

NOTES

REMOVAL OF SECURITIES ACT OF 1933 CLAIMS AFTER SLUSA: WHAT CONGRESS CHANGED, AND WHAT IT LEFT ALONE

JORDAN A. COSTA[†]

*"I really didn't say everything I said."*¹

Yogi Berra

INTRODUCTION

The American corporate governance disasters that surfaced with alarming frequency in the fall of 2001 resulted in far more than headline news of executive malfeasance and the Sarbanes-Oxley Act.² One of the effects of the exposure of corporate wrongdoing was a mass of lawsuits by investors. Enron alone gave rise to numerous claims by investors against issuers under the federal securities laws.³

Federal courts have exclusive jurisdiction over civil suits arising under the Securities Exchange Act of 1934 (the "Exchange Act").⁴ Consequently, using the Exchange Act's general antifraud provisions,

[†] J.D. candidate, June 2005, St. John's University School of Law; B.A., 2002, Fairfield University. The author is grateful to Professor Michael Perino for his guidance, expertise, and encouragement.

¹ YOGI BERRA & DAVE KAPLAN, WHAT TIME IS IT? YOU MEAN NOW? 51 (2002).

² Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.); see, e.g., Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES, Dec. 3, 2001, at A1 (discussing Enron's historic collapse and bankruptcy filing); Simon Romero & Alex Berenson, *WorldCom Says It Hid Expenses, Inflating Cash Flow \$3.8 Billion*, N.Y. TIMES, June 26, 2002, at A1 (calling the WorldCom crisis "what appears to be one of the largest cases of false corporate bookkeeping yet").

³ See, e.g., *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 539 (S.D. Tex. 2003). See generally Oppel & Sorkin, *supra* note 2, at A1.

⁴ Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (2000) (providing for exclusive federal jurisdiction over "violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder").

section 10(b) and Rule 10b-5, many investors sought relief in federal court.⁵ The same is not true, however, for actions arising under the express liability provisions of the Securities Act of 1933 (the "Securities Act"), which generally apply to an issuer's sale of securities to investors.⁶ The concurrent jurisdiction provisions of the Securities Act have always given investors the option of suing in either federal or state court.⁷ While these claims are predominantly filed in federal court, an increasing number of plaintiff's attorneys, for a variety of strategic reasons,⁸ are choosing to file in state rather than federal court. Not surprisingly, defendants often remove such actions to federal court.⁹

Prior to 1998, the Securities Act provided for nonremovable concurrent jurisdiction giving investors the final say over where to litigate their claims.¹⁰ In 1998 Congress addressed widespread abuses of the state court system by class action securities plaintiffs by passing the Securities Litigation Uniform Standards Act ("SLUSA").¹¹ Not only did SLUSA preempt many state law securities class actions, it made significant modifications to the removal provision of the Securities Act. SLUSA

⁵ Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5 (2003); *see, e.g., In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 563 (S.D. Tex. 2002) (discussing 10(b) and 10b-5 actions "brought on behalf of purchasers of Enron Corporation's publicly traded equity and debt securities" in federal court).

⁶ Securities Act of 1933 § 22, 15 U.S.C. § 77v (2000); *see* LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATIONS § 1-H-2 (3d ed. 1998) (noting that the Securities Act is concerned with the "initial distribution of securities . . . to the public").

⁷ *See infra* note 34.

⁸ Pragmatic plaintiffs may be choosing to litigate in state court in order to litigate in front of state judges. Federal judges adjudicate far more federal securities fraud cases, and as a result, have arguably become jaded towards plaintiffs. Professors Joseph A. Grundfest and A.C. Pritchard conducted an empirical study of 167 securities litigations in federal court, and concluded that as a general proposition, familiarity with class action securities fraud litigation "breeds skepticism on the bench." *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 635-36, 684-85 (2002). Judges in districts with a high volume of securities fraud cases "tend to issue pro-defendant rulings on motions to dismiss." *Id.* at 635. Judges in districts with higher volumes of securities fraud cases who themselves adjudicated multiple claims are "even *more strongly inclined* to issue pro-defendant rulings on motions to dismiss." *Id.* (emphasis added).

⁹ *See, e.g., Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03cv0714 BTM(JFS), 2003 U.S. Dist. LEXIS 15832, at *2 (S.D. Cal. Aug. 26, 2003); *Alkow v. TXU Corp.*, No. 3:02-CV-2243-K, 2003 U.S. Dist. LEXIS 7900, at *2 (N.D. Tex. May 8, 2003); *Nauheim v. Interpublic Group of Cos., Inc.*, No. 02-C-9211, 2003 U.S. Dist. LEXIS 6266, at *4 (N.D. Ill. Apr. 15, 2003); *Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122, 1123 (C.D. Cal. 2003); *In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 591 (S.D. Tex. 2002).

¹⁰ *See* 15 U.S.C. § 77v (1994).

¹¹ Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified at scattered sections of 15 U.S.C.) [hereinafter SLUSA].

provided an exception to the general rule that Securities Act claims are nonremovable.¹²

The extent of this exception presented a novel issue for federal courts deciding whether to adjudicate removed claims. Specifically, district courts are not in agreement as to whether SLUSA modified the Securities Act to allow for removal of a class action based only on the express liability provisions of the Act itself.¹³ While at least three courts have construed the exception narrowly and thus prohibited removal of class actions asserting only Securities Act claims,¹⁴ at least two others have construed the exception broadly and allowed removal of such actions.¹⁵

This confusion poses a significant problem for both investors and issuers. A district court's order remanding a case to the state court in which it was originally brought may not be appealed, and, therefore, no appellate court has addressed the divergence in authority.¹⁶ Litigants are thus left with an uncertain judicial landscape, as the issue of what the removal provision in fact says remains largely unsettled.

That the unsettled point exists at all is somewhat surprising, given the static nature of the provision from the passage of the Securities Act in 1933 until its modification by SLUSA in 1998. Congress had nearly fifty-five years to consider modifying the Act to allow for removal of claims.¹⁷ When they did so under SLUSA, one would assume it would have been with carefully crafted language to allow removal of an expressly delineated group of claims. However, this was not the case. The language of the exception is imprecise at best, causing litigants and the judiciary alike to struggle with its application.

Commentators have often accused Congress of inattention to the jurisdictional provisions of the securities laws.¹⁸ Perhaps the discrepancy

¹² See SLUSA, § 101, 112 Stat. at 3230 (amending section 22(a) of the Securities Act).

¹³ Compare *In re Waste Mgmt.*, 194 F. Supp. 2d at 591 (holding corporation was not entitled to removal under SLUSA because shareholders' claims were brought under federal securities law), with *Brody*, 240 F. Supp. 2d at 1124 (permitting such removal under SLUSA).

¹⁴ See *Hawaii Structural Ironworkers Pension Trust Fund*, 2003 U.S. Dist. LEXIS 15832, at *5-6; *Nauheim*, 2003 U.S. Dist. LEXIS 6266, at *17; *Waste Mgmt.*, 194 F. Supp. 2d at 591.

¹⁵ See *Alkow v. TXU Corp.*, No. 3:02-CV-2243-K, 2003 U.S. Dist. LEXIS 7900, at *6 (N.D. Tex. May 8, 2003); *Brody*, 240 F. Supp. 2d at 1124.

¹⁶ See 28 U.S.C. § 1447(d) (2000) (aggrieved defendant lacks standing to challenge a district court decision adverse to their decision to remove); see also *infra* note 77 and accompanying text.

¹⁷ See Securities Act of 1933 § 22, 115 U.S.C. § 77v (enacted in 1933); SLUSA, §§ 101, 22(a), 112 Stat. 3227, 3230 (amending Securities Act of 1933 in 1998).

¹⁸ See, e.g., Thomas Lee Hazen, *Allocation of Jurisdiction Between the State and Federal Courts for Private Remedies Under the Federal Securities Laws*, 60 N.C. L. REV. 707, 709 (1982) (criticizing the lack of consistency among the jurisdictional provisions of the federal securities statutes and proposing that the variations may be "the result of unfortunate legislative

exists here as a matter of happenstance—simply because Congress failed to carefully consider the issue. However, there is evidence to the contrary in the legislative history of SLUSA. Members of both houses did consider the issue of removal of Securities Act claims.¹⁹ Furthermore, at least one member of Congress expressly supported a defendant's ability to remove all such actions.²⁰

If the discrepancy does not exist as a matter of legislative inattention, perhaps it is the result of sloppy drafting. However, consideration of the drafting alternatives that Congress could have chosen suggests otherwise. Had Congress intended to allow for removal of *all* class actions arising under the Securities Act, it could have done so via a simple and direct modification of the statute. It did not do so.²¹

Why did Congress not choose the relatively simple statutory language that would have allowed defendants to remove all Securities Act claims? This Note suggests that while some members of Congress intended to allow removal of all Securities Act claims, Congress as a whole did not. Furthermore, if SLUSA was explicitly drafted to allow for removal of all Securities Act claims, federalism concerns may have prevented it from passing a Democrat-controlled Senate in 1998.²² Thus, for purely political reasons, those members of Congress whose statements in SLUSA's legislative history indicate their support for removal of all claims may have balked at effectuating these intentions clearly in the statute.²³

This Note asserts, however, that the relevant inquiry here is not what Congress intended, but what it actually changed when it modified the removal provision of the Securities Act in SLUSA. Three issues are addressed herein. What is the correct judicial interpretation of the removal provision of the Securities Act as modified by SLUSA? Is the provision clear enough to permit a district court to interpret it on its face? Finally, if the provision may be so interpreted, did Congress actually effectuate its intentions in modifying the provision?

It is well settled that where it is possible for a district court to interpret a federal statute so as to give effect to every word that Congress put to paper, it is inappropriate to look to legislative history for guidance in interpreting a statute.²⁴ While the removal provision of the Securities Act

apathy or inattention”).

¹⁹ See discussion *infra* Part IV.B.

²⁰ See *infra* notes 183–85 and accompanying text.

²¹ See discussion *infra* Part IV.A.

²² See discussion *infra* Part IV.C.

²³ See *infra* notes 208–09 and accompanying text.

²⁴ See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Montclair v. Ramsdell*, 107

could undoubtedly have been worded more clearly, this Note suggests that it can be properly interpreted on its face to allow only for removal of claims asserted *along with* preempted state law claims and therefore, it should be interpreted as such. After all “imprecise” does not necessarily mean “ambiguous.”²⁵ Judicial resort to the legislative history of SLUSA to interpret the provision of the Securities Act is unnecessary.

