United States Courts
Southern District of Texas
FILED
APR 25 2002
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACOB BLAZ, On Behalf of Himself and All Others Similarly Situated, Plaintiff, v. ROBERT A. BELFER , NORMAN P. BLAKE, JR., RICHARD B. BUY, RICHARD A. CAUSEY, RONNIE C. CHAN, JOHN H. DUNCAN, ANDREW S. FASTOW, JOE H. FOY, WENDY L. GRAMM, KEN L. HARRISON, ROBERT K. JAEDICKE, KENNETH L. LAY, CHARLES A. LEMAISTRE, JEROME J. MEYER, JEFFREY S. SKILLING, JOHN A. URQUHART, JOHN WAKEHAM, CHARLES E. WALKER, BRUCE G. WILLISON, HERBERT S. WINOKUR, JR., and ARTHUR ANDERSEN, LLP, Defendants.	CIVIL ACTION NO. ~~H-02-1150~~ 01-3624 (Removed from District Court of Harris County, Texas) JURY TRIAL DEMANDED

COMPENDIUM OF UNREPORTED OPINIONS CITED IN THE MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND

Hardy v. Merrill Lynch, Inc.,
2001 U.S. Dist. LEXIS 19748 (S.D. N.Y. Nov. 30, 2001) — Tab 1

W.R. Huff Asset Management Co., LLC v. BT Securities Corp.,
2001 U.S. Dist. LEXIS 22144 (N.D. Ala. May 2, 2001) — Tab 2

Korsinsky v. Salomon Smith Barney, Inc.,
2002 U.S. Dist. LEXIS 259 (S.D. N.Y. Jan. 10, 2002) — Tab 3

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In re Waste Management, Inc. Securities Litigation,
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Service: **Get by LEXSEE®**
Citation: **2001 U.S. Dist. LEXIS 19748**

*2001 U.S. Dist. LEXIS 19748, **

CHARLES HARDY, individually and on behalf of all others similarly situated, Plaintiffs, - against - MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Defendant.

01 Civ. 5973(NRB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 19748

November 30, 2001, Decided
November 30, 2001, Filed

DISPOSITION: [*1] Plaintiffs' motion to remand denied, and defendant's motion to dismiss granted.

CASE SUMMARY

PROCEDURAL POSTURE: In a class action suit, plaintiff customers sued defendant stock broker in state court alleging breach of fiduciary duty. The broker removed to the action pursuant to 15 U.S.C.S. §§ 77(p)(c) and 78bb(f)(2), and 28 U.S.C.S. §§ 1331 and 1441. The customer moved to remand and the broker cross-moved to dismiss under the Securities Litigation Uniform Standards Act of 1998 15 U.S.C.S. § 78bb(f)(1) and (2).

OVERVIEW: In arguing against defendant's motion, the customers asserted that their claims did not deal with the purchase or sale of stock, but only with decisions to hold the stock. The broker, citing to the customers' complaint, responded that the customers represented that the class purchased stock between a date certain and the date of filing the complaint. Since the complaint did not limit the members of the class to the broker's customers who purchased their shares before defendant made its recommendations, many of them necessarily purchased their shares in connection with the alleged fraud or misrepresentation. The court determined that it was possible to divide the class into three subclasses. The claims of two of the classes could proceed in state court without running afoul of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C.S. § 78bb(f)(1) and (2). The third subclass was subject to removal and dismissal under SLUSA. The court determined that complaint was a covered class action under SLUSA.

OUTCOME: The customers' motion to remand was denied, and the stock broker's motion to dismiss was granted.

CORE TERMS: stock, recommendation, class action, state law, removal, customers, omission, misrepresentation, analyst, removable, federal securities, state law claim, per share, underwriting, inaccurate, common law, misstatement, misleading, heightened, lawsuit, initial public offering, offering, purports, rating, Securities Litigation Reform Act, Securities Exchange Act, common questions of law, similarly situated, motion to dismiss, questions of law

CORE CONCEPTS - ◆ Hide Concepts

Securities Law : Bases for Liability : Private Securities Litigation

The Private Securities Litigation Reform Act (PSLRA), Pub. L. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C.S. § 78a et seq), requires that plaintiffs plead with particularity any omissions or statements alleged to be misleading, including on what bases they believe there to be an omission and precisely which statements were misleading and why they were misleading. The PSLRA also required that any complaint under Rule 10b-5 allege facts creating a strong inference of scienter.

Securities Law : Bases for Liability : Private Securities Litigation
The Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C.S. § 78bb(f)(1) and (2), makes classic securities suits brought in state court subject to removal to federal court and immediate dismissal. In doing so, SLUSA provides a definition for the suits to which it applies.

Securities Law : Bases for Liability : Private Securities Litigation
See 15 U.S.C.S. § 78bb(f)(1) and (2).

Securities Law : Bases for Liability : Private Securities Litigation
Any case that purports to be brought under state law but which, according to the Securities Litigation Uniform Standards Act of 1998's (SLUSA), 15 U.S.C.S. § 78bb(f)(1) and (2), definition, is a traditional securities claim is subject to removal and dismissal under SLUSA.

Securities Law : Bases for Liability : Private Securities Litigation
See 15 U.S.C.S. § 78bb(f)(5)(B).

Securities Law : Bases for Liability : Private Securities Litigation
In order to defeat a motion to remand an action to state court, the removing defendant must show that: (1) the action is a covered class action under the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C.S. § 78bb(f)(1) and (2), (2) the action purports to be based on state law, (3) the action involves a covered security under SLUSA, and (4) that the defendant misrepresented or omitted a material fact in connection with the purchase or sale of such security. 15 U.S.C.S. § 78bb(f)(1) and (2).

Securities Law : Bases for Liability : Private Securities Litigation
The Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C.S. § 78bb(f)(1) and (2), does not define "in connection with the purchase or sale" of a covered security. Relying on the presence of identical language in section 10(b) of the Securities Exchange Act of 1934, other courts have looked to the interpretations of section 10(b) for guidance. In the Rule 10b-5 context, the United States Court of Appeals for the Second Circuit holds that the phrase "in connection with the purchase or sale" of a security does not cover the holding of a security as a consequence of a misrepresentation or omission. Applying parallel reasoning, courts have held that state law claims of misrepresentation or omission that induce a plaintiff to refrain from selling a stock can proceed consistent with SLUSA.

COUNSEL: For MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., defendant: Jay B. Kasner, Edward J. Yodowitz, Jill Rennert, Skadden, Arps, Slate, Meagher & Flom, L.L.P., New York, NY.

JUDGES: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY: NAOMI REICE BUCHWALD

OPINION: MEMORANDUM & ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

This case is a class action brought by Charles Hardy on behalf of himself and other similarly situated individuals ("plaintiffs") against Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch" or "defendant"). Plaintiffs filed their action in the Supreme Court of New York, County of New York, alleging that defendant had breached its fiduciary duty to its brokerage customers by maintaining positive recommendations on shares of Internet Capital Group, Inc., ("Internet Capital") despite defendant's knowledge that Internet Capital faced serious financial problems. Defendant removed the action to the Southern District of New York pursuant to 15 U.S.C. §§ 77p(c) and 78bb(f)(2), and 28 U.S.C. §§ 1331 and 1441. Plaintiffs now **[*2]** move to remand the case to state court. Defendants have filed a cross-motion to dismiss the case. For the reasons set forth below, we deny plaintiffs' motion to remand the case to state court and grant defendant's motion to dismiss.

BACKGROUND

Plaintiffs' complaint is premised on the following scenario. Large investment firms like Merrill Lynch have both brokerage and investment banking divisions. In recent years, the traditional separation between the stock analysts, who research companies, provide detailed reports about them, and recommend which companies investors should buy stock in, and the underwriters, who manage debt and equity offerings, has broken down as underwriting of public offerings has become an increasingly important source of revenue for investment firms. Thus, according to the complaint, rather than providing independent analysis, analysts have became integral parts of their firms' attempts to obtain underwriting business. The complaint alleges that this lack of independence deterred analysts from issuing negative stock recommendations. Indeed, according to a recent survey cited in the complaint, less than one-half of one percent of all analyst reports **[*3]** on companies in the Standard & Poor's 500 had sell recommendations. (Complaint, P 26).

Merrill Lynch managed the initial public offering for Internet Capital, which began trading on August 5, 1999. On August 30, 1999, defendant initiated analyst coverage of Internet Capital with a rating of "Near-Term Accumulate/Long-Term Buy." After being issued at $ 6 per share, Internet Capital's stock appreciated in value until it peaked at $ 200 per share on January 3, 2000, even though the company had only been in existence for three years and had not made a profit. In December 1999, defendant underwrote a further $ 1.12 billion in debt and equity offerings for Internet Capital. As stock prices dropped during 2000 and Internet Capital began to run short of money, defendant did not change its recommendation. On November 9, 2000, defendant lowered its recommendation on Internet Capital to "Near-Term Accumulate/Long-Term Accumulate," a slightly less positive rating. At that time, Internet Capital was trading at $ 10 per share. When the complaint in this case was filed, the price had dropped to $ 2 per share, and defendant maintained its "Near-Term Accumulate/Long-Term Accumulate" recommendation. **[*4]**

Plaintiffs filed their complaint in state court on June 22, 2001. They allege that, by reiterating artificially positive recommendations for Internet Capital stock in order to obtain further underwriting business, defendant placed its interest in obtaining lucrative underwriting agreements above its retail customers, to whom plaintiffs claim Merrill Lynch owed a fiduciary duty. Defendant removed the case to federal court on July 2, 2001, on the grounds that the complaint was a covered class action that fell under the removal provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). 15 U.S.C. §§ 78bb(f)(1) and (2). Plaintiffs moved to remand the case to state court, and defendants have cross-moved to dismiss the complaint under SLUSA, which provides for the dismissal of any covered class action brought under state statutory or common law. For the reasons that follow, we dismiss the complaint without prejudice.

DISCUSSION

I. The Passage of SLUSA

Congress passed SLUSA in 1998 in order to close a loophole in the 1995 Private Securities Litigation Reform Act ("PSLRA"). The PSLRA amended the 1933 Securities Act and the 1934 **[*5]** Securities Exchange Act to impose heightened pleading standards for plaintiffs alleging securities fraud in order to deter meritless "strike" suits. The PSLRA requires that plaintiffs plead with particularity any omissions or statements alleged to be misleading, including on what bases they believe there to be an omission and precisely which statements were misleading and why they were misleading. The PSLRA also required that any complaint under Rule 10b-5 allege facts creating a strong inference of scienter. See Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 78a et seq.).

As many plaintiffs attempted to avoid the PSLRA's heightened pleading requirements, there was a large increase in the number of securities claims filed in state courts alleging state law causes of action. Congress passed SLUSA in order to prevent plaintiffs from bringing traditional securities actions in state courts. SLUSA was intended to restore the status quo ante in which virtually all securities suits were filed in federal courts. In effect, SLUSA was designed to close the loophole in the PSLRA that allowed plaintiffs suing **[*6]** in state courts to avoid the latter's heightened pleading requirements. See 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998), available at 1998 WL 712049.

Thus, SLUSA makes classic securities suits brought in state court subject to removal to federal court and immediate dismissal. In doing so, SLUSA provides a definition for the suits to which it applies. The relevant part of SLUSA states:

> (1) Class action limitations
> No covered class action n1 based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging-
>
> > (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
> > (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (2) Removal of covered class actions
> Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph **[*7]** (1).

15 U.S.C. §§ 78bb(f)(1) and (2). Thus, any case that purports to be brought under state law but which, according to SLUSA's definition, is a traditional securities claim is subject to removal and dismissal under SLUSA.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The term "covered class action" means--
(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.

