Choice of Forum in Securities Litigation: Confronting the Aftermath of Congressional Reform of the Securities Act of 1933

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CHOICE OF FORUM IN SECURITIES LITIGATION:
CONFRONTING THE AFTERMATH OF CONGRESSIONAL REFORM
OF THE SECURITIES ACT OF 1933

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Abstract:
The article addresses the wave of federal legislative reform since the mid-1990s aimed at reducing forum shopping by plaintiffs in securities class actions. In particular, the article examines the direct conflict between section 22(a) of the Securities Act of 1933 (“1933 Act”), which prohibits defendants from removing 1933 Act cases from state court to federal court, and the Class Action Fairness Act of 2005 (“CAFA”), which permits removal of high-dollar class actions involving diverse parties.

The article shows how this statutory conflict has produced a recent split between the Seventh and Ninth Circuit Courts of Appeals. In July 2008, the Ninth Circuit affirmed a district court’s remand order and held that the 1933 Act’s bar on removal trumps CAFA. In contrast, in January 2009, the Seventh Circuit rejected the reasoning of the Ninth Circuit and held that CAFA’s removal provisions supersede the 1933 Act. The article critiques these decisions, as well as several district court and appellate opinions from the Second Circuit that support the Seventh Circuit’s viewpoint. The article examines the underlying policy considerations, and sets forth steps Congress and the courts may take to clarify federal jurisdiction in the midst of an upsurge in securities class actions stemming from the mortgage-backed securities crisis.

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As the financial crisis deepens, aggrieved investors seek relief from the corporations and officers that allegedly issued misleading financial statements despite knowledge of potentially massive liabilities.\(^1\) Despite – or perhaps because of – a wave of federal legislative reform since the mid-1990s aimed at reducing plaintiffs’ “forum shopping,” the debate concerning which judicial fora are available for plaintiffs alleging certain types of securities fraud persists. Plaintiffs argue that they should be able to litigate in state court so long as they draft their complaints so as to avoid the jurisdictional hooks of federal legislation such as the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")\(^2\) and the Class Action Fairness Act of 2005 ("CAFA").\(^3\) Defendants decry their adversaries’ alleged abuse of pleading requirements and argue that the recent congressional reforms mandate that all but a limited pool of securities claims belong in federal court.

The current controversy over choice of forum in securities litigation has its origins in the Great Depression. The Securities Act of 1933 ("1933 Act"),\(^4\) enacted to address fraudulent securities offerings that led in part to the Stock Market Crash of 1929,\(^5\) provided straightforward guidance to plaintiffs and defendants alike. Section 22(a) of the 1933 Act provided for concurrent jurisdiction in both state and federal courts over claims arising under the Act; plaintiffs could choose whether to sue in state or federal court.\(^6\) Section 22(a) also expressly states that claims brought in state court are not subject to removal to federal court: “no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”\(^7\) Section 22(a)’s non-removal regime remained relatively uncontroversial – and unchanged – until the end of the twentieth century.

Today, however, investors considering filing suit in state court face uncertainty. Three major pieces of federal legislation enacted since 1995 in an attempt to broaden federal jurisdiction over securities claims and class actions have muddled the issue of whether federal courts have jurisdiction over suits brought in state court that only allege violations of the 1933 Act or state laws. The resulting confusion has led to inconsistent results in district and appellate courts across the country. Depending on which circuit they are sued in for their allegedly

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\(^6\) 15 U.S.C. § 77v(a). The statute reads, in relevant part:

> The district courts of the United States . . . shall have jurisdiction of offenses and violations under this title [15 U.S.C.§§ 77a et seq.] 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 this title.

\(^7\) Id. (emphasis added).

\(^7\) Id.
fraudulent securities offerings, defendants may have significant reason to doubt whether federal courts will remand litigation to “plaintiff-friendly” state courts.

The culprit for the latest confusion is CAFA, which provides for “Federal court consideration of interstate cases of national importance under diversity jurisdiction.” CAFA amended the traditional requirements for diversity jurisdiction under 28 U.S.C. § 1332 so that complete diversity is no longer required; CAFA grants district courts original jurisdiction over “any civil action” with at least 100 potential class members where the amount in controversy exceeds $5 million and at least one plaintiff is diverse from at least one defendant. Under 28 U.S.C. § 1453, class actions meeting these requirements are removable to federal court. Thus, the anti-removal provision of the 1933 Act stands in direct conflict with the removal provision of CAFA. District courts deciding whether to remand a class action brought under the 1933 Act that also meets the jurisdictional requirements of CAFA have two choices: follow section 22(a) and rule that removal is prohibited, or find that §1453(b) supersedes section 22(a) and deny remand.