Finally, this Note suggests that although there is evidence in SLUSA’s legislative history that some members of Congress intended to allow defendants the option to remove all Securities Act claims, this was not the intent of Congress as a whole. The fact that Congress chose not to enact a relatively simple modification to the removal provision of the Act weighs heavily against the proposition that Congress failed to achieve its objective in SLUSA.²⁶

This Note proceeds as follows. Part I provides relevant background, examining removal under the federal securities laws generally before exploring the reasons for the passage of SLUSA and the modification of the removal provision of the Securities Act. Part II discusses the reported judicial decisions to date that have addressed the issue of whether SLUSA allows removal of a Securities Act claim filed alone. Part III suggests that the removal provision of the Securities Act can be interpreted without resort to the legislative history of SLUSA, and must be so interpreted in light of relevant statutory interpretation precedent. Part IV suggests simple language that SLUSA could have used to allow for removal of all Securities Act claims. It then examines the legislative history of SLUSA, and concludes that while some members of Congress wanted to allow for removal of all Securities Act claims, Congress as a whole did not.

I. BACKGROUND

A. Removal Jurisdiction Under the Federal Securities Laws

State courts of general jurisdiction and federal district courts generally have concurrent jurisdiction to adjudicate claims arising under federal law.²⁷ Where concurrent jurisdiction exists, a plaintiff may choose

U.S. 147, 152 (1883)).

²⁵ See discussion *infra* Conclusion.

²⁶ See *infra* Part IV.

²⁷ See, e.g., Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 145 (2001) (“[S]tate and federal courts have concurrent jurisdiction to hear most cases that fall within Article III.”). Concurrent jurisdiction does not exist, however, where Congress has expressly limited jurisdiction under a statute to the federal courts, thereby preventing a plaintiff from bringing an action under it in state court. See, e.g., 28 U.S.C. § 1338 (2000).

to bring a federal claim in state court.²⁸ Removal jurisdiction allows a defendant who is sued in state court on a federal claim to move the litigation to the federal court in which the action could have been brought initially.²⁹ Defendants do not always have the option of removal. Congress has reserved the right to circumscribe removal in all cases in which they chose to do so in the modern removal statute, 28 U.S.C. § 1441.³⁰

²⁸ Commentators have proposed several justifications for concurrent jurisdiction, which allows members of the state judiciary to decide questions of federal law at the discretion of the plaintiff. Concurrent jurisdiction eliminates “the necessity for litigants to travel great distances to federal forums” to litigate federal rights. Janet M. Bowermaster, *Two (Federal) Wrongs Make a (State) Right: State Class-Action Procedures as an Alternative to the Opt-In Class-Action Provision of the ADEA*, 25 U. MICH. J.L. REFORM 7, 49 (1991) (citing Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 551 (1925)). The ability to litigate federal claims in state court may also offer a plaintiff the ability to avoid a district court’s crowded docket and pursue expedient justice. *See id.* (noting the ability of concurrent jurisdiction to “prevent congestion of the federal courts with the great volume of cases engendered by federal statutes” (citing Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 516–17 (1928)).

²⁹ 28 U.S.C. § 1441. While the Constitution does not expressly provide for removal jurisdiction, *see* CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 38 (6th ed. 2002) (remarking that removal jurisdiction is not “mentioned in the Constitution”); Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 437 (1999) (“No provision in the Constitution authorizes federal courts to exercise removal jurisdiction.”), it has existed by federal statute since the passage of the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80 (1789); Frank Pommersheim, “*Our Federalism*” in *the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts’ Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 159 n.135 (2000) (quoting ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 322–23 (3d ed. 1999)) (noting that while the constitution “defines the matters that federal courts may hear . . . it is silent as to the procedures that may be used to initiate federal court jurisdiction”); *see also* WRIGHT & KANE, *supra*, at § 38 (tracing removal jurisdiction to the Judiciary Act of 1789); Tristin K. Green, Comment, *Complete Preemption – Removing the Mystery from Removal*, 86 CAL. L. REV. 363, 364 (1998) (noting that removal was an “invention of Congress” which came into being when the “Judiciary Act of 1789 established a provision permitting removal jurisdiction”).

³⁰ *See* WRIGHT & KANE, *supra* note 29, at § 38 (noting that § 1441 is the “present removal statute”). Actions may be removed under § 1441(a) “[e]xcept as otherwise expressly provided by Act of Congress.” 28 U.S.C. § 1441(a) (emphasis added). Alternatively stated, removal is authorized when Congress is otherwise silent on the matter. *See* Young, *supra* note 27, at 145 (remarking that removal jurisdiction exists “at Congress’s sufferance”).

Congress has, in some instances, expressly legislated to proscribe removal. *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3721 (3d ed. 1998) (noting that “there are a number of federal statutes expressly providing that particular actions are not removable, even though they are within the original subject matter jurisdiction of the federal courts”).

Other statutory restrictions include limiting removal to cases in which the federal courts have original jurisdiction, *see* 28 U.S.C. § 1441(a); *see also* WRIGHT, MILLER & COOPER, *supra*, § 3721 (noting that as a general rule, “an action is removable from a state court to a federal court only if it might have been brought in the latter originally”), and limiting removal in diversity cases. 28 U.S.C. § 1441. By discussing removal of Securities Act claims, this Note deals only

Congress has expressly proscribed removal under § 1441 of several private civil causes of action under the federal securities laws.³¹ In fact, the federal securities laws generally fall into two³² removal jurisdiction categories: those that provide for concurrent federal and state jurisdiction with no right of removal to federal court, and those that provide for concurrent federal and state jurisdiction subject to the right of removal to federal court.³³

The Securities Act of 1933 fell under the first category as originally promulgated.³⁴ While the Act provided for federal jurisdiction “concurrent

with removal of claims “arising under . . . [the] laws of the United States,” which are “removable without regard to the citizenship or residence of the parties.” 28 U.S.C. § 1441(b). The availability of and procedure for removal in diversity cases will not be considered here. *See generally* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992) (providing a thorough study of the issue).

³¹ Beginning with the passage of the Securities Act of 1933, 15 U.S.C. §§ 77a-77z-3, Congress passed a total of six statutory schemes to regulate the securities industry. They include the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm, the Public Utility Holding Company Act of 1935, 15 U.S.C. §79a-79z-z6, the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb, the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64, and the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21. Commentators have often discussed the lack of consistency among the jurisdictional provisions of these statutes. *See* WRIGHT, MILLER & COOPER, *supra* note 30, § 3584; *see also*, Hazen, *supra* note 18, at 709 (noting the lack of consistency among the jurisdictional provisions and proposing as a possible reason for the divergence “legislative apathy or inattention”); Matthew J. Press, Note, *Arbitration of Claims Under the Securities Exchange Act of 1934: Is Exclusive Jurisdiction Still Justified?*, 77 B.U. L. REV. 629, 630 (1997) (noting the difference between the jurisdiction under the Securities Exchange Act and the rest of the federal securities regulation statutes).

³² The Securities Exchange Act has always provided for exclusive federal jurisdiction over “all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.” 15 U.S.C. 78aa. Exchange Act claims cannot be brought in state court, are not subject to removal, and thus do not fall into either category. *See* Press, *supra* note 31, at 631–32 (remarking that of the “six main federal statutes that regulate the securities industry . . . only the 1934 Act provides for exclusive federal jurisdiction”); *see also* WRIGHT, MILLER & COOPER, *supra* note 30, § 3584 (“The Securities Exchange Act stands alone [because the] jurisdiction of federal courts is exclusive of suits arising under [it].”).

³³ Public Utility Holding Act claims, *see* 15 U.S.C. § 79y, and Investment Advisers Act claims, *see* 15 U.S.C. § 80b-14, fall under the second jurisdictional category, giving state courts of general jurisdiction and federal district courts jurisdiction concurrent with one another, subject to the defendant’s right of removal to federal court. While the Investment Company Act provides for concurrent jurisdiction over claims as a general rule, 15 U.S.C. § 80a-43, the statute further provides for exclusive federal jurisdiction over suits to an investment advisor’s “breach of [a] fiduciary duty involving personal misconduct.” 15 U.S.C. § 80(a)-35; *see* WRIGHT, MILLER & COOPER, *supra* note 30, § 3584. Thus, the Act falls within both categories.

³⁴ *See* 15 U.S.C. § 77v (1994). The Trust Indenture Company Act incorporates by reference the jurisdictional provision of the Securities Act, and, consequently, an understanding of the authority of state and federal courts to hear claims arising under the Act necessarily hinges upon an interpretation of the referenced provision. *See* 15 U.S.C. § 77vvv (2000) (“[J]urisdiction and venue of suits and actions brought to enforce any liability or duty created by . . . this sub-chapter,

with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title,” it further provided that “no case . . . brought in any State court of competent jurisdiction shall be removed to any court of the United States.”³⁵ Accordingly, it was well settled that the provision modified the general removal authority of § 1441(a), and thus prevented a defendant, sued in state court under a Securities Act claim, from removing the action to federal court.³⁶

B. The Private Securities Litigation Reform Act of 1995 and Its Aftermath

In 1995, Congress overhauled class action securities litigation in federal court by passing, over President Clinton’s veto, the Private Securities Litigation Reform Act (“PSLRA”).³⁷ The legislation was fueled in part by a crescendo of protest in the early part of the decade from “accountants, the high technology industry, and the securities industry,” who asserted that widespread abuses in class action securities litigation had led to “legalized extortion.”³⁸

Because securities class action litigation was easy to bring and expensive to defend, defendants felt pressured into settling claims instead

or any rules or regulations or orders prescribed under the authority thereof, shall be *as provided in section 22(a) of the Securities Act of 1933.*”) (emphasis added); *see also* WRIGHT, MILLER & COOPER, *supra* note 30, § 3584 (noting that the jurisdictional provision of the Securities Act is “incorporated by reference in the Trust Indenture Act”).

³⁵ 15 U.S.C. § 77v (1994); *see* WRIGHT, MILLER & KANE, *supra* note 22, § 3584 (“[T]he Securities Act[] grants jurisdiction to the district courts concurrent with the courts of the states[] and provides that no action brought in a state court of competent jurisdiction may be removed to federal court.”); Hazen, *supra* note 18, at 712 (discussing the Act’s “concurrent, nonremovable state jurisdiction”). Note that by incorporating this jurisdictional provision by reference, the Trust Indenture Act also provided for concurrent, nonremovable state jurisdiction during this period. *See supra* note 34.