15 U.S.C. § 78bb(f)(5)(B)

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*8]

II. Application of SLUSA to the Complaint

The primary issue in this case is whether it is removable under SLUSA. If SLUSA applies, then the removal was proper and the state law claim must be dismissed. If SLUSA does not apply, then the Court must remand the case for lack of federal subject matter jurisdiction.

In order to defeat a motion to remand an action to state court, the removing defendant must show that: (1) the action is a "covered class action" under SLUSA; (2) the action purports to be based on state law; (3) the action involves a "covered security" under SLUSA; and (4) that the defendant misrepresented or omitted a material fact "in connection with" the purchase or sale of such security. See 15 U.S.C. §§ 78bb(f)(1) and (2).

The first three requirements are not in dispute. The complaint is a covered class action, as there are common questions of law and fact, and plaintiffs seeks to recover damages on behalf of himself and others. See 15 U.S.C. § 78(f)(5)(B). The action clearly purports to be based on state law, as the complaint alleges only breach of fiduciary duty. Similarly, the Internet Capital stock **[*9]** is clearly a covered security. Internet Capital is listed on the Nasdaq exchange, which is specifically enumerated in the statute. See 15 U.S.C. § 78bb(f)(5)(E), referencing § 77r(b).

The parties' dispute hinges on the fourth requirement: whether or not the alleged breach of fiduciary duties occurred in connection with the purchase or sale of a security. Plaintiffs argue that their claim does not deal with the purchase or sale of Internet Capital stock, but only with decisions to hold the stock. Defendant responds by citing the complaint, which states that the plaintiff represents the class that purchased shares of Internet Capital between August 5, 1999, the day after the initial public offering, and the date the complaint was filed. (Complaint, P 54). The defendant argues that, because the complaint does not limit the members of the class to Merrill Lynch customers who purchased their shares before defendant made its recommendations, many of them necessarily purchased their shares in connection with the alleged fraud or misrepresentation.

SLUSA does not define "in connection with the purchase or sale" of a covered security. Relying on the presence of **[*10]** identical language in section 10(b) of the Securities

Exchange Act of 1934, other courts have looked to the interpretations of section 10(b) for guidance. See, e.g., Spielman v. Merrill Lynch, Pierce, Fenner & Smith Inc., 2001 WL 1182927 at *2 (S.D.N.Y. October 9, 2001) (collecting cases). But see Shaw v. Charles Schwab & Co., Inc., 128 F. Supp. 2d 1270, 1274 (C.D. Cal. 2001) (holding that the phrase "in connection with" does not necessarily have the same meaning in SLUSA and section 10(b)). In the Rule 10b-5 context, the Second Circuit has held that the phrase "in connection with" the purchase or sale of a security does not cover the holding of a security as a consequence of a misrepresentation or omission. Gurary v. Winehouse, 190 F.3d 37, 46 n.9 (2d Cir. 1999). See also First Equity Corp. of Florida v. Standard & Poor's Corp., 869 F.2d 175, 180 n.2 (2d Cir. 1989); Abrahamson v. Fleschner, 568 F.2d 862, 868 (2d Cir. 1977) (holding that Rule 10b-5 does not include being induced not to sell). Applying parallel reasoning, courts have held that state law claims of misrepresentation or omission that induce **[*11]** a plaintiff to refrain from selling a stock can proceed consistent with SLUSA. See Spielman, 2001 WL 1182927 at *2, citing Gutierrez v. Deloitte & Touche, L.L.P., 147 F. Supp. 2d 584, 595 (W.D. Tex. 2001). Thus, based on cases decided under section 10(b) and under SLUSA there is significant support for the conclusion that any plaintiffs who held Internet Capital stock as a result of the defendants' alleged misrepresentation or omission, but who did not sell or purchase the stock as a result of the analyst report, have alleged a state law claim that is not removable under SLUSA. See Lalondriz v. USA Networks, Inc., 54 F. Supp. 2d 352, 353 (S.D.N.Y. 1999).

III. Application of SLUSA to the Prospective Class

While for the reasons just discussed, some potential class members have asserted claims that fall outside traditional federal securities laws, the breadth of the class covered by the complaint brings within its ambit traditional federal securities claims that are thus removable and dismissable under SLUSA. The class pled covers all Merrill Lynch customers who purchased Internet Capital shares between the initial public **[*12]** offering on August 5, 1999 and the date of the filing of the complaint. (Complaint, at P 54). It makes no effort to distinguish between customers who purchased before and after the stock rating allegedly became inaccurate. Thus, some portion of the class purchased stock in reliance on the alleged misstatement, i.e. in connection with the purchase or sale of a security, and thus must have their claims removed and dismissed under SLUSA.

More specifically, there are three potential sub-classes into which the class as alleged in the complaint could be divided. The first group would be those who purchased Internet Capital shares between August 5 and August 30, 1999, when defendants initiated their coverage of the stock. These customers could not have relied on a statement of any kind from Merrill Lynch in purchasing the stock, and their only potential claim would be that they held their stock as a result of defendant's allegedly inaccurate statements. This claim raises no federal securities issues and could only be a common law claim. It would therefore not be removable under SLUSA. See Gordon v. Buntrock, 2000 WL 556763, at *3 (N.D. Ill. 2000) (remanding a state law claim **[*13]** on the grounds that the complaint explicitly limited the class to all persons holding shares before any of the alleged misrepresentations took place).

The second class contains those customers who purchased the stock after August 30, 1999, and before the date on which Merrill Lynch's stock recommendation allegedly became a misrepresentation and who continued to hold the stock after the recommendation allegedly became inaccurate. These plaintiffs, too, raise only a state law claim that cannot be removed under SLUSA.

The third class contains those customers who bought their shares after Merrill Lynch's stock recommendation allegedly became inaccurate. These plaintiffs have raised a federal securities claim that is subject to removal and dismissal under SLUSA as they purchased their shares in reliance on an alleged misstatement.

The problem for the class alleged in this complaint is that the complaint makes no attempt to limit its scope to the class permitted in Gordon. The Court cannot determine how much, if any,

of the potential class alleged by plaintiff brings a claim that could be properly brought in state court without being subject to removal under SLUSA. A further problem **[*14]** is that the complaint does not contain sufficient detail to determine to whether Mr. Hardy, the named plaintiff and prospective class representative, has raised a claim that can avoid removal under SLUSA.

Given the problems with the class as alleged in the complaint, this Court sees three options for how to resolve the present motion: 1) we could divide the class into two parts, one to be remanded to state court and the other to be removed and dismissed under SLUSA; 2) we could remand the entire case to state court for a determination of which class members have properly brought state law claims; or 3) we could deny plaintiffs' motion to remand the complaint and dismiss it under SLUSA, which would permit the plaintiffs to bring a new complaint in state court properly limited to those class members who have state law claims. We opt not to divide the class as pled because the complaint contains too little information to identify which class members have potential state law claims. Next, allowing this case to be remanded would require the state court to determine which potential members of the plaintiff class were subject to removal under SLUSA and which had brought state law claims. **[*15]** This option would undermine the Congressional intent in passing SLUSA, which was to prevent securities claims from being brought in state court.

We are therefore left with the third option, that of denying plaintiffs' motion to remand the case. Having determined that complaint is a covered class action under SLUSA, we are required to dismiss it. See 15 U.S.C. § 78bb(f)(1) (stating that "no covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained..."). Plaintiff, of course, may recommence an action in state court limited to issues of state law.

To reiterate, plaintiffs' motion to remand is denied, and defendant's motion to dismiss is granted.

IT IS SO ORDERED.

DATED: New York, New York

November 30, 2001

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Service: **Get by LEXSEE®**
Citation: **2001 U.S. Dist. LEXIS 19748**
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Citation: **2001 us. dist lexis 22144**

*2001 U.S. Dist. LEXIS 22144, *; Fed. Sec. L. Rep. (CCH) P91,673*

W.R. HUFF ASSET MANAGEMENT CO, L.L.C., etc., Plaintiff, v. BT SECURITIES CORPORATION, et al., Defendants.

CIVIL ACTION NO. 00-AR-1630-S

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

2001 U.S. Dist. LEXIS 22144; Fed. Sec. L. Rep. (CCH) P91,673

May 2, 2001, Decided
May 2, 2001, Filed, Entered

DISPOSITION: [*1] Action remanded. All pending motions not carried with the order of remand are moot.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff investment manager sued defendant companies in state court, alleging fraud and misrepresentation in connection with the sale of securities. The companies removed the action to federal court. The federal court denied the investment manager's motion to remand. The investment manager moved inter alia for reconsideration and leave to amend. The companies moved to dismiss the claims.

OVERVIEW: The companies argued that the investment manager's state law claims were preempted by the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (1998). The investment manager argued that its claims pre-dated the SLUSA and the SLUSA did not apply retroactively. The court concluded that the SLUSA did not apply retroactively because Congress had not clearly expressed an intent for retroactive application. Moreover, retroactive application was unfair given the procedural posture of the case because it denied the investment manager and the individuals on whose behalf it purported to act the efficient resolution of their claims. In essence, the court concluded that it lacked subject matter jurisdiction because 15 U.S.C.S. § 77p(c) had no retrospective application.

OUTCOME: The motion for reconsideration was granted and the case was to be remanded to state court. The remaining motions were to be denied.

CORE TERMS: retrospective application, state law, retroactivity, removal, retroactive effect, federal law, unnamed, congressional intent, class action, pre-enactment, temporal, applicability, retroactively, impermissible, unfairness, amend, Securities Act, Exchange Act, subject matter jurisdiction, prospective application, reasonable reliance, date of enactment, federal question, fair notice, prospectively, retroactive, inferred, lawsuit, predominate, statutory provision

CORE CONCEPTS - ◆ Hide Concepts

Civil Procedure : Jurisdiction : Subject Matter Jurisdiction : Federal Question Jurisdiction
The well-pleaded complaint rule does not prevent federal question removal under 28 U.S.C.S. § 1331 if federal law so pervasively covers the field that a purported state cause of action cannot exist without, in reality, being nothing if not a federal claim.

Civil Procedure : Removal : Postremoval Procedures
28 U.S.C.S. § 1447(c) requires a federal court to remand an action removed to it if subject matter jurisdiction is lacking, unless and until that lack of jurisdiction only appears after a final judgment has been entered.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
In the context of determining whether a statute applies retroactively, the Landgraf analysis focuses on conduct as the central fact for determining retroactivity. Moreover, given the purpose for a presumption against retroactivity, there is nothing within the logic of the Landgraf analysis that can explain why a court should not apply that presumption equally to a case pending as to a case not pending on the date of a statute's enactment, as long as pre-enactment conduct forms the basis for liability. No matter which comes first, the enactment or the filing, the application of a statute may be precluded on the basis of impermissible retroactivity, either as a matter of statutory construction or as a matter of the constitutional guarantee of due process.

Governments : Legislation : Construction & Interpretation
Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
A court must follow explicit and unambiguous congressional instruction, unless the clear intent is overridden by some constitutional prohibition. If there is no statutory prescription, the court must determine whether retrospective application would have an impermissible retroactive effect.

Governments : Legislation : Construction & Interpretation
There is a statutory maxim that the expression of one thing is the exclusion of another.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
Congress, if retroactivity is to be achieved, must show that it has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness by providing a loud and clear signal that a statute takes effect from a time anterior to its passage.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
Because prospective application does not carry the long-recognized, powerful potential for unfairness that is inherent in retrospective application, Congress is not required to be express in manifesting its intention that a statute apply prospectively only. Negative inference, therefore, can be an appropriate means for determining congressional intent for prospective application; however, this does not mean that negative inference provides a backdoor way around the need for an express legislative command in order to acquire retrospective application.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
If applying the relevant statutory provisions to a particular case would have a retroactive effect, unless there is clear congressional intent to give it that effect, the statute cannot be applied to pre-enactment conduct.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
A statute is not allowed to have retroactive effect if applying it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. A court should rely on familiar considerations of fair notice, reasonable reliance, and settled expectations.

