(Mis)Interpreting SLUSA: Closing the Jurisdictional Loophole in Federal Securities Class Actions

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Over the past fifteen years, Congress has twice attempted to curb frivolous securities class action lawsuits. It first passed the Private Securities Litigation Reform Act ("PSLRA"), which fell short of achieving Congress's goal because plaintiffs were able to avoid the more stringent rules of federal courts by filing securities class action claims in state courts. Congress then sought to close this loophole by passing the Securities Litigation Uniform Standards Act ("SLUSA"), which amended the Securities Act of 1933 ("1933 Act") to make federal court the exclusive venue for certain securities class actions.

Congress's effort has been complicated, though, by the multiple district court interpretations of the SLUSA amendments that have developed. This article argues that the correct answer lies in SLUSA's revision to the 1933 Act's jurisdictional clause. Unlike other approaches to interpreting the 1933 Act, what I call the "jurisdictional approach" to SLUSA finds strong support in both the text and the congressional intent underlying the statute. This reading leads to a harmonious interpretation of the rest of SLUSA's revisions, and is therefore the approach judges should use when they apply the 1933 Act in cases involving "covered class actions" to keep federal claims in federal court.

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INTRODUCTION

In response to the stock market crash of 1929, Congress passed the Securities Act of 1933[1] ("1933 Act") to provide the first comprehensive regulation of securities markets.[2] The 1933 Act requires companies to provide full and fair disclosure of securities sold in interstate and foreign markets by filing a registration statement with the Securities and Exchange Commission and providing prospective investors with detailed information before issuing securities to the public.[3] The 1933 Act also contains a private right of action, but originally provided that if a plaintiff chose to file a class action in state court, her claim could not be removed to federal court.[4] Although the 1933 Act's "jurisdictional provision" gave state and federal courts concurrent jurisdiction over a private cause of action arising under the 1933 Act, the "anti-removal provision" disallowed removal once a plaintiff chose to file in a particular court.[5] As a result, plaintiffs were given the power to choose the forum for class actions arising under the 1933 Act.[6]

Then, in 1995, Congress attempted to limit the number of securities class actions by passing the Private Securities Litigation Reform Act ("PSLRA").[7] The purpose of the PSLRA was to prevent courts from certifying meritless class actions alleging fraud in the sale of securities.[8] To accomplish this objective, the PSLRA established procedural, jurisdictional, and substantive reforms that applied in federal courts.[9] However, because the 1933 Act allowed plaintiffs to choose to file suit in state courts, plaintiffs were able to avoid the more stringent requirements of the PSLRA.

In order to remedy this, in 1998, Congress passed the Securities Litigation

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1. Securities Act of 1933 (1933 Act), ch. 38, § 22, 48 Stat. 74 (prior to 1998 amendment).

2. William B. Snyder, Jr., Comment, *The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court*, 85 N.C. L. REV. 669, 672 (2007).

3. *Id.*

4. 1933 Act, § 22, 48 Stat. at 86 (prior to 1998 amendment).

5. *Id.*; *see infra* Part I.

6. *See* Snyder, *supra* note 2, at 673.

7. Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995).

8. Knox v. Agria Corp., 613 F. Supp. 2d 419, 421 (*citing* Lander v. Hartford Life and Annuity Ins. Co., 251 F.3d 101, 107 (2d. Cir. 2001)).

9. Merrill Lynch, Pierce, Fenner & Smith v. Dabit, 547 U.S. 71, 81 (2006) (*quoting* H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)).

Uniform Standards Act[10] ("SLUSA"), which revised the jurisdictional and anti-removal provisions of the 1933 Act in a way that altered federal court jurisdiction over 1933 Act class actions.[11] Congress intended the SLUSA amendments to make federal court the exclusive venue for most 1933 Act class action lawsuits so the requirements of the PSLRA would apply.[12] Congress made this change to prevent plaintiffs from "evad[ing] the protections that Federal Law provides against abusive litigation" by filing suit in state court.[13]

Since SLUSA was enacted, the federal judiciary has struggled with its application to class action removal for claims arising under the 1933 Act.[14] Specifically, courts are divided on whether they have jurisdiction to hear class action lawsuits arising under the 1933 Act.[15] The courts' primary disagreement is over how SLUSA's revision to the 1933 Act's anti-removal provision should be interpreted; this has led to a major split in the federal judiciary.[16] Some judges take a narrow approach to interpreting the revised anti-removal provision, and conclude that federal courts do not have jurisdiction over class actions brought under the 1933 Act.[17] Alternatively, other judges take a broader approach to reading the revised anti-removal provision, concluding that

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10. Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, § 101, 112 Stat. 3230 (1998) (codified as amended at 15 U.S.C. § 77v(a) (2000)).