³⁶ *See, e.g.,* U. S. Indus., Inc. v. Gregg, 348 F. Supp. 1004, 1015 (D. Del. 1972) (noting that section 22(a) of the Securities Act “restricts the grant of general removal jurisdiction found in” 28 U.S.C. § 1441(a)), *rev’d on other grounds*, 540 F.2d 142 (3d Cir. 1976).

³⁷ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.) [hereinafter PSLRA]; *see* MICHAEL A. PERINO, SECURITIES LITIGATION AFTER THE REFORM ACT 1011 (2004) (describing the passage of the Act); Harvey L. Pitt et al., *Promises Made, Promises Kept: The Practical Implications of the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 845, 846 (1996) (discussing the congressional override of President Clinton’s veto).

³⁸ PERINO, *supra* note 37, at 1013. Members of the Republican party addressed the concerns of the high technology industry in particular in their 1994 Contract with America. *See*, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 150 (Ed Gillespie & Bob Shellhas eds. 1994) (noting that “high technology . . . and other growth companies are the hardest hit” by abuses in securities class action litigation).

of undertaking the expense of litigating them.³⁹ Then future Securities and Exchange Commission chairman Harvey Pitt suggested that the issuer's decision to settle was a matter of economics, and not of culpability:

[A]n adverse announcement by a public company which produced a quick drop in the company's stock price [would be followed] [w]ithin days—sometimes within hours—[by] shareholder class action complaints . . . alleging that earlier statements of optimism by the company or its executives constituted securities fraud. Confronted with costly litigation and potentially crippling liability, the vast majority of defendants settled.⁴⁰

To combat the problem, the PSLRA significantly reformed the federal securities laws to make private litigation more difficult to bring in federal court.⁴¹ The overarching goal of the legislation was to provide protection “from abusive securities litigation” for “investors, issuers, and all who are associated with” the American capital markets.⁴²

In 1997, at the request of President Clinton, the SEC's Office of the General Counsel studied securities class action litigation after the PSLRA in an effort to measure the level of success the Act had achieved in attaining its aforementioned goals. In doing so, it prepared a report which

³⁹ See PERINO, *supra* note 37, at 1016; see, e.g., William Tucker, *Shakedown?: Technology Firms Have Volatile Earnings. Lawyers Have Figured Out How to Get Fat Off This Fact of Life*, FORBES, Aug. 19, 1991, at 98. (reporting how one high technology CEO remarked that plaintiffs' attorneys “know how expensive it is for us to take our case to court. We're supposed to give them a few million dollars so they'll go away.”).

⁴⁰ Pitt, *supra* note 37, at 847. Professor Janet Cooper Alexander of Stanford Law School studied a group of securities lawsuits relating to initial public offerings of securities in the high technology industry, and concluded that:

- i) Lawsuits were filed “against every company in the industry whose stock declined significantly in the months following its initial stock offering”;
- ii) virtually every suit settled; and
- iii) most cases settled for almost precisely 25 percent of the damage exposure, and where they did not, the deviations could be “accounted for by non-merits-related factors.”

Leonard B. Simon & William S. Dato, *Legislating on a False Foundation: The Erroneous Academic Underpinnings of the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 959, 960 (1996) (citing and quoting Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 500 (1991)).

⁴¹ See, e.g., Marc I. Steinberg, *Securities Law After the Private Securities Litigation Reform Act—Unfinished Business*, 50 SMU L. REV. 9, 10–12, 17, 19 (1996) (discussing the reforms in the PSLRA which are broadly aimed at achieving this result). Professor Michael A. Perino has summarized the PSLRA's reforms by organizing them into nine major categories as follows: (1) Pre-Filing and Case Organization Requirements, PERINO, *supra* note 37, at 1023, (2) Pleading and Proof Requirements, *id.* at 1024–25, (3) Mandatory Discovery Stay, *id.* at 1025, (4) Proportionate Liability and Contribution, *id.* at 1026, (5) Damages, *id.*, (6) Sanctions, *id.* at 1026–27, (7) Safe Harbor for Forward-Looking Statements, *id.* at 1027, (8) Class Action Settlement Procedures, *id.* at 1027–28, and (9) Miscellaneous Provisions, *id.* at 1028.

⁴² H.R. REP. NO. 104-369, at 32 (1995).

addressed the impact of the PSLRA “on the effectiveness of the securities laws and on investor protection,” and examined “the extent and nature of any litigation under the Act.”⁴³ The report found that the PSLRA produced both intended and unintended consequences.⁴⁴

Among the intended consequences of the Act was an overall decrease in volume of securities class action activity in federal court.⁴⁵ Simply put, issuers were sued less frequently in federal court immediately following the PSLRA than in the months leading to its passage: 52% fewer federal securities class actions were filed in federal court during the year following the passage of the PSLRA than in the year preceding it.⁴⁶

Of those actions that *were* brought, there was an increased delay between the release of adverse information about an issuer and the filing of the action against them.⁴⁷ It was evident from the actions filed after the PSLRA that “greater research and investigation” began to go into the typical federal securities class action complaint, a fact that points towards

⁴³ OFFICE OF THE GENERAL COUNSEL, U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, at 1 (1997) at <http://www.sec.gov/news/studies/reform.txt> [hereinafter SEC REPORT].

⁴⁴ See *infra* notes 45–46, 49 and accompanying text. Commentators across various legal disciplines have often described a “law of unintended consequences” of legislative activity. Hindsight often reveals that prediction of *all* of the effects of even well studied and carefully drafted legislation is impossible. See generally Rob Frieden, *Regulatory Opportunism in Telecommunications: The Unlevel Competitive Playing Field*, 10 COMMLAW CONSPECTUS 81, 82–84 (2001) (noting the unintended consequences of federal telecommunications legislation); David A. Hyman, *Medicine in the New Millennium: A Self-Help Guide for the Perplexed*, 26 AM. J.L. & MED. 143, 148 (2000) (remarking that the “costs of . . . unintended consequences” must be taken into account in determining the appropriateness of prospective legislative activity); *Symposium on Bioinformatics and Intellectual Property Law: The Proper Scope of IP Rights in the Post-Genomics Era*, 8 B.U. J. SCI. & TECH. L. 233, 250 (2002) (“All legislation has unintended consequences . . .”) (comments of Rebecca Eisenberg).

⁴⁵ See PERINO, *supra* note 37, at 1017.

⁴⁶ SEC REPORT, *supra* note 43, at 2–21. The report does qualify this statistic somewhat. It notes that “the first three months of the year following passage of the Act are unrepresentative [because] only 15% of the cases were filed in this quarter.” *Id.* at 1. It notes further that “1996 witnessed a bull market.” *Id.* at 22. Finally, the report cautions against judging the effectiveness of the PSLRA on purely statistical grounds alone. *Id.* However, shortcomings of the statistic notwithstanding, the report concludes that “[t]he ‘race to the courthouse’ has slowed somewhat,” following the passage of the PSLRA. *Id.* at 23.

By 1998, the drop in federal securities class action filings that the SEC had identified had largely disappeared. See JOSEPH A. GRUNDFEST, MICHAEL A. PERINO ET AL., SECURITIES CLASS ACTION LITIGATION IN FIRST QUARTER 1998, at 1 (1998) (noting that “[t]he volume of securities class action activity in federal court has grown substantially since the earliest days of the Reform Act”).

⁴⁷ See SEC REPORT, *supra* note 43, at 24. The report attributed the slowing of the “race to the courthouse” to the heightened pleading standards and lead plaintiff provisions of the PSLRA. See *id.*

the conclusion that while meritorious claims were still developed and brought, frivolous claims were not.⁴⁸

The report found, however, that the most “significant development in securities litigation post-Reform Act” may in fact have been an unintended consequence of the legislation—a dramatic shift in class action filings from federal court to state court during the year following the enactment of the PSLRA.⁴⁹ Professors Michael A. Perino and Joseph A. Grundfest similarly asserted in a 1997 paper that approximately 26% of securities class action litigation moved from federal to state court during the year after the passage of the PSLRA.⁵⁰

The shift of securities class action litigation from federal to state courts was attributed to a “substitution effect” whereby plaintiffs resort to state court to avoid the new, more stringent requirements imposed by the federal judiciary on litigants per the PSLRA.⁵¹ Plaintiffs had an incentive to file actions in state court to avoid the PSLRA’s heightened pleading standard, discovery stay, and safe harbor for forward-looking information.⁵²

The shift threatened to undermine the intentions of the PSLRA by providing litigants with another forum in which to bring the very type of non-meritorious and aggressive actions that the Act sought to eliminate.⁵³

⁴⁸ See *id.* at 22 (finding that less than 12% of the complaints filed post-PSLRA were “based solely on forecasts that have not proved true” and furthermore that the complaints in general did “not have the type of glaring errors which would suggest that they were the product of a hurried word processing ‘cut and paste’”).

⁴⁹ *Id.* at 70–71; see PERINO, *supra* note 37, at 11,011 (“One of the most significant of [the] unintended consequences [of the PSLRA] involved plaintiff’s attorneys’ strategic attempt to avoid the Reform Act altogether by filing their actions in state rather than federal court.”).

⁵⁰ JOSEPH A. GRUNDFEST & MICHAEL A. PERINO, SECURITIES LITIGATION REFORM, THE FIRST YEAR’S EXPERIENCE: A STATISTICAL AND LEGAL ANALYSIS OF CLASS ACTION SECURITIES FRAUD LITIGATION UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, at ii (rel. 97.1) (1997).

⁵¹ See GRUNDFEST & PERINO, *supra* note 50, at 49. The notion that restrictive interpretation of the federal securities laws by the federal judiciary could potentially lead to a movement of litigation to state courts was not foreign to scholarly literature prior to the PSLRA. See PERINO, *supra* note 37, at 11,015 n.20.

⁵² See Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 292–93 (1998). Professor Richard W. Painter summarized the reasons which were often offered to substantiate the movement of plaintiffs to state court to avoid the PSLRA’s requirements:

First, statistical data purportedly show that plaintiffs filed claims in state court that the 1995 Reform Act made difficult to litigate in federal court. . . . Second, proponents of preemption argue that other groups of plaintiffs filed suits simultaneously in state and federal court . . . in order to evade the 1995 Reform Act’s discovery stay.

Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 42 (1998).

⁵³ See Painter, *supra* note 52, at 42.