Securities Law : Bases for Liability : Private Securities Litigation
See 15 U.S.C.S. § 77p(c).

Securities Law : Bases for Liability : Private Securities Litigation

If applicable, 15 U.S.C.S. § 77p(c) does two things, (1) permits removal of a state action, and (2) sinks the state ship once in the federal harbor.

Securities Law : Bases for Liability : Private Securities Litigation
15 U.S.C.S. § 77p(c), by incorporating 15 U.S.C.S. § 77p(b), requires the dismissal of some, but not all, actions sounding in state law and essentially alleging fraud in connection with the sale of certain securities.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
Labeling a rule as "procedural" does not end the retroactivity inquiry.

Securities Law : Bases for Liability : Private Securities Litigation
See 15 U.S.C.S. § 77p(f)(2)(A).

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
The question in determining the retroactivity of a statute is whether dispossessing individuals, potential future plaintiffs, of a right after the occurrence of the events giving rise to their cause of action, attaches new legal consequences to those events. Expanding the temporal reach of a statute, whether forward or backward in time, will naturally further the ends sought by the legislation. That unremarkable proposition cannot overcome the presumption against retroactivity.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
Federal courts are courts of limited jurisdiction, so that any statute upon which a removal from state court can be based, must be construed against federal and in favor of state jurisdiction. When Congress is ambiguous on the question of the retroactivity of a preemptive federal statute, and when removability depends upon a retroactive application of that statute, the ambiguity must be resolved against removability and thus against retroactivity. This is the only way to recognize the primacy of the state courts as courts of first instance.

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For ARTHUR ANDERSEN, LLP, defendant: M Robert Thornton, Ralph B Levy, Mark M Maloney, Barry Goheen, KING & SPALDING, Atlanta, GA.

JUDGES: WILLIAM M. ACKER, JR., UNITED STATES DISTRICT **[*2]** JUDGE.

OPINIONBY: WILLIAM M. ACKER, JR.

OPINION: MEMORANDUM OPINION

Procedural Background

Plaintiff, W.R. Huff Asset Management Co., L.L.C. ("Huff"), is an investment management company. It originally filed this action in state court for itself and on behalf of certain of its unnamed owner-clients. It proceeded under various state law theories. It alleged that defendants engaged in fraud and misrepresentation in connection with the sale of securities. It carefully avoided the slightest hint of reliance upon federal law. Defendants removed the case to this court, alleging super-preemption of Huff's state law claims by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA" or "the Act"), Pub. L. No. 105-353, 112 Stat. 3227 (1998). The "well-pleaded complaint" rule does not prevent federal question removal under 28 U.S.C. § 1331 **if** federal law so pervasively covers the field that a purported state cause of action cannot exist without, in reality, being nothing if not a federal claim. The provisions relevant to defendants' preemption theory are found in Title I of SLUSA, which amends Section 16 of the Securities Act of 1933 ("the Securities Act"), **[*3]** 15 U.S.C. § 77p, and Section 28 of the Securities Exchange Act of 1934 ("the Exchange Act"), 15 U.S.C. § 78bb. Because § 101 (a) of SLUSA, which amends the Securities Act, is materially identical to § 101(b), which amends the Exchange Act, it provides the means by which a federal court can ascertain whether it has jurisdiction.

In its opinion of August 17, 2000, this court concluded that SLUSA was Huff's exclusive avenue for relief, found the existence of a federal question, and therefore denied Huff's motion to remand. However, the court expressly encouraged Huff to request the Eleventh Circuit to accept an appeal under 28 U.S.C. § 1292(b). This court reasoned that an interlocutory expression by the Eleventh Circuit on this court's subject matter jurisdiction would advance the ultimate termination of this litigation and would minimize the likelihood of a waste of judicial resources. The Eleventh Circuit rejected Huff's attempt at an appeal. This provoked the three motions by Huff now pending in this court: 1) motion to reconsider the August 17 opinion, 2) alternative motion to sever and remand the case as to **[*4]** one defendant, Deloitte & Touche, LLP ("Deloitte"), and 3) alternative motion for leave to amend the complaint. Defendants have filed a motion to dismiss and their own motion to amend the opinion of August 17.

The Eleventh Circuit's decision not to decide the question of jurisdiction constitutes a reminder to this court of its obligation under 28 U.S.C. § 1447(c) to constantly examine and reexamine its own jurisdiction. This obligation is ever present, without regard to Huff's motion for reconsideration. Simply, § 1447(c) requires a federal court to remand an action removed to it if subject matter jurisdiction is lacking, unless and until that lack of jurisdiction only appears after a final judgment has been entered. Accordingly, this court takes a second look at its jurisdiction. For reasons the court will now elaborate, it finds that it does not have jurisdiction. In other words, a new look is about to result in a different outcome.

If this court did have jurisdiction, the case would be over, because defendants' argument for removal jurisdiction is based on 15 U.S.C. § 77p(c), which is identical to, and goes hand in hand with, 15 U.S.C. § 77p(b), **[*5]** which would require dismissal. If the former is satisfied, so is the latter. Because the court now finds that SLUSA does not apply because the Act does not apply retroactively, this court cannot do anything except to remand the case. It remains to be seen what the Circuit Court of Jefferson County, Alabama, the forum properly chosen by Huff, will do with the case. This court concentrates only upon the obligation created by 28 U.S.C. § 1447(c), which is unambiguous, even if, from time to time, it calls for a change of mind.

Discussion

If SLUSA is not to be applied retroactively to conduct predating its enactment, SLUSA does not preempt Huff's state law claims, and there is no federal question upon which defendants can invoke the removal jurisdiction of this court.

The court takes a deeper look into whether applying SLUSA to Huff's complaint would be "retrospective", so as to implicate the *Landgraf* retroactivity analysis, as elaborated in subsequent Supreme Court decisions. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280, 114 S. Ct. 1483, 1505, 128 L. Ed. 2d 229 (1994); *see Martin v. Hadix*, 527 U.S. 343, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999); **[*6]** *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 138 L. Ed. 2d 135, (1997). Huff points out that all of defendants' acts and omissions that form the basis of claimed liability occurred prior to SLUSA's enactment on November 3, 1998. Huff did not file its complaint until April 28, 2000. In other words, although the case was not filed until after SLUSA became the law of the land, the conduct complained of predated the enactment. On the basis of references to "pending cases" in *Landgraf* and some of its progeny, *see, e.g., Martin*, 527 U.S. at 352, 119 S. Ct. 1998; *Landgraf*, 511 U.S. at 249-50, 114 S. Ct. 1483; *Hunter v. United States*, 101 F.3d 1565, 1569 (11th Cir. 1996) (en banc), the argument is made that the protection recognized by *Landgraf* against unfair retrospective application should be limited to those actions in which the complaint was filed prior to enactment of the law proscribing the conduct. However, upon reflection, the court concludes that the *Landgraf* limitation cannot **[*7]** be reconciled with *Hughes Aircraft*, in which the plaintiff filed suit in 1989, but premised liability on a 1986 amendment to the Fair Claims Act, saying that it should be applied to the defendant's pre-1986 conduct. *See Hughes Aircraft*, 520 U.S. at 941-45, 117 S. Ct. 1871. Even though the *Landgraf* complaint was pending at the time of the statutory enactment at issue there, the unanimous *Hughes Aircraft* Court employed the *Landgraf* analysis, without commenting on the obvious feature that distinguishes the two cases, and concluded that the 1986 amendment could not be applied retroactively. *See Hughes Aircraft*, 520 U.S. at 945-51, 117 S. Ct. 1871. ✖In so doing, the Supreme Court reaffirmed the fact that *Landgraf* focuses on **conduct** as the central fact for determining retroactivity. *See, e.g., Landgraf*, 511 U.S. at 250, 114 S. Ct. 1483. Moreover, given the purpose for a presumption against retroactivity, as discussed in *Landgraf*, 511 U.S. at 265-73, 114 S. Ct. 1483, there is nothing within the logic of *Landgraf* that can explain why a court should not apply that presumption equally to a case **[*8]** **pending** as to a case **not pending** on the date of a statute's enactment, as long as pre-enactment **conduct** forms the basis for liability. No matter which comes first, the enactment or the filing, the application of a statute may be precluded on the basis of impermissible retroactivity, either as a matter of statutory construction or as a matter of the constitutional guarantee of "due process". Huff's complaint raises the overarching concern over SLUSA retroactivity when it relies upon defendants' actionable **conduct** that occurred prior to SLUSA's enactment.

In order to decide whether SLUSA covers defendants' conduct, the first question to be answered is whether Congress expressly described the statute's temporal reach. *See Martin*, 527 U.S. at 352, 119 S. Ct. 1998 (citing *Landgraf*, 511 U.S. at 280, 114 S. Ct. 1483). ✖A court must follow explicit and unambiguous congressional instruction, unless the clear intent is overridden by some constitutional prohibition. *See Landgraf*, 511 U.S. at 266-72, 280, 114 S. Ct. 1483. If there is no statutory prescription, the court must determine whether retrospective application would **[*9]** have an impermissible "retroactive effect". *See id.* SLUSA's applicability provision, which covers § 101(a) and § 101(b), states: "The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act." § 101(c), 112 Stat. at 3233. Subsection 101(c), then, amounts to an express **proscription** that forbids the application of SLUSA to any case pending on the day SLUSA came into force. However, to the degree it establishes the Act's temporal reach, such a **prescription** must be **inferred**. It is certainly not express except as to pending cases. ✖Based on the statutory maxim that the expression of one thing is the exclusion of another,

the inference can be drawn from the language of SLUSA's applicability provision that the Act does apply to all cases brought after enactment, whether or not based on pre-enactment conduct. Because it cannot be said that § 101(c) expressly prescribes the temporal reach of SLUSA, it falls short of the standard established by the Supreme Court for accomplishing retroactivity as to pre-enactment conduct by unequivocal statutory language.

This court's ultimate finding of **[*10]** no retroactivity is not based just upon the definitional distinction occasioned by the one-letter difference between "prescribe" and "proscribe". The Supreme Court's discussion of what the "clear statement rule" means in practice leaves no doubt that § 101(c) fails as a purported manifestation of congressional intent for retrospective application in this case. The potential for elementary unfairness that plagues retrospective application has long justified the Supreme Court's stance that Congress, if retroactivity is to be achieved, must show that it "has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness" by providing a loud and clear signal that a statute takes effect from a time anterior to its passage. *Landgraf*, 511 U.S. at 268, 114 S. Ct. 1483; *see Lindh*, 521 U.S. at 325-26, 328, n.4, 117 S. Ct. 2059. The *Landgraf* Court cited an example of a congressional expression that would have passed retroactive muster: "The new provisions **shall** apply to all proceedings pending on **or commenced after the date of enactment of this Act**." 511 U.S. at 260, 114 S. Ct. 1483 (emphasis added; **[*11]** internal quotation marks omitted); *see Martin*, 527 U.S. at 354-55, 117 S. Ct. 1998 (quoting Landgraf's illustration). The words of § 101(c), namely, "The amendments made by this section **shall not** affect or apply to any action commenced before and pending on the date of enactment of this Act" (emphasis added), do not come close to taking the Supreme Court's advice on draftsmanship. 112 Stat. at 3233. Assuming that Landgraf's hypothetical provision would suffice, the absence of similarly absolute language **for** retrospective application in § 101(c) distinguishes SLUSA's applicability provision. *See Lindh*, 521 U.S. at 328 n.4, 117 S. Ct. 2059. Moreover, the suppositional example provided in *Landgraf* shows that express language for a retrospective application of SLUSA to actions filed post-enactment could have effortlessly been added to § 101(c). Therefore, § 101(c) fails as an expression of legislative intent to override the presumption against retrospective application. This court respectfully disagrees with *In Re Bankamerica Corp. Sec. Litig.*, 95 F. Supp.2d 1044, 1046 n.2 (E.D.Mo. 2000), in which that court concluded **[*12]** that § 101(c) prevents retrospective application of SLUSA only as to cases filed pre-enactment. The difference of opinion between this court and the Eastern District of Missouri means only that this court had good reason to certify the jurisdictional question for interlocutory review.

