights, duties, and obligations “relating to or created by or pursuant to any security.” Plaintiffs seeking remand to state court have argued that the exception is broad, encompassing claims of fraud and misrepresentation under the federal securities laws. On the other hand, defendants seeking removal have argued that the exception must be narrowly interpreted to include only those claims arising from the instruments themselves, not those based on the rights created by federal law. No court has yet ruled on the scope of the exception for purposes of Section 11 claims brought in state court and removed to federal court. (Although the issue was briefed in the *Luther* case, the district court did not resolve it.) However, the U.S. Court of Appeals for the Second Circuit recently endorsed (over a dissent) a narrow reading of the securities exception in a case involving claims brought under New York’s consumer fraud statute.<sup>33</sup>

The arguments in favor of a narrow reading of the securities exception invoke principles of statutory interpretation as well as legislative history. In *Luther*, the defendants argued for a narrow reading of § 1332(d)(9)(C)’s exclusion of class actions that “solely” involve claims that relate “to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security.” They maintained that the lawsuit did not involve rights, duties, or obligations “created by or pursuant to” the mortgage pass-through instruments at issue. Instead, they contended, the claims arose from disclosure duties created by federal law. The defendants also argued that the plaintiffs’ reading of the exception renders certain limiting words superfluous. “If Congress had intended that misrepresentation claims of the sort alleged here would come within the ambit of Section 1332(d)(9)(C), Congress could simply have provided that the exception applies to any claim ‘relating to a security’ or ‘relating to the purchase or sale of a security.’” But Congress exempted only claims relating to “the rights, duties . . . , and obligations relating to or created by or pursuant to any security.” According to the defendants, those “limiting, qualifying terms” mean that plaintiffs’ fraud claims are not covered by the exception.

Arguments very similar to those made by the *Luther* defendants were essentially accepted by the Second Circuit in its recent decision in *Estate of Pew v. Cardarelli*, although in that case the claims were based on state law. The Second Circuit allowed back into federal court a case that the district court had originally remanded to state court based on CAFA’s securities exception. The district court had broadly read the securities exception to include

the plaintiff's claims that the issuer of certain debt certificates failed to disclose that it was insolvent when marketing the certificates. The court of appeals, however, concluded that in order to "relate to" the rights and obligations "created by or pursuant to" a security, the plaintiffs' claims must be "grounded in the terms of the security itself, the kind of claims that might arise where the interest rate was pegged to a rate set by a bank that later merges into another bank, or where a bond series is discontinued, or where a failure to negotiate replacement credit results in a default on principal."<sup>34</sup> The claim that a debt security was marketed fraudulently, however, "does not enforce the rights of Certificate holders as holders"<sup>35</sup> and accordingly, the court held, is not excepted from CAFA under the securities exception. The court was persuaded that its interpretation preserved the meaning of statute's language while accurately reflecting the goals of CAFA as expressed in its legislative history

Other statutory interpretation arguments have been made in favor of a narrow reading of the securities exception. The *Luther* defendants went behind the statute's plain language and argued that various canons of statutory construction require a narrow interpretation of the securities exception. For example, the canon of *noscitur a sociis*, literally, "it is known by its associates," counsels that the meaning of a word should be informed by its context. A plaintiff seeking the remand of a federal securities class action would argue that the securities exception applies to the federal claims because the rights at stake "relate to" a security. Applying the principle of *noscitur a sociis*, however, results in a different interpretation. As the *Luther* defendants argued, the plaintiffs define "relating to" broadly by viewing it in isolation. In context, however, "relating to" is part of a string of variants ("created by or pursuant to"), and read together, the phrase more plausibly means that CAFA excepts from its purview only those claims that arise from or are incident to the terms of the securities themselves. As already noted, the *Luther* court did not resolve this issue, and the Second Circuit in *Estate of Pew* interpreted what it called the "ambiguous" language and "imperfect drafting" of CAFA<sup>36</sup> without reference to the canons of construction.

Another issue that has arisen frequently under CAFA is which party bears the burden of establishing the applicability of an exception to removability. As a preliminary matter, the federal courts of appeals have uniformly decided that CAFA did not alter the traditional rule that the party seeking removal bears the burden of establishing federal subject matter jurisdiction, which for present purposes means demonstrating that the size of the class, diversity of the parties, and amount in controversy satisfy the requirements for federal jurisdiction.<sup>37</sup> These appellate courts held that the traditional rule could not be altered by Congressional committee reports seeming to condone the shifting of the burden onto plaintiffs to establish non-removability under CAFA where language to that effect did not make it into law.

The question remains, however, whether a plaintiff seeking *remand* based on an exception to CAFA bears the burden of proving that exception. So far, the news is good for defendants: At least three federal appeals courts have held that once a case is removed, the plaintiff bears the burden of proving that an exception to CAFA's removal provision requires remand

to state court.<sup>38</sup> While these cases do not involve the securities exception to removal, their reasoning applies fully to such cases.

### The 1933 Act's non-removal position is superseded by CAFA.

Defendants have argued that the broad non-removability clause of the 1933 Act, as modified by SLUSA, cannot be the basis for remanding a case that was removed under CAFA because the removability provision in the later statute (CAFA) trumps the non-removability clause in the earlier statute (the 1933 Act). This argument was soundly rejected by the district court in *Luther*. In that case, the district court relied on a principle of statutory construction that a specific statute is not controlled or nullified by a later, general law unless the later law expresses a clear contrary intention.<sup>39</sup> In so ruling, the court rejected the defendants' argument that by not including a "savings clause" or language to the effect that CAFA operates "except as provided by other law," Congress affirmatively expressed its intent for CAFA to trump § 77v(a). We are not aware of other courts reaching this decision.