Recent litigation in the Second, Seventh, and Ninth Circuits has exposed the confusion Congress has created, as courts have dealt with the conflicting jurisdictional provisions in very

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10 28 U.S.C. § 1332(d)(2) provides:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

different ways. In July 2008, in *Luther v. Countrywide Home Loans Servicing LP*, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court’s remand order and held “that the Class Action Fairness Act of 2005, which permits in general the removal to federal court of high-dollar class actions involving diverse parties, does not supersede § 22(a)’s specific bar against removal of cases arising under the 33 Act.”12 In September 2008, in *New Jersey Carpenters Vacation Fund v. Harborview Mortgage Loan Trust 2006-4* ("Harborview"),13 a district court in the Southern District of New York addressed the same question that the Ninth Circuit faced in *Luther* but came to the opposite conclusion. “Constrained” by Second Circuit precedent that broadly interpreted CAFA’s removal provision, the Harborview court ruled that “CAFA overrides the Securities Act’s anti-removal provision” and denied plaintiffs’ motion to remand “a large, non-local securities class action dealing with a matter of national importance, the mortgage-backed securities crisis that is currently wreaking havoc with the national and international economy.”14 Likewise, in January 2009, the U.S. Court of Appeals for the Seventh Circuit, in *Katz v. Gerardi*, expressly rejected the reasoning of the Ninth Circuit in *Luther* and held that, notwithstanding section 22(a), “securities class actions covered by the [CAFA] are removable, subject to [CAFA’s] exceptions...”15

The stakes are high. As the economy tumbles, corporations argue that securities litigation risks, particularly in the class action context, are adversely affecting the competitiveness of capital markets in the United States.16 Corporate defendants warn that *Luther* will increase the risks and costs associated with underwriting a national securities offering, as defendants will have to defend “sprawling” litigation in state courts across the country.17 The plaintiffs’ bar defends the right – bestowed by Congress in 1933 and never expressly taken away – of defrauded investors to litigate in the forum of their choice for certain claims brought pursuant to the 1933 Act or state law.18 In the context of securities class actions, that federal courts often impose more stringent class certification requirements than state courts makes

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12 533 F.3d 1031, 1032 (9th Cir. 2008).
14 Id. at *19.
18 This debate over choice of forum mirrors the broader regulatory battle between these “colossal” interests groups over the ability of aggrieved investors to bring suit under federal statutes as well as state common law: issuers, underwriters, and accountants have urged contraction of private rights of action, while the plaintiffs’ bar has urged an expansion of liability. See generally Painter, supra note 8, at 11-12.
removal a critical turning point in litigation, particularly in terms of each party’s leverage in negotiating settlements.\(^{19}\)

As Justice Frankfurter recognized, “procedure is instrumental; it is the means of effectuating policy.”\(^{20}\) This Article explores how Congress has caused the uncertainty and controversy regarding plaintiffs’ choice of forum in securities litigation to fester, and the ways in which federal courts have addressed whether to exercise jurisdiction over cases suitable for removal under CAFA and similar statutes yet non-removable under section 22(a) of the 1933 Act. Part I reviews the statutory framework for removal in the often overlapping context of securities and class action litigation. Part I discusses how the Private Securities Litigation Reform Act of 1995 (“PSLRA”)\(^{21}\) and SLUSA demonstrate Congress’s intent to broaden federal jurisdiction over securities litigation, yet how Congress repeatedly left open loopholes for plaintiffs to exploit in order to remain in state court.

Part II reviews how courts decided removal issues in the wake of SLUSA. In particular, I focus on California Public Employees’ Retirement System v. Worldcom, Inc. (“Worldcom”),\(^{22}\) a Second Circuit case that had important consequences for courts addressing removal motions after the enactment of CAFA.