11. This article will refer to the amendments to these two provisions as the "SLUSA amendments."

12. H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.).

13. *Id.*

14. *Compare* Unschuld v. Tri-S Sec. Corp., No. 06 Civ. 2931-JEC, 2007 U.S. Dist. LEXIS 685132007 (N.D. Ga. Sept. 14, 2007) (following the narrow approach and granting remand), Irra v. Lazard Ltd., No. 05 Civ. 3388 (RJD)(RML), 2006 U.S. Dist. LEXIS 61395 (E.D.N.Y. Aug. 15, 2006) (same), Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Comm'ns Corp., N. CV 05-2730-RGK, 2005 U.S. Dist. LEXIS 14202 (C.D. Cal. June 28, 2005) (same), *In re* Tyco Int'l, Ltd., 322 F. Supp. 2d 116 (D.N.H. 2004) (same), Nauheim v. Interpublic Group, No. 02-C9211, 2003 U.S. Dist. LEXIS 6266 (N.D. Ill. Apr. 16, 2003) (same), Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp., No. 03-cv-0714-BTM (JFS), 2003 U.S. Dist. LEXIS 15832 (S.D. Cal. Aug. 27, 2003) (same), *and In re* Waste Mgmt. Inc. Secs. Litig., 194 F. Supp. 2d 590 (S.D. Tex. 2002) (same), *with* Rubin v. Pixelplus Co., No. 06 Civ. 2964 (ERK), 2007 U.S. Dist. LEXIS 17671 (E.D.N.Y. Mar. 13, 2007) (following the broad approach and denying remand), Pinto v. Vonage Holdings Corp., No. 07-62, 2007 U.S. Dist. LEXIS 33287, 2007 1381746 (D.N.J. May 7, 2007) (same), Lowinger v. Johnston, No. 3:05-CV-316-H, 2005 U.S. Dist. LEXIS 44720 (W.D.N.C. Oct. 13, 2005) (same), *In re* King Pharms., Inc., 230 F.R.D. 503, 505 (E.D. Tenn. 2004) (same), Kulinski v. Am. Elec. Power Co., No. Civ. A C-2-03-412, 2003 U.S. Dist. LEXIS 26447 (S.D. Ohio. Sept. 19, 2003) (same), Brody v. Homestore, Inc., 240 F. Supp. 2d 1122 (C.D. Cal. 2003) (same), and Alkow v. TXU Corp., No. 02-CV-2738-K, 2003 U.S. Dist. LEXIS 7900 (N.D. Tex. May 8, 2003) (same). *See also* Jordan A. Costa, Note, *Removal of Securities Act of 1933 Claims After SLUSA: What Congress Changed, and What it Left Alone*, 78 ST. JOHN'S L. REV. 1193, 1223 (2004).

15. All of the courts mentioned in note 14 agree that after the SLUSA amendments, (1) individual state and federal claims arising under the 1933 Act brought in state court are still *not* removable and that (2) state law class actions alleging fraud *are* removable. Thus, the only jurisdictional question left is whether federal class actions arising under the 1933 Act are removable to federal court. For those without a background in securities law, this can be quite confusing. This article attempts to explain 1933 Act jurisdiction for claims in the simplest way possible.

16. *See supra* note 14.