Indeed, the Securities and Exchange Commission's Office of the General Counsel reported that of the securities class action litigations that it studied, which were commenced in state court during the year after the PSLRA's passage,⁵⁴ 15% were based "solely on failed forecasts"—the very type of litigation based on highly speculative assumptions of issuer wrongdoing that the PSLRA was intended to address.⁵⁵ Plaintiffs' attorneys had strategically selected state forums when they had low expectations that their actions would "survive a motion to dismiss under" the federal securities law as modified by the PSLRA.⁵⁶

C. *The Securities Litigation Uniform Standards Act*

Congress was not blind to the fact that its intentions in enacting the PSLRA were regularly being subverted by the creativity of plaintiff's counsel. On July 24, 1997, the Senate Subcommittee on Securities held an oversight hearing on the PSLRA, and heard testimony from ten witnesses on the matter.⁵⁷ Shortly thereafter, senators Phil Gramm, Christopher Dodd, Peter V. Domenici, and eleven others introduced the Securities Litigation Uniform Standards Act of 1997.⁵⁸ The bill preempted state-law-based securities fraud class actions for certain nationally-traded securities.⁵⁹

Supporters of the Uniform Standards Act argued that preemption was necessary for two major reasons.⁶⁰ First, statistical data indicated that

⁵⁴ The report does note that due to difficulty in obtaining data about the number of securities-related cases filed in state court, its findings on the matter were not to be treated as exhaustive. See SEC REPORT, *supra* note 43, at 72 n.253.

⁵⁵ See *id.*, at 75 (reporting that as compared to 12% of complaints filed at the state level, "15% of the state court complaints we reviewed [were] based solely on failed forecasts"). Another commentator, studying a different sample of state court filings, suggested that the differential between false forecast complaints filed in state rather than federal court was significantly higher. See Perino, *supra* note 52, at 313 ("[T]here are approximately twice as many state court complaints based solely on false forecasts as there were in the federal sample . . .").

⁵⁶ See Perino, *supra* note 52, at 307 (discussing how "weaker" cases are filed in state courts in order to circumvent the PSLRA's strong inference of fraud pleading standard).

⁵⁷ S. REP. NO. 105-182, at 1-2 (1998). The witnesses represented all perspectives on the issue, from those in the academic and regulatory community who had identified the post-PSLRA shift in litigation to state court, to those in the high technology industry who had allegedly been adversely affected by the post-PSLRA activity, to prominent representatives from the securities class action plaintiffs' bar. See *id.* at 1-5.

⁵⁸ See Painter, *supra* note 52, at 49. Representatives Rick White and Anna Eshoo introduced a near identical bill in the House of Representatives. See *id.* at 47.

⁵⁹ A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L.Q. 435, 436-37 (2000); see also PERINO, *supra* note 37, at 11,021 (noting that "SLUSA structures preemption by invoking the language of the implied and express private rights of action under the federal securities laws").

⁶⁰ See Painter, *supra* note 52, at 41.

plaintiffs filed weaker claims in state court that the PSLRA made difficult to litigate in federal court, because of, for example, the PSLRA's discovery stay.⁶¹ Preemption was thus necessary "to ensure the effectiveness of the Reform Act."⁶² Second, the subversion of the PSLRA would 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."⁶³

SLUSA passed by unanimous consent in the Senate and by a vote of 319–82 in the House, and was signed into law by President Clinton on November 3, 1998.⁶⁴ It represented a direct attempt by Congress to "limit[] the post-PSLRA shift of cases from federal to state court."⁶⁵ Toward that end, SLUSA "deprived state courts of the power to adjudicate certain securities fraud class actions."⁶⁶ Although the language used is not identical, SLUSA essentially preempted all state law class actions which fell within the scope of Rule 10b-5,⁶⁷ a general federal anti-fraud prohibition which was promulgated under the Securities Exchange Act.⁶⁸

Mechanically, preemption is accomplished by permitting the defendant to remove preempted claims, which the federal court must then dismiss.⁶⁹ Thus, instead of bringing a motion to dismiss in state court, a defendant must remove the action so that it can be dismissed in federal court.⁷⁰ Commentators have noted that Congress chose removal to

⁶¹ *See id.*

⁶² PERINO, *supra* note 37, at 11,018.

⁶³ *See Painter, supra* note 52, at 41; *see also* PERINO, *supra* note 37, at 11,019 (noting the argument for preemption, which proposes, that because "the securities most effected by class action litigation were securities that traded on national markets. . . [i]t [makes] little sense to have these securities subject to possibly inconsistent rules in different jurisdictions").

⁶⁴ Painter, *supra* note 52, at 58–59; *see also* PERINO, *supra* note 37, at 11,020.

⁶⁵ PERINO, *supra* note 37, at 11,020–21.

⁶⁶ Pritchard, *supra* note 59 at 483. SLUSA also gave federal courts discretion to stay state court proceedings. PERINO, *supra* note 37, at 11,040. These provisions of SLUSA, *see* 15 U.S.C. §§ 77z-1(b)(4), 78u-4(b)(3)(D) (2000), which "empower[] courts to prevent parties from circumventing the [PSLRA's] discovery stay through state court actions," PERINO, *supra* note 37, at 11,040, are beyond the scope of this note.

⁶⁷ 17 C.F.R. § 240.10b-5 (2004).

⁶⁸ *See* Pritchard, *supra* note 59, at 483 n.242 ("[SLUSA] has essentially the same broad reach as the general anti-fraud prohibition found in the SEC's Rule 10b-5 . . .").

⁶⁹ *See* 15 U.S.C. §§ 77p(b), 78bb(f)(1) (providing that no preempted action "may be maintained in any State or Federal court by any private party"); *see also* PERINO, *supra* note 37, at 11,022 ("The federal court must dismiss the removed action if it determines that the SLUSA preempts it.").

⁷⁰ *See* Pritchard, *supra* note 59, at 490 (noting that "[o]rdinarily, one would expect the law to require the defendant to bring its motion to dismiss or demurrer in state court").

accomplish preemption so that the federal judiciary would be the interpreter of the scope of SLUSA's preemption.⁷¹

SLUSA's use of the removal device to accomplish preemption of state claims created a novel issue in terms of removal of federal claims. SLUSA modified the Securities Act of 1933 and the Exchange Act of 1934 to facilitate removal of preempted claims.⁷² Jurisdiction over Exchange Act claims has always been exclusively federal, and thus SLUSA did not result in confusion over removal of Exchange Act claims themselves.⁷³ Prior to 1998, however, the Securities Act provided for nonremovable concurrent jurisdiction over actions arising under its express liability provisions.⁷⁴ SLUSA modified the removal provision of Securities Act by inserting the language "[e]xcept as provided in section 16(c)" before "no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed . . ."⁷⁵ This modification, to allow preempted state law claims to be removed and dismissed at the federal level, created some situations in which federal claims arising under the Securities Act are removable.

There is considerable judicial confusion, however, about when those situations, in which a defendant may remove a Securities Act claim filed in state court, exist.⁷⁶ What did Congress change, and what did it leave alone? May a defendant remove an action brought only under the express liability provisions of the Securities Act? As a defendant generally lacks any recourse to appeal a district court decision to remand a case to the State court from which it was removed, there is consequently no appellate authority to clarify this confusion.⁷⁷ Most district courts faced with this

⁷¹ *Id.* ("The removal provision . . . serves [an] important federal interest[]: it allows federal courts to interpret the scope of preemption, thus enhancing uniformity."); *see also* PERINO, *supra* note 37, at 11,022 (noting that Congress intended to have "federal courts, rather than state courts, . . . interpret the scope of preemption under the statute").

⁷² *See* SLUSA, §§ 101, 22(a), 28, 112 Stat. 3227, 3230 (1998) (amending section 22(a) of the Securities Act and section 28 of the Securities Exchange Act).

⁷³ *See* Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa. Section 27 states:

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 any liability or duty created by this chapter or the rules and regulations thereunder.

Id. (emphasis added).

⁷⁴ *See* discussion *supra* Part I.A.

⁷⁵ SLUSA § 101(a)(3) (amending section 22(a) of the Securities Act); 15 U.S.C. § 77v (section 22(a) as amended).

⁷⁶ *See* discussion *infra* Part II.A.

⁷⁷ 28 U.S.C. § 1447(d), which provides a "[p]rocedure after removal generally," proscribes review of an order to remand "a case to the State court from which it was removed on appeal or otherwise," 28 U.S.C. § 1447(d), and thus, an aggrieved defendant lacks standing to challenge a

issue today are thus faced with an issue of first impression, with scarce authority to guide their decision.

II. INTERPRETING THE REMOVAL PROVISION OF THE SECURITIES ACT AFTER SLUSA

A. Divided Judicial Decisions

Five reported district court decisions to date address the issue of whether SLUSA permits removal of a class action that implicates only the express liability provisions of the Securities Act. The decisions are divided: three courts have remanded the removed Securities Act cases,⁷⁸ while two courts have kept the cases in federal court.⁷⁹

1. SLUSA Proscribes Removal of a Class Action Alleging Only Securities Act Claims

In *In re Waste Management, Inc. Securities Litigation*,⁸⁰ the United States District Court for the Southern District of Texas, in a case of first impression,⁸¹ held that it was improper to remove a case alleging *only* violations of sections 11, 12(a)(2), and 15 of the Securities Act of 1933⁸² from state court,⁸³ and therefore remanded the case pursuant to 28 U.S.C. § 1447(c).⁸⁴

district court decision adverse to their decision to remove. While the statute provides an exception for civil rights cases, *id.* (providing that an order remanding a case removed pursuant to § 1443 “shall be reviewable”), such is clearly inapplicable to Securities Act cases. Additionally, it is well settled that a defendant may not skirt an adverse decision to remand via a mandamus suit. *See* 16 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 107App.113 ¶ (2)(a) (3d ed. 2004) (discussing the “general principle that mandamus will not lie to compel retention of a case”). Furthermore, the narrow exception to this rule carved out by the Supreme Court in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 353 (1976), which allows mandamus in those rare cases in which a district court remands “for reasons not authorized by statute,” 16 MOORE ET AL., *supra* § 107App.113(2)(a), has yet to be invoked post-SLUSA to challenge remand of a Securities Act claim.