Part III explores CAFA and the contrasting approaches that courts in the Second, Seventh, and Ninth Circuits have taken in deciding whether to grant plaintiffs’ motions to remand securities claims that, on the one hand, are non-removable under the 1933 Act, yet, on the other hand, may be removable under CAFA. I argue that courts in the Second Circuit repeatedly have allowed policy considerations to cloud their statutory interpretation in favor of expanded federal jurisdiction. I compare the Second Circuit’s approach to the more straightforward analysis of the Ninth Circuit in Luther, and evaluate the Seventh Circuit’s decision creating a circuit split in Katz. I conclude that both the Seventh and Ninth Circuit set forth reasonable interpretations of Congress’s poorly drafted “reforms,” but that the Seventh Circuit’s view is the most likely to persist.

Part IV discusses the aftermath of Luther, Harborview, and Katz, examines the underlying policy considerations, and sets forth steps Congress and the courts may take to clarify federal jurisdiction in the midst of an upsurge in securities class actions.

I

REMOVAL IN SECURITIES LITIGATION: THE TRADITIONAL FRAMEWORK

One commentator has noted that “[w]ith the ebbs and flows of the securities markets . . . investor protection has been a fluctuating concept in the eyes of Congress. In bad times, investors merit protection from corporate wrongdoers and securities professionals manipulating the markets. In good times, investors become the pawns of plaintiffs’ lawyers seeking to exploit their clients’ misfortunes for their own gains.”\(^{23}\) The discussion below highlights the major

\(^{19}\) See infra notes 346-49 and accompanying text.


\(^{22}\) 368 F.3d 86, 90 (2d Cir. 2004).

changes in federal law regarding plaintiffs’ choice of forum in securities litigation. Despite several pieces of legislation enacted to broaden federal jurisdiction over the most common types of securities litigation, Congress has never expressly taken away plaintiffs’ power, under section 22(a) of the 1933 Act, to litigate certain types of securities claims in state courts.

As a matter of background, claims arising under federal law fall within the original jurisdiction of federal courts under 28 U.S.C. § 1331. Pursuant to 28 U.S.C. § 1332, claims meeting the requirements for diversity jurisdiction similarly fall within the jurisdiction of the federal courts. Claims properly brought under either § 1331 or § 1332 are subject to removal under 28 U.S.C. § 1441(a), which establishes removal jurisdiction:

Except as otherwise provided by an Act of Congress, any civil case 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.24

As discussed below, “except as otherwise provided by an Act of Congress” in § 1441(a) refers to statutes such as section 22(a) of the 1933 Act.25

A. The Securities Act of 1933

States began enacting “blue sky” laws in 1911 and by 1933 every state except Nevada had passed a statute regulating the sales of securities.26 Most state laws preserved common law remedies and included civil liability provisions.27 However, the blue sky laws were inadequate, given the inability of each state’s securities commissioner to extend his authority outside of his state.28 Indeed, the blue sky laws failed to prevent or remedy two “major waves” of securities fraud - one lasting from 1917 to 1920, the other in the late 1920s.29

After the election of President Franklin Roosevelt, Congress acted quickly to enact federal securities legislation that would complement state laws by addressing the deficiencies of state-by-state regulation and the “race to the bottom,” i.e., competition among states for corporate charters that led to laxity in states’ enforcement of fiduciary duties.30 The Securities Act of 193331 regulates distributions of securities;32 Congress provided an express private right

26 See Painter, supra note 8, at 21.
27 See id.
28 See id. at 22-23
29 See id. at 23.
30 See id. at 13-14, 23-24.
32 See 3 James D. Cox & Thomas Lee Hazen, Cox & Hazen On Corporations §27.09 (2d ed. 2003); 1 Louis Loss & Joel Seligman, Securities Regulation 225 (3d ed. 1989) (noting that the 1993 Act “is concerned by and large with the initial distribution of securities rather than with their subsequent trading”).
of action for purchasers of securities in section 11 of the 1933 Act.\textsuperscript{33} Section 22(a) of the 1933 Act provides for concurrent jurisdiction in both state and federal courts over claims arising under the Act.\textsuperscript{34} Section 22(a) also expressly states that claims brought in state court are not subject to removal to federal court: “no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”\textsuperscript{35} When a plaintiff has properly filed a case under the 1933 Act in state court, the 1933 Act’s anti-removal provision trumps § 1441(a) and the defendant cannot remove the case to federal court. Hence, in enacting section 22(a), Congress prevented federal claims from being heard in federal courts – an “unusual step,” indicating the importance of the dual forum approach.\textsuperscript{36}