17. *See supra* note 14 for courts following the narrow approach and granting remand.

federal courts do in fact have jurisdiction over such claims.[18]

Although the arguments made by both groups of judges have merit, neither interpretation is entirely convincing. District courts that adopt a narrow approach to interpreting the revised anti-removal provision find support in the plain meaning of its text.[19] However, this approach conflicts with the congressional intent underlying SLUSA because it results in federal courts lacking jurisdiction to hear 1933 Act claims.[20] Conversely, courts that adopt a broad approach to interpreting the revised anti-removal provision find support in SLUSA's congressional findings. However, they employ a strained textual interpretation of the 1933 Act's anti-removal provision to reach this result.[21]

To further complicate this disagreement among trial judges, there is little precedent governing district court interpretations of SLUSA. Procedural rules make it extremely difficult for federal appellate courts to review district courts' decisions to grant or deny remand of 1933 Act class action claims.[22] Thus, trial courts are forced to interpret SLUSA's revisions to the 1933 Act without guidance from appellate courts, resulting in a patchwork of case law that varies from district to district,[23] and even among judges in a single district.[24] This inconsistency encourages plaintiffs to seek out forums that employ the narrower approach to interpreting the 1933 Act's amended anti-removal provision. Doing so ensures that class actions brought in state court remain in state court, where the plaintiff can avoid the heightened pleading requirements and other limitations that exist when 1933 Act claims are litigated in federal court. This forum shopping disrupts the consistent application of federal law while creating a significant amount of uncertainty for both investors in and

18. *See supra* note 14 for courts following the broad approach and denying remand.

19. *See Unschuld*, 2007 U.S. Dist. LEXIS 68513, at 19-20 (N.D. Ga. Sept. 14, 2007).

20. H.R. Rep. No. 105-803, at 13.

21. *See* Rubin v. Pixelplus Co., No. 06 Civ. 2964 (ERK), 2007 U.S. Dist. LEXIS 17671, at 14-15 (E.D.N.Y. Mar. 13, 2007).

22. For example, an order remanding a case to state court is unreviewable. 28 U.S.C. § 1447 (2000) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."); Kircher v. Putnam Trust Funds, 126 S. Ct. 2145, 2153 (2006). Conversely, federal appellate courts can only hear appeals from final decisions, and a denial of remand is not considered final. *See Kircher*, 126 S. Ct. at 2157; Milbank, Tweed, Hadley & McCloy, LLP, *Plaintiff's Motion To Remand 1933 Act Claims Denied*, Feb. 24, 2009, *available at* http://www.milbank.com/NR/rdonlyres/25BA47E8-5BA6-4784-A4DC-5B1CF2EA9B65/0/022409_SLUSA_and_1933_ACT_Claims.pdf.

23. For example, the Southern District of Texas and the Northern District of Texas have adopted opposing views on how SLUSA's revision to the anti-removal provision affects the removability of 1933 Act claims brought in state court. *Compare* Alkow v. TXU Corp., 2003 WL 21056750 (N.D. Tex. May 8, 2003) (denying remand) *with In re* Waste Mgmt., Inc. Sec. Litig., 194 F. Supp. 2d 590 (S.D. Tex. 2002) (granting remand). Thus, a plaintiff seeking to avoid the heightened pleading requirements and other class action reforms in federal court would achieve his desired result in the Southern District of Texas, but not in the Northern District of Texas. *See* Snyder, *supra* note 2, at 678.

24. In the Eastern District of New York, some judges take the broad approach while others take the narrow approach to interpreting the SLUSA amendments. *Compare* Irra v. Lazard Ltd., 2006 WL 2375472 (E.D.N.Y. Aug. 15, 2006) (granting remand) *with* Rubin v. Pixelplus Co., Ltd., 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007) (denying remand).

issuers of securities.

This article proposes a solution to this problem by presenting a third approach to interpreting the 1933 Act that focuses on SLUSA's revision to the 1933 Act's jurisdictional provision, rather than focusing primarily on its anti-removal provision, which is the approach most courts have taken. This "jurisdictional approach" concludes that federal courts do in fact have jurisdiction over 1933 Act class actions by adopting a plain-meaning interpretation of the 1933 Act's jurisdictional clause that is supported by both the text and the congressional intent underlying SLUSA.[25] Although the jurisdictional approach has been employed by few courts so far,[26] this article argues that all courts should apply it when interpreting the SLUSA amendments.