The use of negative inference in *Lindh* to determine the temporal reach of a federal statute does not alter this court's conclusion. In *Lindh*, from the presence of explicit language in only one of two substantively similar and simultaneously enacted chapters in the Antiterrorism and Effective Death Penalty Act, making that chapter applicable to pending cases, the Supreme Court inferred that the other chapter was not meant to apply to pending cases. 521 U.S. at 326-30, 117 S. Ct. 2059. However, the *Lindh* Court used negative inference to find that the statutory provision applied **prospectively**; here, using negative inference to divine congressional intent would result in **retrospective** application. Because prospective application does not carry the long-recognized, powerful potential for unfairness that is inherent in retrospective application, *see Landgraf*, 511 U.S. at 265-73, 114 S. Ct. 1483, **[*13]** the Supreme Court does not require that Congress be express in manifesting its intention that a statute apply prospectively only. Negative inference, therefore, can be an appropriate means for determining congressional intent for **prospective** application; however, this does not mean that negative inference provides a backdoor way around the need for an express legislative command in order to acquire **retrospective** application. *See Lindh*, 521 U.S. at 325-29, 117 S. Ct. 2059. n1 Thus, from § 101(c), it can easily be inferred that the temporal reach of SLUSA covers actions initiated post-enactment. However, if applying the relevant SLUSA provisions to a particular case would have a retroactive effect, unless there is clear congressional intent to give it that effect, it cannot be applied to pre-enactment conduct.

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n1 Indication to the contrary in *Mayers v. Reno*, 175 F.3d 1289, 1302-1303 (11th Cir. 1999) is **dictum.** The court in *Mayers*, like the Supreme Court in *Lindh*, used negative inference to find congressional intent for prospective application only. Furthermore, any persuasiveness of statements in *Mayers* on this issue is undercut by Martin's subsequent re-affirmation of the requirements and role of the clear statement rule. Martin 527 U.S. at 353-54, 119 S. Ct. 1998.

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Having found that there is no clear, controlling statutory language in SLUSA, the court explores whether applying SLUSA to the conduct complained of is impermissible for reasons of constitutional proportion, or of public policy. The *Landgraf* Court held that a statute would not be allowed to have retroactive effect if applying it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf 511 U.S. at 280, 114 S. Ct. 1483. A court should rely on "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.*, at 270, 114 S. Ct. 1483.

The statute that this court is checking out for possible retroactive effect is 15 U.S.C. § 77p(c), entitled "Removal of covered class actions", which provides: "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)." As alluded to *supra* in the discussion of the **[*15]** procedural posture of this case, subsection (b) compels a dismissal of actions based on state law if they allege fraud, deception, or misrepresentation regarding the purchase or sale of securities traded, or authorized to be traded, nationally. 15 U.S.C. § 77p(b). If applicable, § 77p(c) does two things, 1) permits removal of a state action, and 2) sinks the state ship once in the federal harbor. This is the classic sequence of events in ERISA preemption removals. The first consequence, if severed from the second, usually does not raise concerns because a removal opportunity achieved retroactively is not so shocking. *See, e.g., Hughes Aircraft*, 520 U.S. at 950-51, 117 S. Ct. 1871. Whether § 77p(c) does or does not raise such concerns need not be decided, because SLUSA dictates that each of the two consequences **not** be looked at in isolation from the other. The plain language of SLUSA shows that Congress contemplated that removal would be obtainable only if subsequent dismissal follows. Thus, the two steps were clearly intended to operate in tandem. n2 SLUSA makes ERISA look like a good friend to those who want to pursue their state law **[*16]** remedies in state court. The appropriate level of analysis limits the examination to § 77p(c) itself, not to its conjoined subparts, and the whole provision must be devoid of retroactive effect in order for any portion of it to withstand scrutiny in the present procedural context. If dismissal is not mandated in order to avoid impermissibly placing a retroactive encumbrance on Huff, the entire provision, including its grant of removal jurisdiction, cannot apply. If this is a conundrum, it is one of Congress's making and not one this court made up.

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n2 Beyond the issue of congressional intent that any removal under § 77p(c) be coupled with dismissal, to determine the retroactive effect of a portion of the provision independently of the other would risk the creation of a questionable state of affairs. If consideration of the applicability of the provision's jurisdictional grant was severed from that of the dismissibility aspect of the provision, and the former was not found to have retroactive effect, but the latter was so found, Huff's complaint, entirely based on state law on its face, would be removable under federal law, but not preempted by federal law. This anomaly is otherwise avoided in SLUSA, which does allow a federal district court to entertain certain actions founded on state law. 15 U.S.C. § 77p(d). If those actions get into federal court via removal, that court must remand. 15 U.S.C. § 77p(d)(4). None of these exceptions apply here.

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Subsection 77p(c), by incorporating § 77p(b), requires the dismissal of some, but not all, actions sounding in state law and essentially alleging fraud in connection with the sale of certain securities. Because the preemptive effect is limited to "covered class actions" as defined in 15 U.S.C. § 77p(f)(2)(A), § 77p(c) may be characterized, in a sense, as procedural. However, labeling a rule as "procedural" does not end the inquiry. In *Landgraf*, the Supreme Court "took pains to dispel the 'suggestion that concerns about retroactivity have no application to procedural rules.'" *Martin*, 527 U.S. at 359, 119 S. Ct. 1998 (quoting *Landgraf*, 511 U.S. at 275 n.29, 114 S. Ct. 1483). In keeping with the functional approach, this court must look at the practical procedural restrictions resulting from the application of the term "covered class action". The Act defines it as:

> (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 **[*18]** 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.

15 U.S.C. § 77p(f)(2)(A). Thus, the question is whether SLUSA, if it denies Huff and its unnamed party-clients the use of the various incarnations of "covered class action" as they seek to recover for injuries caused by defendants' alleged violations of state law, is also denying them procedural rights that cannot be retrospectively yanked from under them without running afoul of the notions of "fair notice", "reasonable reliance", **[*19]** and "settled expectations".

In opposition to Huff's motion to remand, defendants have persuasively argued that the plain language of the definition establishes that the present group action led by Huff falls under § 77p(f)(2)(A)(i)(II). Huff brought suit on a representative basis seeking damages not only for itself but for the "owner-clients" for whom it was purportedly acting as investment manager and attorney-in-fact. Compl. P 14-16. In its submissions, Huff has sought to slip the noose of this statutory provision by asserting that common questions of law or fact do not predominate as between it and the unnamed parties or as among the unnamed parties. On August 17, 2000, this court found this argument unconvincing, and still finds it so. Just because Huff's action may not fit the classic profile of a Rule 23, Fed.R.Civ.P., class action does not mean that the action could not be framed to take advantage of that rule. More to the point, the language of § 77p(f)(2)(A)(i) casts a wider net than Rule 23. The bottom line is that this complaint, as drafted, would be prohibited by SLUSA **if** SLUSA applies.

If SLUSA applies, it will deny Huff and the individuals on whose behalf it **[*20]** purports to act the efficient resolution of claims naturally suited to group action and will expose them to the shortcomings inherent in separate actions. Such exposure runs counter to the concepts of fair notice, reasonable reliance, and settled expectations and would attach new legal consequences to completed events that form the factual basis for Huff's complaint. n3 *See, e.g., Martin*, 527 U.S. at 357-60, 119 S. Ct. 1998 (holding that retrospective application of a limitation on attorneys' fees for postjudgment monitoring services stemming from prison conditions litigation would have retroactive effect).

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n3 It is no answer to this point to say that in drafting SLUSA, Congress sought to address what it determined to be, through exercise of its fact-finding powers, an abuse of the established right to proceed as a class by the category of plaintiff into which Huff falls. This court does not dispute the fact that Congress can act prospectively to curb such abuse. That legislative prerogative is not at issue here. The question is whether dispossessing individuals, potential future plaintiffs, of that right after the occurrence of the events giving rise to their cause of action, attaches new legal consequences to those events. Expanding the temporal reach of a statute, whether forward or backward in time, will naturally further the ends sought by the legislation. That unremarkable proposition cannot overcome the presumption against retroactivity. *See Landgraf*, 511 U.S. at 285-86, 114 S. Ct. 1483.

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An additional element of unfairness that underlies unanticipated legal consequences rests on the fact that at the time of Huff's alleged discussions and transactions with defendants, Huff was acting as an investment manager and as attorney-in-fact for unnamed clients who comprise the group which would otherwise have to proceed as individuals. Huff was treated by defendants as the representative of a group. It is not unreasonable, then, for Huff and its clients to have expected that if Huff was misled while operating in its representative capacity, it could bring suit in that same capacity under then existing legal theories to remedy the wrong. If Huff was the conduit for defendants' fraud on its clients, it is hardly fair to take away, post hoc, Huff's right to seek redress for that fraud.

While SLUSA, if it applies, would erase Huff's action under **state** law, it allows for the bringing of **federal** securities fraud claims in the form of a collective action. The legislative history of SLUSA contains many indications that one of its intended effects is to control securities fraud class actions by leaving federal law as the source of legal rights for plaintiffs who choose **[*22]** to proceed as a class. *See, e.g.*, H.R. CONF. REP. No. 105-640, at 13 (1998). However, even assuming arguendo that federal law provides substantially the same remedies as state law, if Huff re-fashioned its state law class action as a federal one, many of the claims would be time barred. A meaningful portion of its claims, if repled under federal law, would fall under § 10(b) of the Exchange Act and Rule 10b-5, which uses language very similar to 15 U.S.C. § 77p(b). The Supreme Court has held that such claims are subject to a 1-year statute of limitations period after discovery of the conduct constituting the violation, and a 3-year period of repose. *See Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). Undoubtedly, under the facts pled by Huff, the operation of these limitations would eliminate a substantial portion of Huff's claims. While it is true that SLUSA does not by its terms dictate this result, especially considering the fact that statutes of limitation are affirmative defenses that must be pled, the practical effect of a retrospective application of SLUSA would be **[*23]** to trim down Huff's case to a virtual nothing. Not taking this eventuality into account when measuring the impact of retrospective application in this case would be holding Huff accountable for its "failure" to bring its state law claims within the periods of repose and limitation applicable to federal claims that are preemptive only if retroactive. This proposition shocks the conscience of this court. Assuming that Huff and its unnamed clients could file substantially the same complaint under federal

law, they could do so only by surrendering otherwise viable causes of action. The reasonable expectations they had at the time of the allegedly actionable conduct cannot be reconciled with such a relinquishment of a substantive right. n4

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n4 The court need not address the serious, but more speculative, argument concerning the combined effect of § 77p(f)(2)(A)(i) and (f)(2)(A)(ii) on the possibility of Huff and its clients receiving any hearing whatsoever on the merits of their state claims. Even if Huff and its clients were to escape the grasp of § 77p(f)(2)(A)(i) by filing a non-representative action, or actions, of less than 50 plaintiffs and subsequently were able to elude the grouping possibility anticipated in § 77p(f)(2)(A)(ii), they would still have been denied the procedural right to pursue effective relief in the form of a collective action. Because the court finds that § 77p(f)(2)(A)(i)'s limitations alone would have a retroactive effect, there is no need to determine whether retrospective application of the "covered class action" term would lead to an impermissible result in other ways.

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There is one last rule of statutory construction that strongly militates against applying SLUSA to pre-enactment conduct. It arises from the principles of federalism and comity which recognize that ☆federal courts are courts of limited jurisdiction, so that any statute upon which a removal from state court can be based, must be construed against federal and in favor of state jurisdiction. When Congress is ambiguous on the question of the retroactivity of a preemptive federal statute, and when removability depends upon a retroactive application of that statute, the ambiguity must be resolved against removability and thus against retroactivity. This is the only way to recognize the primacy of the state courts as courts of first instance.