The legislative history of the 1933 Act does not explain why Congress enacted section 22(a).\textsuperscript{37} Federal non-removal provisions are uncommon. The “rather exclusive club”\textsuperscript{38} includes actions under the Federal Employers Liability Act\textsuperscript{39} and the Violence Against Women Act.\textsuperscript{40} Federal non-removal provisions preserve a plaintiff’s choice of forum, slow the “federalization” of traditional areas of state law, and help diminish burdens on federal courts.\textsuperscript{41}

As Justice Frankfurter noted, in fields with a “highly intricate interplay of the States and the National Government in their regulation,”\textsuperscript{42} “allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy.”\textsuperscript{43} In such contexts, the “unquestioned aim” of a non-removal provision is to block “considerable inroads

\textsuperscript{33} 15 U. S. C. § 77k(b). See generally Herman & Maclean v. Huddleston, 459 U.S. 375, 381 (1983) (“Section 11 of the 1933 Act allows purchasers of a registered security to sue certain enumerated parties in a registered offering when false or misleading information is included in a registration statement. The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability.”).

\textsuperscript{34} 15 U.S.C. § 77v(a).

\textsuperscript{35} Id.


\textsuperscript{38} Cook, \textit{supra} note 23, at 633 & n.89.

\textsuperscript{39} 28 U.S.C. § 1445(a).

\textsuperscript{40} \textit{Id.} § 1445(d). Other examples include claims under the Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. § 3612; admiralty actions under the “saving to suitors” clause, 28 U.S.C. § 1333; certain actions against common carriers under the Interstate Commerce Act, 28 U.S.C. § 1445(b); actions arising under state worker’s compensation laws, 28 U.S.C. § 1445(c); actions arising under the Jones Act, 46 U.S.C. app. § 688(a); and actions under the Death on the High Seas Act, 46 U.S.C. § 761.

\textsuperscript{41} See Cook, \textit{supra} note 23, at 634.


\textsuperscript{43} \textit{Id.} at 375.
into the traditionally exercised concurrent jurisdiction of the state courts.”

In securities law too, Congress did not want states’ authority to be disturbed by removal of related actions to federal court. Political sentiment in 1933 “favored retention of a state role.”

Given the broader Congressional intent behind the 1933 Act, the other main justification for the 1933 Act’s non-removal clause, like its counterparts, was to preserve plaintiffs’ choice of forum. “This concern for the rights of complaining investors is consistent with the general pattern of solicitude for such persons pervading the securities legislation.”

B. The Securities Exchange Act of 1934

The Securities Exchange Act of 1934 (“1934 Act”) served to protect investors from fraud occurring in the securities exchanges. The 1934 Act provided for much broader regulation than the 1933 Act, “regulat[ing] all aspects of public trading of securities,” including the secondary securities market. In contrast to the 1933 Act, the 1934 Act vested federal courts with exclusive jurisdiction over claims brought under it. In other respects, the 1934 Act complements its predecessor. Like the 1933 Act, the 1934 Act expressly protected states’ blue sky laws from federal preemption, in order “to protect, rather than to limit, state authority.”

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44 Id. at 372.
45 See Cook, supra note 23, at 633.
49 The Act’s general antifraud provisions are found in section 10(b) and Rule 10b-5. 15 U.S.C. § 78j(b); 17 C.F.R. 240.10b-5 (2003).
50 Cox & Hazen, supra note 32, §27.09
52 As Justice Powell noted, “[t]he 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities.” Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976). However, plaintiffs bringing private causes of action under the two statutes face “a far different set” of procedural and substantive requirements. See Cook, supra note 23, at 631.
53 See Securities Exchange Act of 1934, ch. 404, 28(a), 48 Stat. 881, 903 (codified as amended in 15 U.S.C. 78bb(a)). Section 28(a) of the 1934 Act stated that, except as otherwise provided, “nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.” Id. Section 28 mandated that “the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.” Id. Painter notes that one reason that Congress did not include an express private right of action in the 1934 Act was that Congress specifically preserved state causes of action in the 1933 Act. Painter, supra note 8, at 79.
There is no official Congressional explanation for the 1934 Act’s grant of exclusive federal jurisdiction, even though Congress debated the grant. Most likely, Congress sought “to achieve greater uniformity of construction and more effective and expert application of that law,” and “to safeguard express actions under the 1934 Act with heavy burdens on plaintiffs or of a highly technical nature with no basis in state common law.” Interestingly, in 1934 Congress considered amending the 1933 Act so as to provide for exclusive federal jurisdiction for claims brought pursuant to the 1933 Act, but the proposed amendment was not part of the final legislation.