The analysis proceeds in three parts. Part I provides background on congressional efforts to reform class actions. Part II summarizes the two competing approaches to interpreting SLUSA that focus on its revision of the anti-removal provision. Part III introduces the jurisdictional approach as the best interpretation of the SLUSA amendments by using a 2009 case from the United States District Court for the Southern District of New York, *Knox v. Agria*, as a case study, and argues for the universal adoption of this approach.[27] Part IV examines how another judge from the Southern District of New York applied the jurisdictional approach in the recent high-profile securities class action *In re Fannie Mae 2008 Securities Litigation*.[28] The article then briefly concludes.

I. SECURITIES LITIGATION REFORM: CREATING LOOPHOLES INSTEAD OF CLOSING THEM

Over the course of the twentieth century, private securities litigation became an increasingly important component of securities regulation.[29] Because many individual 1933 Act claims are too small to justify the individual litigation expense, the class action's ability to aggregate such claims makes it a popular vehicle for asserting securities law violations.[30] However, class actions became highly susceptible to abuse by plaintiff's attorneys,[31] who took advantage of the 1933 Act's class action provision by "using professional

25. *Knox*, 613 F. Supp. 2d at 424-25.

26. *See* Rovner v. Vonage Holdings Corp., 2007 U.S. Dist. LEXIS 8656 (D.N.J. Fed. 5, 2007) (applying the jurisdictional approach); Knox v. Agria Corp., 613 F. Supp. 2d 419 (S.D.N.Y. 2009) (same); *In re* Fannie Mae 2008 Sec. Litig., 2009 U.S. Dist. Lexis 109888 (S.D.N.Y. 2009) (same).

27. *Knox*, 613 F. Supp. 2d at 419.

28. *In re* Fannie Mae 2008 Sec. Litig., 2009 U.S. Dist. Lexis 109888 (S.D.N.Y. 2009).

29. *See* Snyder, *supra* note 2, at 675.

30. *In re* VMS Sec. Litig., 136 F.R.D. 466, 473 (N.D. Ill. 1991).

31. Evan A. Davis et al., *Class Actions*, *in* 7 SECURITIES LAW TECHNIQUES: TRANSACTIONS AND LITIGATION § 92.01 (A.A. Sommer, Jr. ed., 2006).

plaintiffs in their cases, filing carbon copy complaints, and racing to the courthouse to be the first to file a case" immediately after a company's press release announced unexpectedly weak earnings.[32] Additionally, because of the substantial expense of defending themselves against class actions, corporations often chose to settle even if plaintiffs filed meritless class action lawsuits.[33]

These problems prompted congressional action. In 1995, Congress passed the Private Securities Litigation Reform Act[34] ("PSLRA") in order to prevent the certification of meritless class actions alleging fraud in the sale of securities.[35] The PSLRA consists of comprehensive procedural, jurisdictional, and substantive reforms that apply in federal courts.[36] These reforms include capping recoverable damages and attorneys' fees, restricting the selection and compensation of lead plaintiffs, making sanctions an available mechanism to deter frivolous lawsuits, and authorizing a stay of discovery pending resolution of any motion to dismiss.[37] As a result of the PSLRA's defendant-friendly structure, however, plaintiffs made the strategic decision to avoid its limitations by bringing suit in state courts under state statutes and common law.[38] Plaintiffs were therefore able to exploit a jurisdictional loophole to escape the statute's reach.[39]

In response to this loophole, Congress passed SLUSA in 1998 to "correct the perceived failure of the PSLRA to curb abuses of federal securities fraud litigation arising under the 1933 Act."[40] SLUSA amended the 1933 Act to make federal court the "exclusive venue for most securities class action lawsuits [and] . . . to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than Federal, court."[41] To accomplish this purpose, SLUSA amended two provisions of the 1933 Act relevant to filing class actions: the anti-removal provision and the jurisdictional provision.

However, since SLUSA went into effect, district courts have had significant

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32. Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 136 (2004).

33. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975).

34. Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995).

35. *Knox*, 613 F. Supp. 2d at 421 (*citing* Lander v. Hartford Life and Annuity Ins. Co., 251 F.3d 101, 107 (2d. Cir. 2001)).

36. Merrill Lynch, Pierce, Fenner & Smith v. Dabit, 547 U.S. 71, 81 (2006) (*quoting* H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)).