⁷⁸ *See* *Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03cv0714 BTM(JFS), 2003 U.S. Dist. LEXIS 15832, at *3 (S.D. Cal. Aug. 26, 2003); *Nauheim v. Interpublic Group of Cos., Inc.*, No. 02-C-9211, 2003 U.S. Dist. LEXIS 6266, at *17 (N.D. Ill. Apr. 15, 2003); *In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 591 (S.D. Tex. 2002).

⁷⁹ *Alkow v TXU Corp.*, No. 3:02-CV-2738-K, 2003 U.S. Dist. LEXIS 7900, at *7 (N.D. Tex. May 8, 2003); *Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122, 1124 (C.D. Cal. 2003).

⁸⁰ 194 F. Supp. 2d at 590.

⁸¹ *Id.* at 591.

⁸² 15 U.S.C. §§ 77k, 77l(a)(2), 77(o); *see Waste Mgmt.*, 194 F. Supp. 2d at 591. The plaintiffs sued “solely under the Securities Act of 1933 on behalf of themselves and all other similarly situated . . .” *Id.* (emphasis added).

⁸³ *Waste Mgmt.*, 194 F. Supp. 2d at 591.

⁸⁴ *Id.* at 596; *see* 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that

The court reviewed the history of the SLUSA, and noted that it “made federal court the exclusive venue for securities fraud class actions meeting its definitions and ensured they would be governed exclusively by federal law”⁸⁵ by providing for “mandatory removal and dismissal”⁸⁶ of “securities fraud claims that fall within its ambit.”⁸⁷ The court noted the well-settled rule that a defendant whose removal of a claim under SLUSA was challenged by a motion to remand for improper removal must satisfy a five-part test to defeat the motion by showing:

- (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 have misrepresented or omitted material facts;
- (5) that the alleged misrepresentation or omission was made “in connection with” the purchase or sale of the covered security.⁸⁸

Plaintiffs noted that their action was based solely on Securities Act claims. Because SLUSA allows removal of “covered class actions,” which are defined *only* to include “certain class actions that assert *state statutory or common law claims*,” the action was nonremovable and must therefore be remanded.⁸⁹

Defendants argued that the plaintiffs’ claims in fact satisfied steps one, three, four and five of the test,⁹⁰ and challenged the validity of the “state statutory or common law” requirement of step two. Section 22(a) of the Securities Act does not allow for removal of “[any] case arising under this subchapter and brought in any State court,”⁹¹ except as provided in

the district court lacks subject matter jurisdiction, the case shall be remanded.”).

⁸⁵ *Waste Mgmt.*, 194 F. Supp. 2d at 592.

⁸⁶ *Id.* at 593.

⁸⁷ *Id.* at 594.

⁸⁸ *Id.* The court relied on *Korsinsky v. Salomon Smith Barney, Inc.*, No. 01 Civ. 6085 (SKW), 2002 U.S. Dist. LEXIS 259, at *8 (S.D.N.Y. Jan. 9, 2002), and *Hardy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 189 F. Supp. 2d 14, 17–18 (S.D.N.Y. 2001), for this test. The court here sets forth the test in five steps; most other jurisdictions articulate it in four steps. *See, e.g.*, *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1342 (11th Cir. 2002); *Shaev v. Clafin*, No. C 01-0009 MJJ, 2001 U.S. Dist. LEXIS 6677, at *10 (N.D. Cal. May 16, 2001); *Shaw v. Charles Schwab & Co., Inc.*, 128 F. Supp. 2d 1270, 1272 (C.D. Cal. 2001).

⁸⁹ *Waste Mgmt.*, 194 F. Supp. 2d at 594–96 (emphasis added).

⁹⁰ *Id.* at 595 (noting defendants’ arguments that the case was a “covered class action” involving a “covered security” and that it alleged an “untrue statement of a material fact in connection with the purchase or sale of a covered security”).

⁹¹ 15 U.S.C. § 77v(a) (2000).

section 16(c).⁹² The defendants argued that construing the Securities Act to allow removal only of state law claims would fail to give effect to the word “except” in the statute, because a state law claim can never arise under the Securities Act itself.⁹³

The court expressed its disagreement with the defendants’ argument,⁹⁴ but failed to clarify its position by articulating a different reading of the Securities Act after SLUSA. Furthermore, the court did not directly express its approval of the plaintiffs’ reading of the statute.⁹⁵ Instead, the court based its holding that removal was improper on several other factors. It emphasized the well-settled interpretation of the removal provision of the Securities Act prior to SLUSA, and noted the lack of any “express statement by Congress that it was modifying the traditional rule,” proposing that “Congress could easily have made a statement in SLUSA expressly modifying this provision had it so intended.”⁹⁶

In *Nauheim v. Interpublic Group of Companies, Inc.*,⁹⁷ the United States District Court for the Northern District of Illinois similarly held that the “plain language of the Securities Act as amended by SLUSA,”⁹⁸ permits “removal of only those covered class action complaints that are

⁹² 15 U.S.C. § 77p(c).

⁹³ *Waste Mgmt.*, 194 F. Supp. 2d at 595.

⁹⁴ *Id.* at 596 (“[T]he Court finds Defendants’ arguments unpersuasive and disagrees with Defendants’ broad assertion[s] . . .”).

⁹⁵ In fact, the court notes that the plaintiffs’ reliance on a Delaware District Court case in support of their contention was misplaced. *Id.* at 594 (citing and interpreting *Derdiger v. Tallman*, 75 F. Supp. 2d 322 (D. Del. 1999)).

⁹⁶ *Id.*, 194 F. Supp. 2d at 596. The court also noted that as of its decision, “no court has held that claims under the 1933 Act, standing alone, are removable under SLUSA,” *id.* at 596, an entirely circular reason for supporting its holding given its earlier recognition of the issue being one of “first impression.” *Id.* at 591. Supporting what is admitted to be the first decision on point with the argument that no authority had previously held otherwise is, at best, redundant and wholly unpersuasive.

The court also briefly discusses two post SLUSA decisions which, in interpreting the removal provisions of other federal statutory schemes that provide for concurrent jurisdiction, have examined the analogous provision in the Securities Act and determined that it prevents removal of Securities Act claims filed in state court. *Id.* at 596 (citing *PaineWebber, Inc., v. Cohen*, 276 F.3d 197, 208–09 (6th Cir. 2001); *Roseman v. Best Buy Co.*, 140 F. Supp. 2d 1332, 1334 (S.D. Ga. 2001)). This reasoning is certainly more persuasive, especially given that one of the cited courts is a Court of Appeals. However, the author disagrees with the *Waste Management* court’s reliance on the cases, because the cited decisions only *briefly* discuss removal of Securities Act claims and do not in either case support the positions asserted with regard to removal of Securities Act claims. Furthermore, the court, in so relying, failed to discuss in detail its response to the persuasiveness of either the plaintiffs’ or defendants’ aforementioned statutory arguments.

⁹⁷ No. 02-C-9211, 2003 U.S. Dist. LEXIS 6266, at *1 (N.D. Ill. Apr. 15, 2003).

⁹⁸ *Id.* at *10 (internal citations omitted).

based on State statutory or common law.”⁹⁹ They briefly discussed the aforementioned five step test to defeat a motion to remand¹⁰⁰ in support of its conclusion that the statute only allows removal of state law claims.

While the *Waste Management* court may have dodged the issue entirely, the *Nauheim* court indulged a meaningless legal fiction to dispose of the defendants’ argument that interpreting the Securities Act to never permit removal of Securities Act claims renders meaningless the use of the word “except” in section 22(a). Concededly, the defendants’ argument was entirely too broad in asserting that the only way to “give meaning” to the language of section 22(a) is to permit removal of all “covered class actions alleging fraud or manipulation involving the sale or purchase of covered securities, regardless of whether they arise under state or federal law.”¹⁰¹ However, the court’s assertion that the challenged language is “made meaningful” by section 16(c)’s “preemption of an expressly delineated category of state law class actions”¹⁰² is, in this author’s opinion, simply wrong. It is impossible to “make meaningful” every word in section 22(a) without giving meaning to the word “except.” Interpreting the statute to only permit removal of state law claims does not give any meaning to the word.

As the plaintiffs argued in *Waste Management*, a state law claim can never “arise under” the Securities Act.¹⁰³ Therefore, if only state law claims are removable, a claim “aris[ing] under this subchapter” is never removable, thus rendering the word “except” meaningless. Put alternatively, section 22(a) provides a general rule that a case arising under the Securities Act is not removable, but indicates that there is one exception.¹⁰⁴ The *Nauheim* court held that, contrary to what the statute says on its face, there is in fact no exception, and entirely failed to justify this conclusion.¹⁰⁵

⁹⁹ *Id.* at *11 (emphasis added). The court in turn relies on the *Waste Management* court’s discussion of the “plain language of SLUSA” demonstrating “Congress’ intent to preempt a specifically defined category of state-law class actions” *Id.* at *11 (quoting *Waste Mgmt.*, 194 F. Supp. 2d at 593) (internal citation omitted). This language notwithstanding, this author again submits that the *Waste Management* court’s discussion of the “plain language” of the Securities Act as modified by SLUSA was inadequate.

¹⁰⁰ *Id.* at *11–12; see *supra* note 88 and accompanying text.

¹⁰¹ *Nauheim*, 2003 U.S. Dist. LEXIS 6266, at *14 (emphasis added).

¹⁰² *Id.* at *15.

¹⁰³ See *supra* notes 85–87 and accompanying text.

¹⁰⁴ See *supra* notes 91–92 and accompanying text.

¹⁰⁵ See *Nauheim*, 2003 U.S. Dist. LEXIS 6266, at *17. The author disagrees with the court’s conclusion regarding the “clear and unambiguous language of the statute.” See *id.* Furthermore, the court contradicted its own assertion that the statute is clear on its face. While in one instance it reasoned, “[w]here, as here, the words of a statute are clear and unambiguous, our inquiry is complete,” *id.* at *12 (emphasis added) (citing *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249,

*Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.*¹⁰⁶ is the most recent reported decision on the issue. The United States District Court for the Southern District of California announced its decision to follow *Waste Management* and *Nauheim*¹⁰⁷ before similarly concluding that “the plain language” of section 16(c) of the Securities Act “limits removal to class actions that are based upon state claims.”¹⁰⁸

The court expressly recognized the aforementioned inconsistency between the use of the words “except” and “arising under” in the statute and a holding that only state law claims are removable.¹⁰⁹ However, it concluded that the “statute is clear” and that it is inappropriate to “modify it to effect Congress’s likely intent.”¹¹⁰ Congressional intent aside, the court directly contradicted itself by calling the statute “clear” and by simultaneously recognizing the “inconsistency” in its language.¹¹¹ The court’s holding is, therefore, little more than mere acceptance of non-binding precedent. The Southern District of California in supporting their conclusion on the face of the Securities Act itself, ignored the opportunity to succeed where the preceding courts, which have adopted its position, have failed.