The dual federal-state framework for securities regulation and litigation fora persisted through the 1990s. In the regulatory context, there were at least two reasons for this durability. First, the burden imposed by state laws on securities issuers decreased due to state legislatures’ re-writing of statutes “to reduce compliance burdens at the state level when a securities issuance is registered at the federal level.” Second, the evolving securities laws and regulatory agencies of some states, such as California, performed a “significant enforcement role with respect to fraud in local securities offerings.”

In the second half of the twentieth century, private securities litigation became an “increasingly important component of securities regulation.” Plaintiffs took advantage of the class action device, which was “particularly suitable in securities fraud cases, where the damages to each individual investor may not be substantial enough to justify incurring the costs of litigation.” Adding to the popularity of securities class actions was the availability of reasonable attorneys’ fees for successful class plaintiffs.

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56 Id. at 383 (quoting Murphy v. Gallagher, 761 F.2d 878, 885 (2d Cir.1985)).
58 See id. at 633 (citing 78 Cong. Rec. 8717 (1934) (statement of James Landis) (noting that the proposed amendment would eliminate concurrent jurisdiction of federal and state courts for the enforcement of the 1933 Act)). One observer has concluded that “[s]o far as the legislative history shows, the [jurisdictional] difference in these two related statutes is pure happenstance.” AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 183 (1969).
59 Painter, supra note 8, at 29 (noting that the Secondary Mortgage Market Enhancement Act of 1984, which regulated mortgage-backed securities, was a rare example of preemption during this period).
60 Seligman, supra note 46, at 675-76.
61 Id. at 677.
63 Id. (quoting In re VMS Sec. Litig., 136 F.R.D. 466, 473 (N.D. Ill. 1991)).
C. The Private Securities Litigation Reform Act of 1995

For our purposes, Congress’s next major initiative came more than sixty years after the 1933 Act. The 1994 congressional elections resulted in the securities and accounting industry gaining significant leverage in Congress, at the expense of the plaintiffs’ bar. Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA") to provide uniform standards for class actions and other suits alleging fraud in the securities market. Congress intended for the PSLRA to stop plaintiffs from bringing private securities fraud actions in state court rather than federal court. In particular, Congress wanted the PSLRA to curtail "strike suits"—"meritless class actions alleging fraud in the sale of securities" brought to "extract a sizable settlement from companies that are forced to settle, regardless of the lack of merits of the suit, simply to avoid the potentially bankrupting expense of litigation." As such, the PSLRA contained new procedural and pleading requirements for federal securities claims.

The PSLRA did not amend the jurisdictional provisions of the 1933 or 1934 Acts. Indeed, the PSLRA’s heightened pleading requirements for securities fraud class actions did not even apply to claims brought under the 1933 Act. Thus, a loophole existed through which plaintiffs seeking to avoid the procedural and substantive burdens of the PSLRA could sidestep the PSLRA by bringing suits under the 1933 Act in state court. Moreover, plaintiffs wishing to avoid the constraints of the PSLRA on potential 1934 Act claims could seek similar remedies by filing claims in state court alleging violations of state securities laws and common law fraud.