37. *Id.* at 81 (*citing* 15 U.S.C. § 78u-4 (2009)).

38. Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 123 (2d Cir. 2003) ("Confronted with more onerous procedural requirements and dimmed prospects of success under the PSLRA, litigants simply abandoned use of federal court and filed suit in state court under state securities laws.").

39. *Id.* ("PSLRA's objectives went largely unrealized due to this 'federal flight' loophole").

40. *Knox*, 613 F. Supp. 2d at 421.

41. H.R. Rep. No. 105-803, at 13.

difficulty determining how Congress intended the SLUSA amendments to alter the 1933 Act's provisions applicable to class actions. The major dispute among the courts is whether or not federal courts retain jurisdiction over class actions arising under the 1933 Act.

II. THE REVISED ANTI-REMOVAL PROVISION

The confusion over the removal of 1933 Act class actions is grounded in conflicting interpretations of SLUSA's revision to the anti-removal provision.[42] The provision's confusing, layered structure makes it difficult even to comprehend the text, but it is important to follow the steps of analysis in order to assess the validity of the competing interpretations.

First, we look at the provision as it was initially passed in 1933. The 1933 Act's original anti-removal provision provided that "no case arising under this title and brought in any State court . . . shall be removed to any court of the United States."[43] Second, we look at the new language the SLUSA amendment inserted into the original provision. SLUSA modified this general prohibition against removal as follows: "*[e]xcept as provided in section 77p(c) of [the 1933 Act]*, no case arising under [the 1933 Act] and brought in any State court . . . shall be removed" to federal court.[44]

Third, we look at Section 77p(c) of the 1933 Act, to which the SLUSA amendment refers. Section 77p(c), the "removal provision," establishes that "any covered class action brought in any State court involved a covered security, as set forth in subsection (b)" can be removed to federal court "and shall be subject to subsection (b)."[45] And fourth, we look at subsection (b), the "preclusion provision," which prohibits state or federal courts from hearing any covered class action raising state statutory or common law claims based on "an untrue statement or omission of a material fact" or on the use of "any manipulative or deceptive device or contrivance" in the sale of a nationally traded security.[46]

Courts that focus on interpreting the anti-removal provision to determine whether federal jurisdiction exists over 1933 Act claims disagree about the ambiguity in sections (b) and (c).[47] Specifically, as noted above, the removal provision (c) cites the preclusion provision (b). Thus, because (c) allows

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42. *See* note 14, *supra*; *see also* Snyder, *supra* note 2, at 680.

43. 1933 Act, § 22, 48 Stat. at 86 (prior to 1998 amendment).

44. SLUSA, § 101, 112 Stat. at 3230 (codified as amended at 15 U.S.C. § 77v(a) (2000)) (emphasis added).

45. SLUSA, § 101, 112 Stat. at 3228 (codified as amended at 15 U.S.C. § 77p (2000)) (emphasis added).

46. SLUSA, § 101, 112 Stat. (codified as amended at 15 U.S.C. § 77p(b) (2000)); *Knox*, 613 F. Supp. 2d at 422.

47. *See* Snyder, *supra* note 2, at 680-81.

removal of securities "as set forth in subsection (b)," and because (b) addresses only class actions "based upon the statutory or common law of any State," some district courts have taken a narrow interpretive approach, concluding that (c) only authorizes removal of class actions alleging state-law claims, and have therefore remanded class actions alleging pure 1933 Act claims to state court.[48] By holding that purely federal claims brought in state court under the 1933 Act are not removable, however, these courts have created a new loophole that allows federal class action lawsuits to be brought in state court.