2. SLUSA Permits Removal of a Class Action Alleging Only Securities Act Claims

*Brody v. Homestore, Inc.*¹¹² was the first reported decision to hold that SLUSA permits removal of a case in which the plaintiffs allege only Securities Act claims.¹¹³ In *Brody*, the United States District Court for the Central District of California supported its conclusion in large part by relying on the legislative history of SLUSA.¹¹⁴

254 (1992)), by later engaging in a discussion of the legislative history of SLUSA in support of its holding, see *Nauheim*, 2003 U.S. Dist. LEXIS 6266, at *15–16, it wholly undermined this conclusion.

¹⁰⁶ No. 03cv0714 BTM(JFS), 2003 U.S. Dist LEXIS 15832, at * 1 (S.D. Cal. Aug. 26, 2003).

¹⁰⁷ See *id.* at *5 (noting that the court “agrees with the reasoning of *In re Waste Management* [and] *Nauheim*”).

¹⁰⁸ *Id.*

¹⁰⁹ See *id.* at *6.

¹¹⁰ *Id.*

¹¹¹ See *id.*

¹¹² 240 F. Supp. 2d 1122 (C.D. Cal. 2003)

¹¹³ *Id.* at 1123 (holding that “SLUSA authorizes removal of class actions asserting violations of the 1933 Act”).

¹¹⁴ See *id.* at 1123–24. The author submits that this reliance on the legislative history of SLUSA in interpreting the provision as written was wholly inappropriate. See discussion *infra* Part III.B.

The court noted the findings in the legislation itself regarding the “number of securities class action lawsuits [that] have shifted from Federal to State courts.”¹¹⁵ It then looked beyond the statute to further support the proposition that SLUSA modified the Securities Act to allow a defendant to remove Securities Act claims filed alone.¹¹⁶

Finally, the court discussed what it considered to be the “most persuasive argument” in support of its holding.¹¹⁷ It reasoned that because section 22(a) of the Securities Act did not permit removal of claims filed in state court prior to SLUSA,¹¹⁸ and SLUSA modified this section so as to exempt “covered class actions” from this prohibition,¹¹⁹ SLUSA therefore must have modified the provision to allow removal of Securities Act claims.¹²⁰ This reasoning ignores the fact that interpreting section 22(a) as permitting removal of only state law claims is a significant departure from the pre-SLUSA meaning of the provision.¹²¹ Thus, the interpretation put forth by the plaintiff, “that SLUSA meant to authorize removal only of securities litigation brought pursuant to state law,”¹²² would hardly render the “amendment to [section 22] meaningless,” as the court suggests.¹²³

In *Alkow v. TXU Corp.*,¹²⁴ the United States District Court for the Northern District of Texas held that removal of a class action asserting only Securities Act claims was proper under SLUSA.¹²⁵ The court noted that generally, the plaintiff’s choice of state or federal court under the Securities Act is to be undisturbed.¹²⁶ It observed that the one exception to this rule is section 16(c), and focused its attention on interpreting the exception.¹²⁷

¹¹⁵ See *Brody*, 240 F. Supp. 2d at 1124 (quoting SLUSA, § 2, Pub. L. No. 105-353, 112 Stat. 3227 (1998)).

¹¹⁶ See *id.* (citing 144 CONG. REC. H11019-01, H11020 (daily ed. Oct. 15, 1998) (statement of Rep. Bliley)).

¹¹⁷ *Id.*

¹¹⁸ See *id.* (noting that “[p]rior to SLUSA, [section 22(a)] prohibited removal of claims brought under the 1933 Act”).

¹¹⁹ See *id.*

¹²⁰ See *id.* (reasoning that to interpret the provision otherwise “would render the amendment to [section 22(a)] meaningless”).

¹²¹ See discussion *supra* Part I.A.

¹²² *Brody*, 240 F. Supp. 2d at 1124.

¹²³ See *id.*

¹²⁴ No. 3:02-CV-2738-K, 2003 U.S. Dist. LEXIS 7900, at *1 (N.D. Tex. 2003).

¹²⁵ See *id.* at *6.

¹²⁶ See *id.* at *3 (remarking that if a plaintiff choose to bring a Securities Act claim in state court, “a defendant generally has no right to remove the case to federal court” (citing 15 U.S.C. § 77v(a) (2000))).

¹²⁷ See *id.* (noting that the “one exception to the general rule is [section 16(c)]”).

The *Alkow* court rejected the plaintiffs' contention that the exception applied only to state law claims.¹²⁸ It reasoned that if section 16(c) applied only to state claims, "no claims arising under the 1933 Act would be removable."¹²⁹ The word "except" in section 22(a) would be meaningless, because no state law claim could ever arise under the Securities Act.¹³⁰ The court reasoned that by reading the statute to allow removal of Securities Act claims, it was able to "harmonize[]" sections 16(c) and 22(a) of the Securities Act. Finally, the court looked to the legislative findings in the statute itself to support its conclusion that allowing removal furthered the intent of Congress to "counteract the shift in [securities] cases to state courts" prior to SLUSA.¹³¹

B. Interpreting the Removal Provision of the Securities Act on its Face

1. Statutory Interpretation Precedent

It is well settled that courts interpreting a statute should "give effect, if possible, to every clause and word of [the] statute."¹³² Put alternatively, "[w]hen the words of a statute are unambiguous . . . judicial inquiry is complete"¹³³ Furthermore, because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there,"¹³⁴ resort to the legislative history of a statute that can be interpreted on its face is inappropriate. The "sole function of the courts" presented with such an unambiguous legislative enactment "is to enforce it according to its terms."¹³⁵

Thus, a district court determining whether to adjudicate or remand a case in which the plaintiffs allege only violations of the Securities Act of 1933 should reach an initial conclusion as to whether the statute can be read "to give effect . . . to every clause and word" that Congress put to

¹²⁸ *Id.* (remarking that "[a] careful reading of the statute . . . shows the [plaintiffs'] arguments are unpersuasive").

¹²⁹ *Id.* at *4.

¹³⁰ *See id.* at *3–4 (noting that accepting the plaintiffs' argument "would require the court to ignore the language Congress chose," which it cannot do).

¹³¹ *Id.* at *4–6.

¹³² *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (quoting *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

¹³³ *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citing *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

¹³⁴ *Id.* at 253–54 (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–42 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102–03 (1897); *Oneale v. Thornton*, 10 U.S. (6 Cranch) 53, 68 (1810)).

¹³⁵ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

paper.¹³⁶ If such a reading is possible, the court should end their inquiry there,¹³⁷ presume that Congress effectuated its intentions in the statute, and apply the statute on its face without resort to its legislative history.

2. Giving Effect to Every Word of the Statute

It is submitted that the removal provision of the Securities Act, as modified by SLUSA, can be interpreted on its face, and therefore should be so interpreted, without regard to the statute's legislative history. A Securities Act claim is removable only when it is asserted along with a state law claim that SLUSA preempts.¹³⁸ Only in these very limited circumstances does SLUSA change¹³⁹ the well-settled rule¹⁴⁰ that a Securities Act claim is not removable.

The obvious starting point in concluding that the statute can be properly interpreted on its face is section 22(a) itself.¹⁴¹ It provides: "[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."¹⁴² Thus, as a general rule, claims "arising under" the Securities Act are not removable.

The sentence providing this general rule is, however, qualified by the language which precedes it. Consequently, the general rule applies "[e]xcept as provided in section [16(c)]."¹⁴³ The court is thus instructed by section 22(a) to turn to section 16(c) to learn when claims "arising under" the Securities Act *are* removable.

There is no possible reading of the statute that gives effect to every word Congress put to paper and, at the same time, fails to allow removal of any claims "arising under" the Securities Act. Such a reading would render the word "except" meaningless, as there would be no exception to the aforementioned general rule.¹⁴⁴ Conversely, there is no possible

¹³⁶ See *Gade*, 505 U.S. at 100 (quoting *Menasche*, 348 U.S. at 538–539 (quoting *Montclair*, 107 U.S. at 152)).

¹³⁷ See *Connecticut Nat'l Bank*, 503 U.S. at 254 (citing *Rubin* 449 U.S. at 430).

¹³⁸ See PERINO, *supra* note 37, at 11,029.

¹³⁹ See discussion *supra* Part I.C.

¹⁴⁰ See *supra* notes 34–36 and accompanying text.

¹⁴¹ 15 U.S.C. § 77v(a) (2000).

¹⁴² *Id.*

¹⁴³ *Id.* (emphasis added).

¹⁴⁴ For precisely this reason, the author disagrees with the reported decisions which have held that *no* claims "arising under" the Securities Act are removable after SLUSA. See *Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03cv0714 BTM(JFS), 2003 U.S. Dist. LEXIS 15832, at *5 (S.D. Cal. Aug. 26, 2003) ("The plain language of [the Securities Act] limits removal to class actions that are based upon state claims."); *Nauheim v. Interpublic Group of Cos., Inc.*, No. 02-C-9211, 2003 U.S. Dist. LEXIS 6266, at *17 (N.D. Ill. Apr. 15, 2003) (holding that "[u]nder the clear and unambiguous language of [the Securities Act] as

reading of the statute that gives effect to every word Congress put to paper and, at the same time, allows removal of all claims “arising under” the Securities Act.¹⁴⁵ If all claims “arising under” the Securities Act were removable, the statute’s qualifying language would fail to be an exception at all, and, again, the word “except” would be rendered meaningless. Therefore, as directed by section 22(a), we turn next to section 16(c)¹⁴⁶ to determine the subset of Securities Act claims filed in state court that are removable.

To be removable under section 16(c), the claims must meet the relatively complex definition of a “covered class action”¹⁴⁷ and must

amended by SLUSA,” the plaintiffs’ complaint, which was “based entirely on” the Securities Act, “cannot be removed from state court”); *In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 596 (S.D. Tex. 2002) (construing the “plain, literal meaning of the non-removability clause of the 1933 Act” as preventing removal of Securities Act claims).