For the foregoing reasons, separate and in combination, this court cannot and will not grant defendants' motion to dismiss. To do so would constitute a dispositive ruling, something this court cannot do when it lacks subject matter jurisdiction because 15 U.S.C. § 77p(c) has no retrospective application. The only recourse is to send the case back to the court of competent jurisdiction from whence it came.

Conclusion [*25]

The action will be remanded. All pending motions not carried with the order of remand will be moot. A separate and appropriate order will be entered.

DONE this 2nd day of May 2001.

WILLIAM M. ACKER, JR.

UNITED STATES DISTRICT JUDGE

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Service: **Get by LEXSEE®**
Citation: **2002 U.S. Dist. LEXIS 259**

*2002 U.S. Dist. LEXIS 259, *; Fed. Sec. L. Rep. (CCH) P91,671*

GERSH KORSINSKY, individually and on behalf of all others similarly situated, Plaintiff, - against- SALOMON SMITH BARNEY INC. and JACK GRUBMAN, Defendants.

01 Civ. 6085 (SWK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2002 U.S. Dist. LEXIS 259; Fed. Sec. L. Rep. (CCH) P91,671

January 9, 2002, Decided
January 10, 2002, Filed

DISPOSITION: [*1] Plaintiff's motion to remand DENIED, and defendants' motion to dismiss GRANTED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff stockholder filed a class action complaint against defendants, investment corporation and analyst, on behalf of himself and all other similarly situated persons who purchased stock in a telecommunications corporation at the recommendation of defendants. The stockholder brought a motion to remand to state court after defendants removed to federal court. Defendants brought a cross-motion to dismiss.

OVERVIEW: The stockholder alleged that the investment corporation used the analyst's "buy" recommendations on telecommunications stocks in order to induce companies to bring their investment banking business to the investment corporation. The stockholder alleged that by reiterating artificially positive recommendations for the telecommunications corporation's common stock in order to obtain the telecommunications corporation's investment banking business, defendants' actions caused monetary damages to the investment corporation's retail customers. The court found that the stockholder's allegations regarding the alleged scheme by defendants rose to the level of material misrepresentations or omissions regarding the value of the securities. The court found that the proposed class consisted of persons who had alleged that they purchased shares of a covered security in connection with a material misrepresentation or omission and, therefore, the claims alleged in the complaint fell under the purview of the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C.S. § 78bb(f), and must be dismissed.

OUTCOME: The court denied the stockholder's motion to remand and granted defendants' motion to dismiss the stockholder's class action complaint.

CORE TERMS: stock, misrepresentation, rating, recommendation, omission, customer, retail, class action, misleading, investment banking, common stock, removal, analyst, purchased stock, material fact, common law, artificially, removable, purview, telecommunications, underwriting, comprised, Securities Litigation Reform Act, initial public offering, common questions of law, motion to dismiss, federal question, order to obtain, proposed class, federal claim

CORE CONCEPTS - ◆ Hide Concepts

Civil Procedure : Removal : Basis for Removal
Civil Procedure : Removal : Postremoval Procedures
A removing party bears the burden of establishing that the case falls within the court's removal jurisdiction. Removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand.

Civil Procedure : Jurisdiction : Subject Matter Jurisdiction : Federal Question Jurisdiction
In order to state a federal claim, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. A non-diverse action cannot be removed to federal court if no federal question exists on the face of the complaint. The plaintiff, moreover, is generally the master of its own complaint and thus entitled to decide what law to rely on. The "master of the complaint" rule does not limit the court to the face of the complaint, however, or to plaintiff's characterization of his claims. In certain limited circumstances, a federal court may look behind the complaint to preclude a plaintiff from defeating federal question jurisdiction through artful pleading, that is, by disguising a federal claim as a claim arising under state law.

Securities Law : Bases for Liability : Private Securities Litigation
The Securities Litigation Uniform Standards Act of 1998, 15 U.S.C.S. § 78bb(f), bars a private party from bringing a "covered class action" based upon the statutory or common law of any state alleging a misrepresentation or omission of a material fact or the use of any manipulative device or contrivance in connection with the sale of a "covered security." 15 U.S.C.S. § 78bb(f)(1).

Securities Law : Bases for Liability : Private Securities Litigation
The Securities Litigation Uniform Standards Act of 1998 (SLUSA), specifically 15 U.S.C.S. § 78bb(f), provides that all cases falling within its purview are both removable to federal court and subject to automatic dismissal. 15 U.S.C.S. § 78bb(f). In order to defeat a motion to remand an action to state court, the defendant must show that: (1) the action is a "covered class action" under SLUSA; (2) the action purports to be based upon state law; (3) the action involves a "covered security" under SLUSA; (4) that the defendant is alleged to have misrepresented or omitted a material fact; and (5) the alleged misrepresentation or omission was made "in connection with" the purchase or sale of the covered security. A "covered class action" is a class action involving common questions of law or fact brought by a named plaintiff on behalf of one or more unnamed parties. 15 U.S.C.S. § 78bb(f)(5)(B). A "covered security" is a security listed on the New York Stock Exchange, the American Stock Exchange, or the Nasdaq National Market, or a security issued by an investment company that is registered, or for which a registration statement has been filed under the Investment Company Act of 1940. 15 U.S.C.S. § 78bb(f)(5)(E).

Securities Law : Bases for Liability : Private Securities Litigation
The requirement of a misrepresentation or omission under the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C.S. § 78bb(f), is satisfied where a plaintiff alleges a misrepresentation concerning the value of the securities sold or the consideration received in return. This requirement must be read flexibly, not technically and restrictively.

Securities Law : Bases for Liability : Private Securities Litigation

Statements directed to the general public which affect the public's interest in the corporation's stock are made in connection with sales or purchases of that stock. A broad construction of the "in connection with" requirement of the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C.S. § 78bb(f), is warranted when dealing with shareholder suits. When the fraud alleged is that the plaintiff bought or sold a security in reliance on misrepresentations as to its value, made by a defendant whose position made it reasonable for the plaintiff to rely on the representation and imposed some duty on the defendant to be honest or to disclose information, then whatever problems there may be with the case, a connection between the fraud and the transaction should not be one of them.

COUNSEL: Daniel A. Osborn, Beatie and Osborn LLP, New York, NY, for Plaintiff.

Richard A. Rosen, Claudia Hammerman, Daniel H. Levi, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, for Defendants.

JUDGES: SHIRLEY WOHL KRAM, UNITED STATES DISTRICT JUDGE.

OPINIONBY: SHIRLEY WOHL KRAM

OPINION: OPINION AND ORDER

SHIRLEY WOHL KRAM, U.S.D.J.

Plaintiff Gersh Korsinsky ("Korsinsky") filed a class action complaint on behalf of himself and all other similarly situated persons who purchased stock in AT&T Corporation ("AT&T") pursuant to the recommendation of analysts at Defendant Salomon Smith Barney Inc. ("SSB"), and one analyst in particular, Jack Grubman ("Grubman") (collectively "defendants"). Korsinsky alleges that SSB and Grubman breached their fiduciary duties to SSB's retail customers by issuing and maintaining positive recommendations on shares of AT&T despite defendants' knowledge that AT&T faced serious financial problems. Korsinsky originally filed this suit in the Supreme Court of the State of New York, New York County on June 15, 2001. Defendants later removed the action to the Southern District **[*2]** of New York pursuant to 15 U.S.C. §§ 77p(c) and 78bb(f)(2), and 28 U.S.C. §§ 1331 and 1441. Korsinsky moves to remand this action to state court and defendants cross-move to dismiss the case. For the reasons set forth below, Korsinsky's motion to remand is denied and defendants' motion to dismiss is granted.

I. BACKGROUND

While a retail customer of SSB, Korsinsky purchased shares of AT&T. n1 Grubman, a well-known and highly respected telecommunications analyst for SSB, "covered" or followed AT&T, along with many other telecommunications companies, and issued recommendations to SSB's retail customers in order to help them make more informed investment decisions. Korsinsky alleges that the previously independent analyst research evaluations are now increasingly influenced by SSB's desire to generate revenue for its investment banking business. Specifically, Korsinsky alleges that SSB began using Grubman's "Buy" recommendations on telecommunications stocks, including AT&T, in order to induce companies to bring their investment banking business to SSB.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 It is unclear from the complaint exactly when Korsinsky purchased shares of AT&T, or whether he continues to own such shares today. However, as noted infra, the class is comprised of those persons who purchased AT&T stock on or after November 29, 1999.

Accordingly, the Court concludes that Korsinsky purchased his shares of AT&T stock on or after November 29, 1999.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[*3]**

On or around November 29, 1999, Grubman issued a "Buy" rating for AT&T, at a time when AT&T was beginning to prepare for a large public offering of stock and was allegedly looking at a number of different investment banks for underwriting assistance with the stock offering. Although the number of shares traded in AT&T increased dramatically after the "Buy" rating, the price of the stock began to decline. Despite the decline, Grubman's "Buy" recommendation remained in place, and in or around April 2000, AT&T completed its proposed public offering, with SSB as a lead manager in the offering. SSB allegedly received fees in excess of $ 44 million for its role as a lead manager. Following the April 2000 offering, AT&T reported a substantial decline in earnings, yet the "Buy" recommendation issued by defendants remained in place. Eventually, while SSB continued to reiterate the "Buy" rating to its retail customers, the stock lost half its value. Finally, on or around October 6, 2000, Grubman reduced his recommendation of AT&T to "Outperform," and three weeks later Grubman again downgraded his recommendation of AT&T to "Neutral."

Korsinsky alleges that SSB's reiteration of Grubman's "Buy" **[*4]** recommendation was strategically done in order to gain AT&T's investment banking business, and defendants' actions therefore constitute a breach of their fiduciary duties owed to SSB's retail customers. The proposed class is comprised of retail customers of SSB who "purchased the common stock of AT&T through Salomon Smith Barney between November 29, 1999 and [June 15, 2001]." Compl. P 49. The complaint alleges, inter alia, that by reiterating artificially positive recommendations for AT&T's common stock in order to obtain AT&T's investment banking business, defendants' actions caused millions of dollars in damages to SSB's retail customers. Defendants removed the action to federal court on July 5, 2001, on the grounds that the complaint is a covered class action falling under the removal provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 78bb(f)(1) and (2).

II. DISCUSSION

A removing party bears the burden of establishing that the case falls within the Court's removal jurisdiction. See Crazy Eddie, Inc. v. Cotter, 666 F. Supp. 503, 508 (S.D.N.Y. 1987). "It is settled that the removal **[*5]** statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand." Steel Valley Auth. v. Union Switch and Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987), cert. dismissed, 484 U.S. 1021, 108 S. Ct. 739, 98 L. Ed. 2d 756 (1988); see also Leslie v. BancTec Serv. Corp., 928 F. Supp. 341, 347 (S.D.N.Y. 1996).

In order to state a federal claim, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." Gully v. First Nat'l Bank, 299 U.S. 109, 112, 81 L. Ed. 70, 57 S. Ct. 96 (1936). A non-diverse action cannot be removed to federal court if no federal question exists on the face of the complaint. See, e.g., Ferro v. Ass'n of Catholic Schs., 623 F. Supp. 1161 (S.D.N.Y. 1985); Hamilton v. Hertz Corp., 607 F. Supp. 1371 (S.D.N.Y. 1985). The plaintiff, moreover, is generally the master of its own complaint and thus entitled to decide what law to rely on. See N. Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978). **[*6]** The "master of the complaint" rule does not limit the Court to the face of the complaint, however, or to plaintiff's characterization of his claims. Still v. DeBuono, 927 F. Supp. 125, 128 (S.D.N.Y. 1996). "In certain limited circumstances, a federal court may look behind the complaint to preclude a plaintiff from defeating federal question jurisdiction through 'artful pleading,' that is, by disguising a federal claim as a claim arising under state law." Bowlus v. Alexander & Alexander Servs., Inc., 659 F. Supp. 914, 918 (S.D.N.Y. 1987); see also Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 758-59 (2d Cir. 1986), cert. denied, 479 U.S. 885, 107 S. Ct. 277, 93 L. Ed. 2d 253 (1986); Greenfield v. Nat'l Westminster Bank USA, 846 F. Supp.