Conversely, some courts take a broader approach to sections (b) and (c) by relying on SLUSA's congressional findings to support the conclusion that federal courts have jurisdiction over class actions arising under the 1933 Act.[49] These findings explain that Congress passed SLUSA in order to remedy the PSLRA's failure to "prevent abuses in private securities fraud lawsuits" and because "a number of securities class action lawsuits have shifted from Federal to State courts," requiring the enactment of "national standards for securities class action lawsuits."[50]

Thus, the broad approach to interpreting the anti-removal provision finds support in the congressional intent underlying SLUSA, as exemplified by the foregoing legislative findings.[51] As noted above, however, the actual text of sections (b) and (c) does not offer much support for the proposition that federal courts retain jurisdiction over class actions arising under the 1933 Act.[52] Although both the narrow and broad approaches have been adopted by a significant number of district courts across the country, neither rests on ground firm enough to win over detractors.[53]

48. *Id. Compare* Rubin v. Pixelplus Co., No. 06-CV-2964, 2007 U.S. Dist. LEXIS 17671 (E.D.N.Y. Mar. 13, 2007) (interpreting SLUSA broadly to include 1933 Act claims) *with* Unschuld v. Tri-S Sec. Corp., NO. 1:06-CV-02931-JEC, 2007 U.S. Dist. LEXIS 68513 (N.D. Ga. Sept. 14, 2007). (interpreting SLUSA narrowly to include only covered class actions raising state or common law claims).

49. *Unschuld*, 2007 U.S. Dist. LEXIS 68513 (N.D. Ga. Sept. 14, 2007).

50. Brody v. Homestore, Inc., 240 F. Supp. 2d 1122, 1124 (C.D. Cal. 2003) (*citing* SLUSA's congressional findings at P.L. 105-353, S. 2).

51. "The premise of this legislation is simple: lawsuits alleging violations that involve securities that are offered nationally belong to Federal court." 144 Cong. Rec. H11019-01, H11020 (1998) (statement of Rep. Bliley). "The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court." *Id.* (Conf. Rep.).

52. *Brody*, 240 F. Supp. at 1123 ("Defendants' arguments convince the Court that, although inartfully (or even inaccurately) worded, SLUSA authorizes removal of class actions asserting violations of the 1933 Act.").

53. *See* note 14, *supra*.

III. THE JURISDICTIONAL APPROACH TO SLUSA: *KNOX V. AGRIA* AS A CASE STUDY

In addition to the anti-removal provision approaches, there is another interpretation, the "jurisdictional approach," that is rooted in both the text *and* the congressional findings underlying the SLUSA amendments.[54] By focusing on SLUSA's revision of the 1933 Act's jurisdictional clause, this approach concludes that state courts no longer have concurrent jurisdiction over class action claims arising under the 1933 Act.[55] This interpretation therefore gives federal courts sole jurisdiction over 1933 Act class action claims, rendering the anti-removal provision irrelevant with regard to the issue. *Knox v. Agria*, a 2009 Southern District of New York case that applied the jurisdictional approach, is a case study for how to clearly and correctly interpret SLUSA's amendments to the 1933 Act.

A. A Convincing Case for Keeping 1933 Act Claims in Federal Court

In *Knox*, the plaintiff filed a putative class action in New York Supreme Court (state trial court) asserting claims under the 1933 Act.[56] His complaint against the defendant alleged that the state court had subject-matter jurisdiction and that his claims therefore could not be removed to federal court.[57] At the same time, three federal securities class actions were in the United States District Court for the Southern District of New York.[58] The plaintiff's complaint contained allegations similar to those in the federal complaints.[59] The defendants removed the action to federal court, and the plaintiff filed a motion to remand.[60]

The district court denied the motion to remand, holding that federal court is the appropriate forum for a 1933 Act class action.[61] After examining the way SLUSA revised the 1933 Act's jurisdictional provision, *Knox* concludes that: (1) 1933 Act class action claims are removable from state to federal court, and (2) state courts lack jurisdiction over 1933 Act class actions, so they must dismiss those claims that are not removed.[62]

The *Knox* decision emphasizes the first sentence of the jurisdictional

54. *See* Rovner v. Vonage Holdings Corp., 2007 U.S. Dist. LEXIS 8656, at 10 (D.N.J. Feb. 5, 2007); *Knox*, 613 F. Supp. 2d at 421 (S.D.N.Y. 2009); *In re* Fannie Mae 2008 Securities Litigation, 2009 U.S. Dist. Lexis 109888, at 8 (S.D.N.Y 2009).

55. *Knox*, 613 F. Supp. 2d at 421.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See* Milbank, *supra* note 22.

61. *Knox*, 613 F. Supp. 2d at 425.