¹⁴⁵ The author disagrees with the reported decisions which can be read to permit removal of *all*, and not a statutorily prescribed *subset of*, claims “arising under” the Securities Act. Such decisions are entirely inconsistent with a reading of the statute on its face which gives effect to every word Congress put to paper. See *Alkow v TXU Corp.*, No. 3:02-CV-2738-K, 2003 U.S. Dist. LEXIS 7900, at *5–6 (N.D. Tex. May 8, 2003); *Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122, 1124 (C.D. Cal. 2003).

¹⁴⁶ 15 U.S.C. § 77p(c). Section 16(c) provides: “Any 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 for the district in which the action is pending, and shall be subject to subsection (b) of this section.” *Id.*

¹⁴⁷ *Id.* “For the purposes of” section 16 in subsection 16(f)(2)(A), a “covered class action” includes:

- (i) any single lawsuit in which—
 - (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
 - (II) 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; or
- (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—
 - (I) damages are sought on behalf of more than 50 persons; and
 - (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

Id. § 77p(f)(2)(A).

Excluded from the above definition in subsection 16(f)(2)(B) are derivative actions: “[T]he term ‘covered class action’ does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.” *Id.* § 77(f)(2)(B).

The statute further specifies in subsection 16(f)(2)(C) how various business organizations are to be treated numerically for purposes of the definition: “For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as

involve a “covered security.”¹⁴⁸ Thus, for example, an individual action brought under the Securities Act¹⁴⁹ that does not meet the statutory definition of a “covered class action,”¹⁵⁰ does not implicate section 16(c), and is, therefore, not removable.¹⁵¹

Of the subset of cases that satisfy the statutory definitions, only those cases which further implicate section 16(b) are removable.¹⁵² The statute refers to subsection 16(b) twice: first, to limit those “covered class actions” which may be removed to those “involving . . . covered securit[ies], as set forth in subsection (b),”¹⁵³ and again to indicate that once removed, the action itself is “subject to subsection (b).”¹⁵⁴ This reading is necessary to give effect to both mentions of subsection 16(b). If the statute was drafted to allow removal of any Securities Act claim which was a “covered class action” involving “covered security,” it would not contain the first reference to section 16(b)—only the second, which gives the district court instructions on how to proceed with the action on removal. This is not, of course, what Congress did. By referring to the section twice, the first instance qualifies which covered class actions involving covered securities may be removed, and the second indicates that the removed case “shall be subject to subsection (b).”¹⁵⁵ The second reference does not indicate again which claims are removable, but instead indicates what should be done with them on removal. To read the statute otherwise so as to allow removal of all Securities Act claims which meet the statutory definitions would fail to give effect to the first mention of section 16(b).

one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.” *Id.* § 77p(f)(2)(C).

¹⁴⁸ 15 U.S.C. § 77p(c). The statute defines a “covered security” in subsection 16(f)(3) to include: “[A] security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section [18(b)] at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred.” *Id.* § 77p(f)(3). Excluded from the definition is: “any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section [4(2)].” *Id.*

¹⁴⁹ An individual investor could, for example, bring an action under the Securities Act to recover for a material misstatement made by an issuer in a prospectus. *See* LOSS & SELIGMAN, *supra* note 6, § 1-H-2 (noting that “[c]ivil . . . liabilities are imposed for material misstatements or omissions in the registration statement or prospectus” of a security).

¹⁵⁰ *See* 15 U.S.C. § 77p(f)(2).

¹⁵¹ Thus, the statute cannot be read to allow removal of all Securities Act claims.

¹⁵² *See* 15 U.S.C. § 77p(c).

¹⁵³ *See id.* (emphasis added).

¹⁵⁴ *Id.* The statute is giving instructions to parties as follows, “Defendant, here is when you can remove, and district court, here’s what to do with removed claims.” *See id.*

¹⁵⁵ *See id.*

Thus, to be removable, a case must include a claim which meets the definition of a “covered class action,” involves a “covered security,” and furthermore implicates section 16(b).¹⁵⁶ Section 16(b) applies only to claims “based upon the statutory or common law of any State or subdivision thereof.”¹⁵⁷ A Securities Act claim, then, could never implicate section 16(b), because it is based upon federal law. Therefore, a Securities Act claim, without more, does not trigger the “except as provided in section [16(c)]” exception in section 22(a),¹⁵⁸ and is not removable. A Securities Act claim, and a state law claim that is not a “covered class action”¹⁵⁹ involving a “covered security, as set forth in subsection (b),”¹⁶⁰ filed together, similarly do not trigger the section 22(a) exception.

The removable subset of Securities Act claims are those that are filed together with a state law based “covered class action,”¹⁶¹ involving a “covered security as set forth in subsection (b),”¹⁶² in state court. Only then may a Securities Act claim be removed “to the Federal district court for the district in which the action is pending.”¹⁶³

III. DID CONGRESS EFFECTUATE ITS INTENTIONS?

A. What Congress Could Have Said

If Congress intended to give defendants the option to remove all class actions involving Securities Act claims, as the *Brody* and *Alkow* decisions suggest, effectuating this intention could not have been simpler. It could have done so in SLUSA by merely drafting an additional sentence in section 16(c).

Section 22(a) need not change at all—the general rule would remain that “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,”¹⁶⁴ and the general rule would still apply “*except* as provided in section [16(c)].”¹⁶⁵

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* § 77p(b).

¹⁵⁸ *See id.* § 77v(a).

¹⁵⁹ *Id.* § 77p(e).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* § 77v(a) (2000).

¹⁶⁵ *See id.* (emphasis added).

Section 16(c) could have expressly allowed for removal of a “class action” arising under the Securities Act, while preserving the preemption of state law claims for which SLUSA currently provides. Those class actions arising under the Securities Act that were removed would then be subject to section 16(b), thus preventing any preempted state law claims that were asserted along with the Securities Act claim or claims from being maintained in federal court. The rest of section 16(c), allowing removal of those covered class actions involving covered securities that implicate section 16(b), would have been drafted exactly as it was. Finally, the descriptive language in section 16(c), which indicates that the section provides only for removal of “covered class actions,” would instead have referred, more generally, to “class actions.” As compared with section 16(c) as enacted under SLUSA, the section 16(c) described above would read:

Removal of ~~covered~~ class actions. *Any class action arising under this title brought in any State court shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).* 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).¹⁶⁶

B. Exploring the Legislative History of SLUSA

Congress clearly could have drafted SLUSA to allow for removal of all Securities Act claims, but it did not do so. The simple reason for this may be that, taken as a whole, the entire legislative body did not intend to do so.¹⁶⁷ It is possible to infer from the legislative history that some individual members of both houses thought that the statute should allow for removal of all Securities Act claims. Furthermore, at least one senator erroneously read the statute and thought that it did do so.¹⁶⁸ Incidentally, Judge Harold Leventhal once remarked that supporting a statute's interpretation by citing its legislative history is analogous to “looking over a crowd and picking out your friends.”¹⁶⁹ So too here, inferring from these isolated statements that Congress intended to allow for removal of all class

¹⁶⁶ Language which would not have been part of section 16(c) is indicated by strikethrough text. Language which would have been to be added to section 16(c) is indicated by *italicized* text.

¹⁶⁷ See Grunfest & Pritchard, *supra* note 8, at 640.

¹⁶⁸ See *infra*, notes 189–90 and accompanying text.

¹⁶⁹ See Grunfest & Pritchard, *supra* note 8, at 645 (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

actions arising under the Securities Act gives these statements far too much credence.

On October 7, 1997, thirteen senators co-introduced S. 1260,¹⁷⁰ which was enacted just over a year later on November 3, 1998 as the “Securities Litigation Uniform Standards Act of 1998.”¹⁷¹ Senator Gramm, a co-sponsor of the bill, noted in his introductory remarks that the July 24, 1997 hearings before the Securities Subcommittee had made readily apparent to its members “a migration of [securities class action] lawsuits to State courts with a real effort and apparently a successful effort [by the plaintiffs’ class action bar] to circumvent what [Congress] had done [in the PSLRA].”¹⁷² He articulated that the bill, *as he understood it*, “sets national standards for stocks that are traded on the national markets. . . . [I]n the case of class action suits, and class action suits only, if a stock is traded on the national market, . . . then the class-action suit *has to be filed in Federal court*.”¹⁷³

The bill’s co-sponsor, Senator Dodd, in his statement introducing S.1260, noted that “[i]t is not unreasonable to assume that . . . weaker, even abusive claims . . . are now finding a home in State court that they no longer have in Federal court.”¹⁷⁴ He read from a letter from President Clinton, in which the President expressed concern that the ability of plaintiffs to select state court to bring securities class action litigation would lead to “multiple and inconsistent standards [which] could undermine national law,”¹⁷⁵ before echoing Senator Gramm’s assertion that the “migration of frivolous class actions to State court threatens the effectiveness of the [PSLRA].”¹⁷⁶ Senator Dodd called for “national treatment for national securities trading on national exchanges”¹⁷⁷ out of the fear that “the possibility of 50 constantly changing State standards” would undermine the federal securities laws.¹⁷⁸

Neither senator overtly supported allowing removal of class actions involving only Securities Act claims. At most, Senator Gramm’s and Senator Dodd’s comments indicated that some of the sponsors of SLUSA

¹⁷⁰ See Statements on Introduced Bills and Joint Resolutions, 143 CONG. REC. S10475 (daily ed. Oct. 7, 1997) (statement of Sen. Gramm).

¹⁷¹ SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

¹⁷² 143 CONG. REC. S10475 (statement of Sen. Gramm).

¹⁷³ *Id.* (statement of Sen. Gramm) (emphasis added).

¹⁷⁴ *Id.* at S10476 (statement of Sen. Dodd) (remarking candidly that “any plaintiffs’ attorney worth his salt is going to file in State court if he feels it will give him an advantage”).

¹⁷⁵ *Id.* (statement of Sen. Dodd).

¹⁷⁶ *Id.* (statement of Sen. Dodd).

¹⁷⁷ *Id.* (statement of Sen. Dodd).

¹⁷⁸ *Id.* (statement of Sen. Dodd).

were concerned with focusing securities class action litigation involving nationally traded securities in federal court.¹⁷⁹ To the extent that they exercised the right to do so, allowing a defendant sued in state court on a Securities Act claim to remove the claim directly addresses this concern. It would ensure that the “national standards for stocks that are traded on the national markets,”¹⁸⁰ which the PSLRA set, would be adjudicated in federal court. Removal would help eliminate the possibility that the effectiveness of federal securities class action reform would be undermined by inconsistent state court adjudications of federal claims. However, neither senator directly addressed these issues.