:02 (S.D.N.Y. 1994).

SLUSA closes a loophole in the 1995 Private Securities Litigation Reform Act ("PSLRA"), which equired plaintiffs to plead with particularity any omissions or allegedly misleading statements, 'including on what bases they believe there to be an omission and precisely which statements were misleading and why they were misleading." Hardy v. Merrill Lynch, Pierce, Fenner & Smith, 2001 U.S. Dist. LEXIS 19748, No. 01 Civ. 5973, 2001 WL 1524471, **[*7]** *2 (S.D.N.Y. November 30, 2001); see also Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 78a et seq). SLUSA preempts certain types of securities class actions and provides that they cannot be maintained in any court in the United States. The purpose of SLUSA is to "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State court, rather than Federal court." H.R.Rep. No. 105-803 (1998). Prior to the passage of SLUSA, many class action plaintiffs filed suit in state court alleging fraud in the sale of securities based upon state statutory or common law, primarily in order to avoid the stringent procedural hurdles for federal securities lawsuits erected by the PSLRA. See Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 107-08 (2d Cir. 2001).

SLUSA bars a private party from bringing a "covered class action" based upon the statutory or common law of any state alleging a misrepresentation or omission of a material fact or the use of any manipulative device or contrivance in connection with the sale of **[*8]** a "covered security." 15 U.S.C. §§ 78bb(f)(1)(A)-(B); see also Derdiger v. Tallman, 75 F. Supp.2d 322, 324 (D. Del. 1999). SLUSA provides that all cases falling within its purview are both removable to federal court and subject to automatic dismissal. See 15 U.S.C. § 78bb(f)(1)-(2). In order to defeat a motion to remand an action to state court, the defendant must show that: (1) the action is a "covered class action" under SLUSA; (2) the action purports to be based upon state law; (3) the action involves a "covered security" under SLUSA; (4) that the defendant is alleged to have misrepresented or omitted a material fact; and (5) the alleged misrepresentation or omission was made "in connection with" the purchase or sale of the covered security. See 15 U.S.C. §§ 78bb(f)(1)-(2); see also Hardy v. Merril Lynch, 2001 U.S. Dist. LEXIS 19748, 2001 WL 1524471 at *3; Prager v. Knight/Trimark Group, Inc., 124 F. Supp.2d 229, 233 (D.N.J. 2000).

A "covered class action" is a class action involving common questions of law or fact brought by a named plaintiff on behalf of one or more unnamed parties. **[*9]** 15 U.S.C. § 78bb(f)(5)(B). A "covered security" is a security listed on the New York Stock Exchange, the American Stock Exchange, or the Nasdaq National Market, or a security issued by an investment company that is registered, or for which a registration statement has been filed under the Investment Company Act of 1940. 15 U.S.C. § 78bb(f)(5)(E) (adopting definition of "covered security" from 15 U.S.C. § 77r(b)).

It is clear from the complaint that this action is a "covered class action" involving a "covered security," and is based upon claims arising under state common law. The complaint is a covered class action, as common questions of law or fact predominate and it was brought by a named plaintiff on behalf of one or more unnamed parties. See Compl. PP 49, 53; see also 15 U.S.C. § 78bb(f)(5)(B). Moreover, AT&T common stock is listed and traded on the New York Stock Exchange, thereby satisfying the definition of a "covered security." See 15 U.S.C. § 78bb (f)(5)(E). Finally, Korsinsky's claim for breach of fiduciary duty is based upon New York common law. **[*10]** See Compl. P 4.

However, the parties disagree as to whether this action involves a misrepresentation or omission of a material fact and whether such misrepresentation or omission was made by the defendants in connection with the purchase or sale of a covered security. Korsinsky asserts that the complaint "does not allege that defendants employed a 'device, scheme, or artifice to defraud' or made a 'material misrepresentation or omission;'" nor does the complaint "allege any activity 'in connection with' or 'involving' the purchase or sale of a security." See Plaintiff's Memorandum of Law in Support of Motion to Remand ("Plf.'s Memo.") at 8. In contrast,

'efendants assert that the complaint clearly contains allegations that the class purchased .T&T common stock in reliance on misrepresentations made by Grubman and SSB. ;pecifically, defendants contend that Korsinsky's statement that SSB "issued and maintained 'avorable recommendations when they knew or should have know that [AT&T's] business and ›rospects were deteriorating,'" constitutes an allegation of a misrepresentation or omission. :ompl. P 53(c); see also Defendants' Memorandum of Law in Opposition to Plaintiff's **[*11]** 1otion to Remand ("Defs.' Memo.") at 11, 13.

The requirement of a misrepresentation or omission is satisfied "where a plaintiff alleges a nisrepresentation 'concerning the value of the securities . . . sold or the consideration received n return.'" Spielman v. Merrill Lynch, Pierce, Fenner & Smith Inc., 2001 U.S. Dist. LEXIS 15943, No. 01 Civ. 3013, 2001 WL 1182927, *3 (S.D.N.Y. Oct. 9, 2001) (quoting Saxe v. E.F. Hutton & Co., Inc., 789 F.2d 105, 108 (2d Cir. 1986). This requirement must be read "flexibly, not technically and restrictively." Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 10 n. 7, 12, 30 L. Ed. 2d 128, 92 S. Ct. 165 (1971) (interpreting the requirement of fraud in connection with the sale of a security under Section 10(b) of the Securities Exchange Act of 1934).

Although the complaint clearly states that "this is not an action for fraud," it outlines several instances of alleged misrepresentations made by SSB and Grubman with regard to the value of AT&T. See Compl. P 4. For example, Korsinsky alleges that despite the fact that AT&T was losing business, had decreased earnings and had made substantial job cuts, Grubman's "Buy" **[*12]** rating remained in place. See Compl. P 36-37. Korsinsky also asserts that because AT&T and other companies looked to Grubman to support their stock, his glowing recommendations were essential to SSB's ability to attract investment banking business, thereby leading SSB to place the interests of its investment banking business over the interests of its retail customers. See Compl. PP 45, 48. As a result, Korsinsky accuses SSB of maintaining "favorable recommendations when they knew or should have known that [AT&T's] business was deteriorating." Compl. P 53(c).

The Court finds that Korsinsky's allegations regarding an alleged scheme by defendants to issue artificially positive ratings on AT&T stock rise to the level of material misrepresentations or omissions regarding the value of the securities. See Spielman, 2001 U.S. Dist. LEXIS 15943, 2001 WL 1182927 at *3. Therefore, the only question remaining is whether the misrepresentations or omissions alleged by Korsinsky were made in connection with the purchase or sale of a covered security.

As conceded by plaintiff, misrepresentations or omissions concerning the value of a covered security satisfy the "in connection with" requirement. **[*13]** See Saxe v. E.F. Hutton & Co., Inc., 789 F.2d 105, 108 (2d Cir. 1986); see also Plf.'s Memo. at 12. "Statements directed to the general public which affect the public's interest in the corporation's stock are made in connection with sales or purchases of that stock." In re Ames Dep't Stores Inc. Stock Litig., 991 F.2d 953, 966 (2d Cir. 1993). The Second Circuit's decision in In re Ames recognized that a broad construction of the "in connection with" requirement is warranted when dealing with shareholder suits. See In re Ames Dep't Stores Inc. Stock Litig., 991 F.2d at 965; see also Ross v. A.H. Robins Co., Inc., 607 F.2d 545 (2d Cir. 1979), cert. denied, 446 U.S. 946, 100 S. Ct. 2175, 64 L. Ed. 2d 802 (1980). In language particularly applicable to the instant case, the Second Circuit clearly stated,

> when the fraud alleged is that the plaintiff bought or sold a security in reliance on misrepresentations as to its value, made by a defendant who position made it reasonable for the plaintiff to rely on the representation and imposed some duty on the defendant to be honest or to disclose **[*14]** information, then whatever problems there may be with the case, a connection between the fraud and the transaction should not be one of them.

ı re Ames Dep't Stores Inc. Stock Litig., 991 F.2d at 967.

: is clear from the complaint that the misrepresentations and omissions alleged were in onnection with the purchase or sale of a covered security. Although Korsinsky contends that ome of the statements in his complaint are merely background facts, the complaint contains umerous references to the purchase of AT&T stock by class members, and specifically states hat Grubman's "Buy" recommendation "causes (1) investors who follow his advice to purchase he stock, and (2) the price of the stock to go up." Compl. P 26. In addition, plaintiff defined he class as those retail customers of SSB who purchased shares of AT&T subsequent to the Jovember 29, 1999 "Buy" rating issued by Grubman and SSB. Therefore, each member of the class is a person who purchased shares of AT&T common stock ostensibly because of the allegedly misleading "Buy" rating issued that day.

In a strikingly similar case recently decided by Judge Buchwald, nearly identical allegations regarding **[*15]** the actions of Merrill Lynch were held to fall under the purview of SLUSA, and the case was therefore dismissed. See Hardy v. Merrill Lynch, 2001 U.S. Dist. LEXIS 19748, 2001 WL 1524471. In Hardy, the plaintiff alleged that Merrill Lynch reiterated artificially positive recommendations for a stock in order to obtain further underwriting business, causing Merrill Lynch to place its interest in obtaining lucrative underwriting agreements above the interests of its retail customers, to whom it was alleged they owed a fiduciary duty. See id. at *2. In Hardy, the class included all Merrill Lynch customers who purchased the stock between the initial public offering and the date of the filing of the complaint. However, because the allegedly inaccurate "Buy" rating came out subsequent to the initial public offering, it could not be determined which members of the class bought in reliance on the rating and which had not, and the complaint was therefore dismissed with leave to replead for those members who purchased prior to the allegedly misleading rating. See id. at *5.

The distinction in Hardy between those customers who may have purchased stock prior to the issuance of an allegedly **[*16]** misleading or inaccurate rating and those who may have purchased after is missing in the instant case. Here, Korsinsky chose to define the relevant class members as those who purchased AT&T stock on or after the date SSB and Grubman issued the "Buy" rating, November 29, 1999. The chosen class definition therefore excludes anyone who may have purchased stock prior to the "Buy" rating, and thus defeats plaintiff's argument that the class is comprised only of members who decided to hold their shares of AT&T stock in reliance on the "Buy" rating. See Pltf.'s Memo. at 10. In Hardy, the only potential class members who could maintain a suit that would not be removable under SLUSA would be those members who purchased before any allegedly misleading rating and continued to hold their shares after the allegedly misleading rating was issued. See Hardy, 2001 U.S. Dist. LEXIS 19748, 2001 WL 1524471 at *5; see also Gutierrez v. Deloitte & Touch, L.L.P., 147 F. Supp.2d 584 (W.D. Tex. 2001) (holding that covered class actions which allege misrepresentations in connection with holding a covered security are not removable to federal court); Gordon v. Buntrock, 2000 U.S. Dist. LEXIS 5977, No. 00 Civ. 303, 2000 WL 556763, **[*17]** at *3 (N.D. Ill. Apr. 28, 2000) (remanding a state law claim on the ground that the complaint explicitly limited the class to all persons holding shares before any of the alleged misrepresentations took place). That class of persons does not exist in this case. Therefore, the Court finds that the proposed class consists of persons who have alleged that they purchased shares of a covered security in connection with a material misrepresentation or omission, and the claims alleged in the complaint therefore fall under the purview of SLUSA and must be dismissed.