62. *Id.*

provision of the 1933 Act, which states that federal and state courts have concurrent jurisdiction over claims arising under the 1933 Act, "except as provided in section 77p of this title with respect to covered class actions." [63] SLUSA added the words "except as provided in section 77p" to the jurisdictional provision; prior to SLUSA, state and federal courts had concurrent jurisdiction over all 1933 Act claims.[64] The *Knox* court interprets this revision by reading "except as provided" as a limiting phrase that modifies the statute's general rule that federal and state courts have concurrent jurisdiction over 1933 Act claims. [65] Thus, by adding this modifying language, Congress removed state courts' power to hear a particular type of 1933 Act claim, and chose to give that power exclusively to the federal judiciary.[66]

The type of federal claim that Congress removed from state courts' jurisdiction falls under the statute's umbrella term "covered class action."[67] Since "covered class action" is a term of art crafted by Congress, the *Knox* decision looks to section 77p of the 1933 Act for the definition.[68] Section 77p(f)(2) explains that a "covered class action" is any lawsuit in which the class has more than fifty members and "questions of law or fact . . . predominate over any questions affecting only individual persons or members."[69]

Thus, under *Knox*, the 1933 Act exempts claims that qualify as "covered class actions" from the general requirement that 1933 Act claims receive concurrent state and federal jurisdiction. As *Knox* concludes, "[b]y excluding these covered class actions from concurrent state and federal jurisdiction, federal courts alone have jurisdiction to hear them. After SLUSA, state courts were no longer 'court[s] of competent jurisdiction' to hear covered class actions raising 1933 Act claims."[70]

B. The Irrelevance of the 1933 Act's Anti-Removal Provision in Determining the Removability of Covered Class Actions

Prior to *Knox*, district courts were "divided on the question whether the anti-removal provision, as amended by SLUSA, allows for removal of covered class actions raising only 1933 Act claims."[71] The *Knox* court's application of the jurisdictional approach frees up the anti-removal provision for a fresh

63. 1933 Act, § 22, 48 Stat. at 86 (codified as amended at 15 U.S.C. § 77v(a) (2000)).
64. SLUSA, § 101, 112 Stat. at 3230 (codified as amended at 15 U.S.C. § 77v(a) (2000)).
65. *Knox*, 613 F. Supp. at 424.
66. *Id.*
67. *Id.*
68. *Id.*
69. SLUSA, § 101, 112 Stat. (codified as amended at 15 U.S.C. § 77p(f) (2000)).
70. *Knox*, 613 F. Supp. 2d at 425.
71. *Id.* at 422.

interpretation. Because *Knox* does not use the anti-removal provision to establish its conclusion that federal courts have exclusive jurisdiction over 1933 Act class actions, the anti-removal provision has no bearing on the removability of such claims. As a result, once a court has interpreted the jurisdictional clause, the exception to the anti-removal provision speaks only to the issue of state-law-based covered class actions.[72] The *Knox* court concludes that state-law-based class actions alleging fraud or manipulation are also removable to federal court.[73]

In interpreting the anti-removal provision in this new light, it is important to note that after SLUSA, both covered class actions asserting 1933 Act claims *and* covered class actions asserting certain state law claims are removable.[74] However, *individual* 1933 Act claims are prohibited from being removed.[75] The *Knox* court interprets the anti-removal provision in a way that prohibits plaintiffs from adding individual 1933 Act claims to state-law-based covered class actions in order to stop a defendant from removing a covered class action to federal court. This allows the court to conclude that both federal and state-law-based class actions will always be removable to federal court, a conclusion that comports with the congressional intent that securities class actions be adjudicated in federal court.