Similarly, while there are statements elsewhere in SLUSA’s legislative history that tend to support removal, the issue is never addressed nor supported directly. For example, the House Report from the Committee of Conference does not explicitly discuss removal of federal claims. It does, however, note that the “migration of claims from federal court to state court ‘may be the most significant development in securities litigation’ since the passage of the new law in 1995”¹⁸¹ and indicates that the bill would make “[f]ederal court the exclusive venue for most securities class action” litigation involving nationally traded securities.¹⁸²

Congressman Bliley voiced his support for the bill on October 15, 1998, remarking that the legislation “will eliminate State court as a venue for meritless securities litigation.”¹⁸³ His support for the bill stemmed from his conviction that “lawsuits alleging violations that involve securities that are offered nationally *belong in Federal court.*”¹⁸⁴ It was this very idea that was, in Congressman Bliley’s opinion, the very “premise” of the legislation.¹⁸⁵ While it can be *inferred* from these comments that Congressman Bliley supported removal, he never addressed the issue directly in his remarks.

However, Senator Feinstein did. On May 13, 1998, she offered her support for S. 1260,¹⁸⁶ praising its establishment of “uniform national standards in securities fraud class action suits.”¹⁸⁷ She indicated that in her view, the bill, as drafted, allowed for removal of class action litigation

¹⁷⁹ *Id.* (statement of Sen. Dodd).

¹⁸⁰ *Id.* (statement of Sen. Gramm).

¹⁸¹ 144 CONG. REC. 25287, 25886 (daily ed. 1998) (quoting SEC REPORT, *supra* note 43, at 69).

¹⁸² H.R. REP. NO. 105-803 at 13 (1998).

¹⁸³ 144 CONG. REC. H11019-01 (daily ed. Oct. 15, 1998) (statement of Rep. Bliley).

¹⁸⁴ *Id.* (statement of Rep. Bliley) (emphasis added).

¹⁸⁵ *Id.* (statement of Rep. Bliley).

¹⁸⁶ 144 CONG. REC. S4778 (daily ed. May 13, 1998) (statement of Sen. Feinstein).

¹⁸⁷ *Id.* (statement of Sen. Feinstein).

based on the federal securities laws: “[T]he legislation would provide for the shifting of securities lawsuits filed in a state court into the more appropriate federal court, a process called ‘removal.’ The removal authority would only apply for class action suits involving nationally-traded securities, such as the New York Stock Exchange.” Removal authority was of paramount necessity, because without it, “companies . . . whose securities are traded throughout the fifty states[] could face liability under *federal* securities laws in fifty *state* courts.”¹⁸⁸

Clearly, Senator Feinstein thought that she was voicing support a bill which furthered “effective national standards . . . to protect [defendants]” by giving them the option to litigate federal class action securities law claims involving nationally traded securities in federal court.¹⁸⁹ However, as established in part III.A. of this Note, her reading of S. 1260, which ultimately became the Securities Litigation Uniform Standards Act of 1998, is erroneous. The statute cannot be read to allow, without more, removal of a Securities Act claim.¹⁹⁰ It is beyond reason to infer from Senator Feinstein’s support for an erroneous reading of SLUSA that Congress as an entire legislative body had the same erroneous reading of the statute, and therefore failed to effectuate its intentions.

C. *Why Congress Stopped Short*

Review of the congressional findings in SLUSA itself, about which the entire legislative body was in accordance, evidences a clear intent to litigate claims involving nationally traded securities in federal court.¹⁹¹ Section 2 of SLUSA noted that the PSLRA “sought to prevent abuses in private securities fraud lawsuits.”¹⁹² It identifies the problem which has emerged: “since enactment of [the PSLRA], considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts,” a shift which “has prevented [the PSLRA] from fully achieving its objectives.”¹⁹³ SLUSA modified the Securities Act of 1933 and the Securities Exchange Act of 1934 in an attempt to obviate the problem.¹⁹⁴

¹⁸⁸ *Id.* (statement of Sen. Feinstein) (emphasis added).

¹⁸⁹ *Id.* (statement of Sen. Feinstein).

¹⁹⁰ See discussion *supra* Part II.B.2.

¹⁹¹ See discussion *supra* Part III.B.

¹⁹² SLUSA, Pub. L. No. 105-353, § 2, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.).

¹⁹³ *Id.*

¹⁹⁴ *Id.* §§ 101–302.

SLUSA, however, allowed for removal of Securities Act claims only in very limited circumstances.¹⁹⁵ Thus, class action litigation of claims based on federal law can occur in state court at the discretion of the plaintiff. Furthermore, review of the legislative history indicates that SLUSA as enacted is consistent with its legislative history.¹⁹⁶ Why, then, didn't Congress intend for SLUSA to go further towards fulfillment of its goals?

The answer may be that SLUSA went as far as it *could* have towards achieving its objectives. Professors Joseph A. Grundfest and A.C. Pritchard recently characterized the legislative process as a “‘game’ in which a legislature develops a coalition sufficiently large to support passage of a bill over the threat of any credible veto.”¹⁹⁷ Perhaps those members of both Houses who supported removal of class actions involving only Securities Act claims balked at clearly articulating this in the text of SLUSA out “of a need to compromise in order to accumulate a majority . . . in support of legislative action.”¹⁹⁸

Legislation introduced in the House around the time of SLUSA would have gone much further toward centering securities litigation in federal court. Professor Richard W. Painter reported that a bill was introduced in the House which would have “preempted state law for almost all suits involving nationally traded securities—not just class action suits.”¹⁹⁹ This bill, titled the Securities Litigation Improvement Act of 1997,²⁰⁰ “failed to make significant headway in the House.”²⁰¹ While the degree to which Congress chose to preempt state securities law is beyond the scope of this Note,²⁰² it is interesting to observe that preemption under SLUSA is comparatively quite narrow. Proponents of the Securities Litigation Improvement Act, which would have gone much further, lacked the support necessary to pass the legislation.

Had SLUSA explicitly allowed removal of all class actions arising under the Securities Act, it may similarly have lacked the political support

¹⁹⁵ See discussion *supra* Part III.A.

¹⁹⁶ See discussion *supra* Part III.B.

¹⁹⁷ Grundfest & Pritchard, *supra* note 8, at 637.

¹⁹⁸ See *id.* at 641.

¹⁹⁹ Painter, *supra* note 52, at 48–49.

²⁰⁰ Securities Litigation Improvement Act of 1997, H.R. 1653, 105th Cong. (1997).

²⁰¹ Painter, *supra* note 52, at 49.

²⁰² It is worth noting for present purposes, however, that concerns over federalism may not have been the reason that Congress chose not to preempt all state securities fraud causes of action. Professor Pritchard reasoned, that “Congress was [aware of] the important role that state fraud law and state courts play in resolving securities disputes between individuals. Congress sought to discourage only class actions against the corporate issuer and its affiliates, with their potential for enormous damages.” Pritchard, *supra* note 59, at 438.

to pass the 105th Congress. Republicans controlled a majority in both the houses of Congress at the time SLUSA was introduced.²⁰³ Professor Pritchard noted that the Republican majority was generally concerned with federalism, and with “returning authority to the states.”²⁰⁴ As a general proposition, proposed legislation which contracted the authority of state judiciary in favor of augmenting that of the federal judiciary was unpopular in this political climate.

Predictably, the Class Action Jurisdiction Act of 1998,²⁰⁵ which would have allowed the 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,”²⁰⁶ stalled in the Republican-controlled legislature. The Class Action Jurisdiction Act was much broader in scope than SLUSA, in that it applied to “all civil actions,”²⁰⁷ and not merely securities class actions. However, had SLUSA similarly attempted to expand federal jurisdiction by allowing for removal of all class actions arising under the Securities Act, it may have met a similar fate. Thus, those members of Congress whose statements in SLUSA’s legislative history arguably evidence their support for removal²⁰⁸ may have balked at effectuating these intentions in the Act in order to create “a coalition sufficiently large” to support its passage.²⁰⁹

CONCLUSION

The federal judiciary has struggled recently with the scope of the removal provisions of the Securities Act. The only certainty for litigants has been that the Uniform Standards Act did in fact modify the well-settled rule that Securities Act claims are not removable from state court.²¹⁰ Predicting the judicial interpretation of the scope of this modification continues to be nearly impossible. Admittedly, the provisions are far from a model of legislative clarity. However, the best reading of SLUSA on its face suggests that Congress intended to allow removal of Securities Act claims only when asserted along with preempted state law claims. This

²⁰³ The 105th Congress was composed of 55 Republicans and 45 Democrats in the Senate and 228 Republicans, 206 Democrats and 1 Independent in the House. See S. PUB. 105-20, at 2–3 (1997).

²⁰⁴ Pritchard, *supra* note 59, at 435.

²⁰⁵ Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. (1998).

²⁰⁶ Pritchard, *supra* note 59, at 436. The Act would have had the federal judiciary apply state substantive law, subject to federal procedural rules. *Id.*

²⁰⁷ H.R. 3789.

²⁰⁸ See discussion *supra* Part III.B.

²⁰⁹ Grundfest & Pritchard, *supra* note 8, at 637.

²¹⁰ See *supra* note 10–12 and accompanying text; see also Pritchard, *supra* note 59, at 490.

interpretation of SLUSA gives effect to every word of the statute, and therefore judicial resort to the statute's legislative history is improper to resolve the issue.²¹¹

Review of the congressional record suggests that the correct interpretation of SLUSA, as a matter of statutory interpretation, is also the correct interpretation as a matter of legislative intent.²¹² Statements of some members of Congress arguably indicate their view that SLUSA should, or did, allow for removal of all Securities Act claims.²¹³ However, in the aggregate, this evidence is insufficient to rebut the presumption that had Congress intended to change fifty-five years of judicial interpretation of the Securities Act, it would have done so overtly—or at least discussed doing so forthrightly. Neither occurred.²¹⁴ Thus, it is submitted that district courts faced with this issue should interpret the statute on its face, as suggested in this Note, without resort to SLUSA's legislative history. Furthermore, because this interpretation is consistent with congressional intent, it is unnecessary for Congress to return to this provision at this time to effectuate its prior intentions.

²¹¹ See discussion *supra* part II.B.2.

²¹² See *supra* notes 167–182 and accompanying text.

²¹³ See *supra* notes 183–188 and accompanying text.

²¹⁴ See discussion *supra* Part III.A–B.