III. CONCLUSION

Therefore, for the reasons set forth above, plaintiff's motion to remand is DENIED, and defendants' motion to dismiss is GRANTED.

O ORDERED.

'HIRLEY WOHL KRAM

JNITED STATES DISTRICT JUDGE

)ated: New York, New York

anuary 9, 2002

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Citation: **2002 U.S. Dist. LEXIS 259**
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)ate/Time: Wednesday, April 24, 2002 - 6:00 PM EDT

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ervice: **Get by LEXSEE®**
tation: **2002 U.S. Dist. LEXIS 3461**

*2002 U.S. Dist. LEXIS 3461, **

IN RE WASTE MANAGEMENT, INC., SECURITIES LITIGATION, This Document Relates to: WILLARD MILLER, GLEN MILLER, DAVID COSLETT, AND MICHAEL DOUGHERTY, Individually and on Behalf of Others Similarly Situated, Plaintiffs VS. WASTE MANAGEMENT, INC., RODNEY R. PROTO, EARL E. DEFRATES, BRUCE E. SNYDER, AND GREGORY T. SANGALIS, Defendants.

MDL 1422, CIVIL ACTION NO. H-01-4381

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

2002 U.S. Dist. LEXIS 3461

February 5, 2002, Decided
February 5, 2002, Entered

PRIOR HISTORY:

Miller v. Waste Mgmt., Inc. (In re Waste Mgmt., Inc., Sec. Litig.), 2002 U.S. Dist. LEXIS 3460 (S.D. Tex. Jan. 17, 2002).

DISPOSITION: [*1] Previous order VACATED, and case REMANDED to state court.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff class sued under the Securities Act of 1933 on behalf of themselves and all others similarly situated who had exchanged securities for defendant corporation's stock and were damaged as a result. The action was removed pursuant to 28 U.S.C.S. § 1441(a) and 15 U.S.C.S. § 77p of the Securities Litigation Uniform Standards Act of 1998 (SLUSA). The instant court previously denied the class' motion to remand under 28 U.S.C.S. § 1447(c).

OVERVIEW: The class argued that removal of the case from state court was improper because the state and federal courts had concurrent jurisdiction along with an express prohibition regarding removal of claims filed in state court under 15 U.S.C.S. § 77v(a). The class also argued that the corporation's reliance on SLUSA was inapposite. The corporation argued that SLUSA applied and removal was proper because the case was a "covered class action" as defined in 15 U.S.C.S. § 77p(f)(A)(I)(II). The court disagreed with the corporation finding that no court had held that claims under the Securities Act of 1933, standing alone, were removable under SLUSA. Moreover, there was no allegation that the class was attempting to fraudulently plead around SLUSA to avoid removal into state court.

OUTCOME: The denial of the class' motion to remand was vacated and the case was remanded for lack of subject matter jurisdiction.

CORE TERMS: removal, class action, Securities Act, omission, common law, lawsuit, state law, removable, stock, securities fraud, material fact, manipulative, untrue statement, savings clause, contrivance, deceptive, state-law, merger, misrepresentation, private party, concurrent, registration statement, plead, Securities Litigation Uniform Standards Act, Securities Litigation Reform Act, Securities Exchange Act, subject matter jurisdiction, questions of law, federal law, case law

CORE CONCEPTS - ◆ Hide Concepts

Civil Procedure : Removal : Basis for Removal
See 28 U.S.C.S. § 1441(a).

Civil Procedure : Removal : Basis for Removal
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Jurisdiction
The Securities Act of 1933, 15 U.S.C.S. § 77v, which allows for concurrent federal and state court jurisdiction, expressly states that no case brought in any state court of competent jurisdiction shall be removed.

Civil Procedure : Removal : Removal Procedures
The party removing the action to federal court bears the burden of affirmatively establishing that subject matter jurisdiction exists.

Civil Procedure : Class Actions
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Statutes of Limitations
See 15 U.S.C.S. § 77p(c).

Civil Procedure : Class Actions
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Jurisdiction
15 U.S.C.S. § 77p of the Securities Litigation Uniform Standards Act of 1998 in essence makes federal court the exclusive venue for securities fraud class actions meeting its definitions and ensured they would be governed exclusively by federal law. 15 U.S.C.S. § 77p(b)-(c).

Civil Procedure : Class Actions
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Jurisdiction
See 15 U.S.C.S. § 78bb(f)(5)(B).

Civil Procedure : Class Actions
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Statutes of Limitations
See 15 U.S.C.S. § 78bb(f)(5)(B).

Securities Law : Initial Public Offerings & the Securities Act of 1933 : Definitions
A covered security is defined as a security that satisfies the standards for covered security specified in paragraph (1) or (2) of section 77r(b) of this title, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred. 15 U.S.C.S. § 77p(f)(3). Section 77r(b), adopted by § 78bb(f)(5)(E), defines a covered security as one listed on the New York Stock Exchange, the American Stock Exchange, or the Nasdaq National Market, or a security issued by an investment company that is registered, or for which a registration statement has been filed under the Investment Company Act of 1940.

Civil Procedure : Class Actions
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Statutes of Limitations
See 15 U.S.C.S. § 78bb(f)(1)(A),(B) and (2).

Civil Procedure : Removal : Basis for Removal
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Jurisdiction
The Securities Litigation Uniform Standards Act of 1998 authorizes the removal of all private actions that are actually traditional securities fraud claims that fall within its ambit to be removable to federal court and makes the state law claims subject to dismissal. 15 U.S.C.S. § 78bb(f)(1)-(2).

Civil Procedure : Removal : Removal Procedures
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Jurisdiction
To defeat a motion to remand for improper removal under the Securities Litigation Uniform Standards Act of 1998 (SLUSA), a defendant must show that: (1) 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 the defendant misrepresented or omitted material facts; and (5) that the alleged misrepresentation or omission was made in connection with the purchase or sale of the covered security.

Civil Procedure : Jurisdiction : Subject Matter Jurisdiction : Jurisdiction Over Action
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Jurisdiction
See 15 U.S.C.S. § 77v(a).

Civil Procedure : Removal : Basis for Removal
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Jurisdiction
15 U.S.C.S. § 77v(a) clearly states that no such claims shall be removed to any court of the United States. 15 U.S.C.S. § 77v(a).

Civil Procedure : Class Actions
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Statutes of Limitations
See 15 U.S.C.S. § 77p(b).

Civil Procedure : Removal : Basis for Removal
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Definitions
15 U.S.C.S. § 77p of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), contains a savings clause, 15 U.S.C.S. § 78bb(f)(3), permitting class actions involving "covered securities" based on state law that would otherwise be removable to continue in state court if they fell within one of its three exceptions.

Civil Procedure : Removal : Removal Procedures
Securities Law : Initial Public Offerings & the Securities Act of 1933 : Jurisdiction
The removal sections under SLUSA are expressly and precisely drawn and limited. 15 U.S.C.S. § 78bb(f)(1) & (2).

Civil Procedure : Removal : Basis for Removal
The touchstone of the federal district court's removal jurisdiction is the intent of Congress.

COUNSEL: For WILLARD MILLER, GLEN MILLER, DAVID COSLETT, MICHAEL DOUGHERTY, plaintiffs: R Bruce McNew, Taylor & McNew, Greenville, DE.

For WILLARD MILLER, GLEN MILLER, DAVID COSLETT, MICHAEL DOUGHERTY, plaintiffs: James A McShane, Morris & Morris, Wilmington, DE.

For WASTE MANAGEMENT INC, RODNEY R PROTO, EARL E DEFRATES, BRUCE E SNYDER, GREGORY T SANGALIS, defendants: Allen M Terrell, Jr, Richards Layton et al, Wilmington, DE.

For RODNEY R PROTO, defendant: Rodney Acker, Jenkens & Gilchrist, Dallas, TX.

For RODNEY & PROTO, defendant: Sharon Katz, Eric F Grossman, Davis Polk et al, Christopher Falkenberg, David Polk et al, New York, NY.

JUDGES: MELINDA HARMON, UNITED STATES DISTRICT JUDGE.

OPINIONBY: MELINDA HARMON

OPINION: ORDER OF RECONSIDERATION AND REMAND

The above referenced proposed class action composed of parties that exchanged securities ssued by Eastern Environmental Services, Inc. for securities **[*2]** issued by Waste Management, Inc. during a merger on or about December 31, 1998, grounded in sections 11, 12(a)(2) and 15 of the Securities Act of 1933 ("the Act"), 15 U.S.C. §§ 77k, 77l(a)(2), and 77o, was removed from the Superior Court for the State of Delaware pursuant to 28 U.S.C. § 1441(a) and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. § 77p, and the general removal statute, 28 U.S.C. § 1441(a). In its last order (# 49), this Court denied Plaintiffs' motion to remand under 28 U.S.C. § 1447(c). Since then the Court has continued to mull over what appears to be a case of first impression, has reconsidered its ruling, and has concluded after all that removal under SLUSA was improper and that this case should be remanded.

Plaintiffs' suit arises out of a stock swap when Waste Management, Inc. ("WMI") merged with Eastern Environmental Services, Inc. ("Eastern") in December 1998. With an exchange ratio of 0.646 WMI shares for each Eastern share, WMI issued newly registered stock to Eastern shareholders pursuant to a Registration Statement **[*3]** and Prospectus filed with the Securities and Exchange Commission on September 24, 1996, and subsequently amended. WMI had previously repeatedly represented that an earlier July 1998 merger of Old Waste Management and USA Waste Services, leading to the formation of WMI, would result in an annual cost savings of $ 800 million in operating synergies and enhanced efficiencies, and that representation was incorporated into the Registration Statement at issue as well as other SEC filings and documents incorporated into it. On July 6, 1999, WMI began issuing statements of adverse financial results and earnings. On November 9, 1999, it announced it would take a $ 1.23 billion after-tax accounting charge, that integration of Old Waste Management with USA Waste had not been proceeding as previously represented, and that the $ 800 million in cost savings would not be realized. The price of WMI stock plummeted. Plaintiffs in this action sued solely under the Securities Act of 1933 on behalf of themselves and all others similarly situated who had exchanged Eastern securities for WMI stock and were damaged as a result.

Title 28 U.S.C. § 1441(a) states,

> ✦Except as **[*4]** otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

✦The Securities Act of 1933, 15 U.S.C. § 77v, which allows for concurrent federal and state court jurisdiction, expressly states that "no case . . . brought in any State court of competent jurisdiction shall be removed."

In enacting removal statutes, Congress intended to "restrict the jurisdiction of federal courts on removal" and therefore removal statutes must be strictly construed. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 85 L. Ed. 1214, 61 S. Ct. 868 (1961). ✦The party removing the action to federal court bears the burden of affirmatively establishing that subject matter jurisdiction exists. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97-98, 66 L. Ed. 144, 42 S. Ct. 35 (1921).