IV. THE JURISDICTIONAL APPROACH AFTER *KNOX*: THE *IN RE FANNIE MAE 2008 SECURITIES LITIGATION*

Another district court in the Southern District of New York recently cited to *Knox* when it also followed the jurisdictional approach. In the 2009 case *In re Fannie Mae 2008 Securities Litigation*, plaintiffs brought a high-profile class action lawsuit alleging multiple violations of the 1933 Act by the Federal National Mortgage Association (Fannie Mae) and a number of investment banks.[76] The plaintiffs initially filed the 1933 Act class action in state court, and the defendants removed it to federal court.[77] The plaintiffs then moved to remand, arguing that federal courts lack jurisdiction over securities class actions brought under the 1933 Act, and that the SLUSA amendments should not be interpreted to allow removal to federal court.[78]

The court rejected both of the plaintiffs' arguments, explaining that *Knox*'s conclusion that "no state court has subject matter jurisdiction over covered

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72. *Id.* at 423.
73. *Id.*
74. *Id.* at 425.
75. *Id.*
76. *In re* Fannie Mae 2008 Securities Litigation, 2009 U.S. Dist. Lexis 109888 at 6-7 (S.D.N.Y 2009).
77. *Id.* at 7.
78. *Id.*

class actions raising 1933 Act claims" is the only appropriate interpretation of the SLUSA amendments.[79] As the court concludes, the *Knox* court's interpretation is in harmony with "SLUSA's underlying rationale: to make federal courts the exclusive venue for securities class actions."[80]

CONCLUSION

Over the past fifteen years, Congress has twice attempted to curb frivolous securities class action lawsuits. It first passed the PSLRA, which fell short of achieving Congress's goal because plaintiffs were able to avoid the more stringent rules of federal courts by filing class action claims in state courts.[81] Congress then sought to close this loophole by passing SLUSA, which amended the 1933 Act to make federal court the exclusive venue for certain securities class actions.[82]

Congress's effort has been complicated, though, by the conflicting interpretations of the SLUSA amendments that have developed. Most district courts have focused on the way SLUSA revised the anti-removal provision. Courts that take a narrow approach conclude that federal securities class actions may not be adjudicated in federal court. However, this interpretation creates another way plaintiffs can avoid federal court, reaching a result Congress did not intend. Conversely, courts that take a broad approach correctly conclude that based on Congress's intent, federal courts should have jurisdiction over federal securities class actions. However, these courts reach that conclusion by misinterpreting the language of the anti-removal provision.

This article demonstrates that the correct answer lies in SLUSA's revision to the jurisdictional clause. Unlike both approaches to interpreting the anti-removal provision, the jurisdictional approach to SLUSA finds strong support in the text *and* in the congressional intent underlying the statute. The jurisdictional approach interprets the first sentence of the jurisdictional clause of the 1933 Act to exclude state courts from hearing all federal securities class actions, thereby keeping them in federal court as Congress intended. This reading leads to a harmonious interpretation of the 1933 Act's remaining

79. *Id.* at 10 (*citing Knox*, 613 F. Supp. 2d at 423).

80. *Id.* at 9-11.

81. *See* Lander v. Hartford Annuity Ins. Co., 251 F.3d 101, 101 (2d. Cir. 2001) (*citing* PSLRA, Pub. L. No. 105-353 §§ 2(1)-(5)).

82. *Lander*, 251 F.3d at 108. *See* California Public Employees' Retirement System v. WorldCom, Inc., 368 F.3d 86, 98 (2d Cir. 2004) (finding that SLUSA "expanded federal jurisdiction" over class actions by making "federal court the exclusive venue for class actions alleging fraud in the sale of certain securities" and by closing the "loophole in the PSLRA"); New Jersey Carpenters Vacation Fund v. Harborview Mortgage Loan Trust, No. 08-593, 2008 WL 4369840, at *2 n.1 (S.D.N.Y. Sept. 24, 2008) ("Congress amended the anti-removal provision with SLUSA in 1998 to ensure that cases involving covered securities class actions be heard in federal court in order to close the remaining loopholes left by [the PSLRA].").

jurisdictional and anti-removal provisions.[83] It is therefore the approach judges should use when they apply the 1933 Act in cases involving "covered class actions" so that they do not end up with a result that paradoxically keeps federal claims in state court. [84] If judges were to universally apply the jurisdictional approach, the result would be a textually accurate interpretation of SLUSA that also effectuates Congress's intent.

83. *Knox*, 613 F. Supp. 2d at 425.

84. As *Knox* states, this approach "prevent[s] certain State private securities class action lawsuits alleging securities fraud from being used to frustrate the objectives of the [PSLRA]," and "make[s] federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities." *Id.*