### Conclusion

Although Congress acted to confine securities class actions to federal court and to subject such actions to PLSRA, courts have disagreed over whether and when *federal* securities class actions may be removed to federal court. The arguments discussed in this memorandum are a starting point for defendants seeking such removal. However, potential defendants in these types of cases would also do well to explore possibilities for legislative reforms addressing what plaintiffs have argued are jurisdictional loopholes in the federal securities statutes.

## Notes:

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- 1 15 U.S.C. § 78u-4 *et seq.*
- 2 *Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043, 1046 (N.D. Cal. 2002).
- 3 *See, e.g., U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 841 (9th Cir. 2007) (stating that class-action attorneys “avoided” the reach of the PSLRA “by filing their securities class actions in state court under state and common law”); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003) (explaining that Congress passed the SLUSA to close the “loophole” in the PSLRA that plaintiffs were exploiting).
- 4 *Lee v. Marsh & McLennan Cos.*, 06 Civ. 6523, 2007 WL 704033 (S.D.N.Y. March 7, 2007).
- 5 *E.g., Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 300 (3d Cir. 2005) (noting that “artful pleading” cannot be used to evade the SLUSA); *Spielman*, 332 F.3d at 124-25; *Potter v. Janus Inv. Fund*, 483 F. Supp.2d 692, 699-700 (S.D. Ill. 2007).
- 6 *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006).
- 7 15 U.S.C. § 77v(a).
- 8 15 U.S.C. § 77p(b).
- 9 15 U.S.C. § 77p(c). Nearly identical provisions are also contained in the 1934 Act; see § 78bb(f)(1) and (2).
- 10 15 U.S.C. § 77r(b).
- 11 15 U.S.C. § 77p(f)(2).
- 12 28 U.S.C. § 1332(d)(2).
- 13 28 U.S.C. § 1332(d)(9)(A) and (C).
- 14 No. 2:07-cv-08165 (C.D. Cal.).
- 15 *Luther v. Countrywide Home Loans Servicing, LP, et al.*, No. 2:07-CV-08165 (C.D. Cal), order of February 28, 2008, at 6.
- 16 *Miller v. Wachovia Corp., et al.*, No. 2:08-cv-00879 (E.D.N.Y.), was filed in the Supreme Court of New York, Nassau County, in January 2008.
- 17 *Plumbers’ Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., et al.*, No. 08-5544, was filed on January 31, 2008 in the Superior Court of Suffolk County, Massachusetts.
- 18 S. Rep. No. 105-182, at 3 (1998).
- 19 H. Rep. No. 105-640, at 8-9 (1998).
- 20 *Id.* at 10; H.R. Conf. Rep. No. 105-805, at 15 (1995) (emphasis added).
- 21 S. Rep. No. 105-182, at 23 (1998) (statement of Senator Reed).
- 22 S. Rep. 106-147m at 10 (1999).
- 23 *Dabit*, 547 U.S. at 82 (quoting SLUSA §2(2), (5)).

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- 24      Id. at 81-83, 85-88.
- 25      S. Rep. 109-14, at 5-6 (2005).
- 26      Id. at 42.
- 27      *E.g., Rubin v. Pixelplus Co.*, No. 06-CV-2964, 2007 WL 778485 (E.D.N.Y. March 13, 2007); *Rovner v. Vonage Holdings Corp.*, No 07-178, 2007 WL 446658 (D.N.J. Feb. 7, 2007)(unpublished); *Brody v. Homestore, Inc.*, No. CV 02-08068, 240 F. Supp.2d 1122 (C.D. Cal. 2003); *Alkow v. TXU Corp.*, Nos. 3:02-CV-2738 & 39, 2003 WL 21056750 (N.D. Tex. May 8, 2003) (unpublished).
- 28      547 U.S. 633 (2006).
- 29      *E.g., Unschuld v. Tri-S Security Corp.*, No.1:06-CV-02931, 2007 WL 2729011 (N.D. Ga. Sep. 14, 2007); *Nauheim v. Interpublic Group of Cos., Inc.*, No. 02-C-9211, 2003 WL 1888843 (N.D. Ill. April 16, 2003); *Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03CV0714BTM, 2003 WL 23509312 (S.D. Cal. Aug. 27, 2003) (unpublished); *In Re Waste Management, Inc. Securities Litigation*, 194 Supp. 2d 590 (S.D. Tex. 2002).
- 30      *Unschuld*, 2007 WL 2729011, at \* 10.
- 31      Id. at \*11.
- 32      In *Kircher*, the Supreme Court held that 28 U.S.C. § 1447(d), which bars review of district court orders remanding for lack of subject matter jurisdiction, prevents a federal court from reviewing a district court's decision to remand a case that it determines is not removable under the SLUSA. 547 U.S. at 639, 648.
- 33      *Estate of Pew v. Cardarelli*, no. 06-5703, 2008 WL 2042809 (2d Cir. May 13, 2008).
- 34      Id. at \*6.
- 35      Id.
- 36      Id. at \*4.
- 37      See *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006); *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) Many of these appellate courts note with disapproval the decisions of about a dozen district courts that holding that the CAFA shifted the burden to the plaintiffs.
- 38      See *Frazier v. Pioneer Americas LLC*, 455 F.3d 542 (5th Cir. 2006); *Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, (7th Cir. 2006); *Evans v. Walter Induss., Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006).
- 39      *Luther v. Countrywide Home Loans Servicing, LP, et al.*, No. 2:07-CV-08165 (C.D. Cal), order of February 28, 2008.

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