Enacted on November 3, 1998, SLUSA, Pub. L. No. 105-353, 112 Stat. 3227, codified **[*5]** as amended in part at 15 U.S.C. §§ 77p and 78bb(f), amended section 22(a) of the Securities

:t of 1933, 15 U.S.C. § 77v(a), to preempt class actions based on state statutory or common w involving a "covered security" as defined in that act. ⇑SLUSA states in part that "no ıvered class action based upon the statutory or common law of any State or subdivision ·ereof may be maintained in any State or Federal court by any private party alleging . . . an ıtrue statement or omission of a material fact in connection with the purchase or sale of a ›vered security . . . ."). 15 U.S.C. § 77p(c).

ongress has enacted several federal statutes n1 in the past few years to attempt to establish niformity in the securities markets. The Private Securities Litigation Reform Act of 1995 "PSLRA"), 15 U.S.C. §§ 77z-l, 78u, which amended the 1933 Securities Act and the 1934 ·ecurities Exchange Act, set out heightened pleading requirements n2 and for complaints ınder Rule 10b-5 mandated pleading of specific facts creating a strong inference of scienter or private class actions and other suits alleging securities **[*6]** fraud in an effort to minimize neritless lawsuits. 15 U.S.C. § 78a et seq. H. Conf. Rep. No. 105-803 (1996). When, as a ·esult, plaintiffs began filing in state rather than federal court, asserting claims under state statutory or common law to avoid the PSLRA's stringent procedural and pleading hoops, Congress passed SLUSA in 1998 to close the loophole. 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998, 1998 WL 712049). ⇑SLUSA in essence made federal court the exclusive venue for securities fraud class actions meeting its definitions and ensured they would be governed exclusively by federal law. 15 U.S.C. § 77p(b)-(c). Congress' purpose in enacting the statute was to "'prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State court, rather than Federal court.'" Korsinsky v. Salomon Smith Barney, Inc., No. 01 6085(SWK), 2002 U.S. Dist. LEXIS 259, 2002 WL 27775, *3 (S.D.N.Y. 2002) quoting H.R. Conf. Rep. No. 105-803 (1998). Moreover, the Court observes that the same report indicates that in SLUSA Congress did not evidence an intent to occupy the entire field **[*7]** of securities regulation, but expressly delineated the scope of preemption:

> In order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

H.R. Conf. Rep. 105-803, *2.

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n1 See also the National Securities Markets Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, 110 State. 3416 (1996), codified in part in 15 U.S.C. § § 77r, 80a, which preempts state "Blue Sky" laws.

n2 The PSLRA requires plaintiffs to plead with particularity any alleged misrepresentations, misleading statements or omissions, including the reasons why plaintiffs think there was an omission or which statements were misleading and why.

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With respect to removal, the plain language of SLUSA, 15 U.S.C. § 77p(c), evidences Congress' intent to preempt a specifically defined category of state-law class actions, which it defines as follows: ⇑"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 . . . ." Title 15 U.S.C. § 78bb(f)(5)(B) defines a "covered

ss action" as

> (i) any single lawsuit in which--
> (I) damages are sought on behalf of more that 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, predominated over any question 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 **[*9]** 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.

15 U.S.C. § 78bb(f)(5)(B).

A "covered security" is defined as "a security that satisfies the standards for covered security specified in paragraph (1) or (2) of section 77r(b) of this title, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred . . . ." 15 U.S.C. § 77p(f)(3). Section 77r(b), adopted by § 78bb(f)(5)(E), defines a "covered security" as one listed on the New York Stock Exchange, the American Stock Exchange, or the Nasdaq National Market, or a security issued by an investment company that is registered, or for which a registration statement has been filed under the Investment Company Act of 1940. SLUSA provides for mandatory removal and dismissal of a specific kind of class action:

> (f) LIMITATIONS ON REMEDIES. **[*10]** --
> (1) CLASS ACTION LIMITATIONS.--No covered class action based upon the statutory or common law of any state or subdivision thereof may be maintained in any State or Federal court by any private party alleging--
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
> (2) REMOVAL OF COVERED CLASS ACTIONS,--Any covered class action brought in any State court involving a covered security, as set forth in paragraph (I), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

15 U.S.C. § 78bb(f)(1)(A),(B) & (2). Thus SLUSA authorizes the removal of all private actions that are actually traditional securities fraud claims that fall within its ambit to be removable to federal court and makes the state law claims subject to dismissal. 15 U.S.C. § 78bb(f)(1)-(2). Korsinsky, No. 01 6085(SWK), 2002 WL 27775 at *3; Hardy **[*11]** v. Merrill Lunch, 2001 U. S. Dist. LEXIS 19748, No. 01 Civ. 5973(NRB), 2001 WL 1524471, *2 (S.D.N.Y. Nov. 30, 2001).

To defeat a motion to remand for improper removal under SLUSA, Defendants must show that (1) the action is a "covered class action" under SLUSA; (2) that the causes of action on

:ir face are based on state statutory or common law; (3) that it involves a "covered security" ıder SLUSA; (4) that it alleges Defendants have misrepresented or omitted material facts; ı (5) that the alleged misrepresentation or omission was made "in connection with" the rchase or sale of the covered security. Korsinsky, 2002 WL 27775, *3; Hardy, 2001 U. S. ;t. LEXIS 19748, 2001 WL 1524471 at *3.

ıintiffs argued that removal of this case from the Superior Court of the State of Delaware in ;w Castle County, Delaware was improper because Section 22 of the Securities Act of 1933, ı which jurisdiction is premised, provides that state and federal courts have concurrent risdiction along with an express prohibition regarding removal of claims filed in state court:

> The district courts of the United States and United States courts of any Territory shall have jurisdiction of offenses **[*12]** and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and concurrent with State and Territorial courts, except as provided in section 16 [15 U.S.C. § 77p] with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by [15 U.S.C. §§ 77a et seq.].

15 U.S.C. § 77v(a). Furthermore, § 77v(a) clearly states that no such claims "shall be emoved to any court of the United States." 15 U.S.C. § 77v(a). Plaintiffs maintain that 28 J.S.C. § 1441(a) by its own terms ("Except as otherwise expressly prohibited by Act of Congress . . . .") does not apply where removal is expressly prohibited by another federal statute. Moreover, they contend that Defendants' reliance on SLUSA, 15 U.S.C. § 77p(b), n3 is inapposite because SLUSA, which allows removal for "covered class action[s] . . . set forth is subsection (b)," applies only to certain class actions that assert state statutory or common law claims, and not to this **[*13]** action, which is based solely on federal law, i.e., the Act.

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n3 Section 77p(b) provides in relevant part,

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal Court by any private party alleging--
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

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Although Plaintiffs cite as authority for their argument Derdiger v. Tallman, 75 F. Supp. 2d 322 (D. Del. 1999), which also involved an exchange of stock in a merger, that case is not on point. Originally plaintiffs in that action filed a class action under Delaware state law alleging breach of fiduciary duty against one of the merging companies through distribution of false information in a proxy statement and aiding and **[*14]** abetting by the other merging entity. Subsequently plaintiffs amended their complaint to allege equitable fraud in these false proxy statements with the intent to induce the stockholders to vote for the merger, also under Delaware state law. The defendant removed the suit under SLUSA and plaintiff moved for

nand. *SLUSA contains a "savings clause," § 78bb(f)(3), permitting class actions involving ›vered securities" based on state law that would otherwise be removable to continue in state ırt if they fell within one of its three exceptions. The Derdiger court found in that case that ›intiff's equitable fraud claim under Delaware law fell within the savings clause. Here the rties agree that none of the claims brought by Plaintiffs is a state law claim, nor does any l within the exceptions preserved by the savings clause.

efendants contend that SLUSA is applicable and removal proper because the case is a overed class action" as defined in § 77p(f)(2)(A)(i)(II), the stock is a "covered security" nder § 77p(f)(3) and 77r(b)(1)(a), it involves an alleged untrue statement of a material fact connection with the purchase or sale of a covered security or used or employed **[*15]** a anipulative device on contrivance in connection with the purchase or sale of a covered ecurity under § 77p(b), and does not fall within the exceptions to removal under § 77p(d). hey contend that the removal clause's (§ 77p(c)'s) reference to subsection (b), the reemption clause (§ 77p(b)), incorporates the types of class action that can be removed those alleging "(1) an untrue statement or omission of a material fact in connection with the urchase or sale of a covered security" or "(2) that the defendant used or employed any nanipulative or deceptive device or contrivance in connection with the purchase or sale of a overed security"), but does not restrict removal only to class actions alleging securities fraud ınder state law. They offer several reasons for their interpretation. First, Plaintiffs' construction would render SLUSA's amendment of the separate anti-removal provision meaningless and violates the fundamental principle in statutory construction of giving meaning to every word used by Congress and avoiding an interpretation that would render some anguage superfluous. The anti-removal clause in the 1933 Act, stating that "no case arising under this subchapter **[*16]** and brought in any State Court" may be removed "except as provided in section 77p(c) of this title," would make no sense because state-law claims can never arise under the federal 1933 Act. Only by construing § 77v(a)'s exception to apply to all claims, federal and state, that fall within § 77p(c) can one avoid nullifying § 77v(a)'s exception to nonremovability, Second, Plaintiffs' construction makes the SLUSA amendments redundant. SLUSA amended both the 1933 Securities Act and the Securities Exchange Act of 1934, which makes federal court the exclusive forum. Defendants insist that if Congress had intended to authorize the removal of only state-law claims, it would not have had to amend both. By amending both, they argue, Congress demonstrated a desire to permit removal of all covered securities fraud class actions, regardless of whether they plead claims under the 1933 Act, the 1934 Act or state law. Defendants also argue that no court has ever held that claims under the 1933 Act cannot be removed under SLUSA. They further insist that all courts considering SLUSA's removal provisions have assumed that all state claims, except those falling within the savings clause, can be removed **[*17]** to federal court. Defendants point to two commentators who have concluded that SLUSA prevents claims under the Securities Act of 1933 from being brought in state court. n4

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n4 David M. Brodsky, Private Actions and Private Rights: Current Hot Topics in Securities Litigation, 1151 Practicing Law Institute, Corporate Law and Practice Course Handbook Series 773, 806 (1999)("[SLUSA] prevents . . . action under the Securities Act of 1933 from being brought in state court); Allan Horwich, The Securities Litigation Uniform Standards Act has Begun to Achieve its Purpose, 3 No. 6 Wallstreetlawyer.com: Sec. Elec. Age 4, available on Westlaw ("SLUSA amended Section 22(a) to make covered class actions under the Securities Act removable.").

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After review, the Court finds Defendants' arguments unpersuasive and disagrees with Defendants' broad assertion regarding the case law. The Court emphasizes that no court has held that claims under the 1933 Act, standing alone, are removable under SLUSA. Indeed, this is the only **[*18]** post-SLUSA case that the Court has discovered in which defendants have

empted to do so. Nor is this Court aware of any published decision that has deviated from plain, literal meaning of the non-removability clause of the 1933 Act. It also notes that the e law, including the authority cited by Defendants, interpreting the removal provision under JSA has focused on the specific language of § 78bb(f)(1) & (2) and have applied it to state- claims only. Furthermore, post-SLUSA cases have referred to the non-removal provision in ir discussions of and comparisons to other federal statutes in determining whether the ter allow for removal where jurisdiction is concurrent. See, e.g., Paine Webber, Inc. v. hen, 276 F.3d 197, 208-09 (6th Cir. 2001); Roseman v. Best Buy Co., 140 F. Supp.2d 32, 1334 (S.D. Ga. 2001).

addition, the removal sections under SLUSA are expressly and precisely drawn and limited. 5 U.S.C. § 78bb(f)(1) & (2). Moreover, this Court observes that there is no allegation, no less ny evidence, in this action that Plaintiffs are attempting to fraudulently plead around SLUSA avoid removal **[*19]** into state court. See, e.g., Bertram v. Terayon Communications ystems, Inc., 2001 U. S. Dist. LEXIS 6215, 2001 WL 514358 (C.D. Cal. Mar. 27, 2001). More nportant, there is no express statement by Congress that it was modifying the traditional rule rohibiting removal of cases brought under the 1933 Act. Congress could easily have made a tatement in SLUSA expressly modifying this provision had it so intended. "The touchstone of he federal district court's removal jurisdiction is . . . the intent of Congress." Metropolitan Life ns. Co. v. Taylor, 481 U.S. 58, 66, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987).

or these reasons, the Court

ORDERS that its previous order denying Plaintiffs' motion to remand is VACATED and H-01-4381 is REMANDED for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c) to the Superior Court for the State of Delaware in New Castle County, where it was pending under Case No. 00C-06-257.

SIGNED at Houston, Texas, this 5th day of February, 2002.

MELINDA HARMON

UNITED STATES DISTRICT **[*20]** JUDGE

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