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65 Painter, supra note 8, at 32.
67 See generally Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 107 (2d Cir. 2001) (discussing the history of the PSLRA and SLUSA). Under pressure from the plaintiffs’ bar and consumer groups, President Clinton vetoed the legislation, but in a rare instance Congress overrode the veto. See Painter, supra note 8, at 34 n.178 (noting that the House voted to override the veto by a vote of 319 to 100, and the Senate vote was 68 to 30), 54-55.
71 For example, plaintiffs bringing securities class actions had to appoint the “most adequate plaintiff,” i.e., the investor with the “largest financial interest in the relief sought by the class.” 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I), 78u-4(a)(3)(B)(iii)(I). The Act contained a “safe harbor” provision precluding litigation alleging that certain forward-looking statements are materially misleading, id. §§ 77z-2, 78u-5, and a provision staying discovery while courts decide motions to dismiss, id. §§ 77z-1(b), 78u-4(b)(3)(B). Another provision sought to limit attorneys from bringing frivolous claims by imposing stricter application of Rule 11 sanctions. Id. §§ 77z-1(c)(1), 78u-4(c)(1); S. Rep. No. 104-98, at 13, as reprinted in 1995 U.S.C.C.A.N. 679, 692; Cook, supra note 23, at 635.
72 15 U.S.C. § 78u-4(b) (applying heightened pleading requirements to “any private action arising under” the 1934 Act); Cook, supra note 23, at 624.
73 15 U.S.C. § 78aa; see also Snyder, supra note 62, at 676.
As a result, the PSLRA was “ineffective in eliminating ‘strike suits’ in large part because class action plaintiffs were able to avoid its strictures by bringing suit in state rather than federal courts.”

The extent to which plaintiffs took advantage of these loopholes is uncertain. The securities industry pointed to one study that identified “a significant shift in litigation from federal to state court,” particularly in California, despite the lack of an “attempt[] to quantify pre-[PSLRA] levels of state court activity in order to measure the exact size of this shift.” Advocates of increased federal jurisdiction over securities litigation, and increased federal preemption of states’ securities laws, noted that “these data are consistent with the hypothesis that plaintiffs are filing ‘weaker’ cases in state court.” Armed with such data, frequent defendants in securities fraud class actions, particularly hi-tech companies in Silicon Valley, lobbied aggressively for increased federal jurisdiction and preemption.

In contrast, a review of state court claims made after passage of the PSLRA failed to provide strong evidence of plaintiffs filing in state court to avoid the PSLRA’s requirements. Consumer groups, state and local governments, public finance officials, and the plaintiffs’ bar relied on such data in opposing increased federal jurisdiction and preemption. These groups alleged that the securities industry aimed to undermine the broader relief provided by state securities laws and state courts. They noted that there was no evidence that plaintiffs who sued in state court and alleged misrepresentations or omissions outside of financial statements were asserting frivolous claims. As we shall see, Congress was unimpressed.

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76 Painter notes that after the enactment of the PSLRA and prior to SLUSA, California was the site of “an overwhelming majority (probably more than two-thirds) of class action suits for securities fraud that plaintiffs have brought under state blue sky laws.” Id. at 36. Painter argues that “California issuers’ hostility to lawsuits brought by California lawyers under California law motivated” Congress to enact SLUSA. Id. at 88-89.
78 Id. at 278.
79 See Painter, supra note 8, at 4-5, 49-50.
80 See id. at 42-45.
81 See id. at 5-6.
82 See Seligman, supra note 46, at 678; Painter, supra note 8, at 8.
83 See id. at 92.

The Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) expanded federal jurisdiction over securities class actions. SLUSA closed the loophole through which plaintiffs seeking to avoid the PSLRA could file state law claims in state court in lieu of 1934 Act claims, and made federal court the exclusive venue for class actions alleging fraud in the sale of certain securities. Despite the inconclusive evidence described above, Congress justified SLUSA as follows:

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.

SLUSA added section 16(c), 15 U.S.C. § 77p(c), amending the 1933 Act’s anti-removal provision. It states: “Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.” Subsection (b), SLUSA’s preclusion provision, preempts state-law “strike suits,” i.e., securities class actions alleging fraud:

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.

84 Pub. L. 105-353, 112 Stat. 3227. The Senate approved its version of the bill by a vote of 79 to 21, and the House voted 340 to 83. Painter, supra note 8, at 58. Unlike with PSLRA, President Clinton did not veto SLUSA.
85 See Worldcom, 368 F.3d at 98.
86 Referring to the uncertain data on the alleged shift of litigation to state court, SEC Chairman Arthur Levitt testified, “Let us not replace the race to the courthouse with a race to the Capitol.” The Securities Litigation Uniform Standards Act of 1997 - S. 1260: Hearings on S.1260 Before the Subcomm. on Sec. of the Senate Comm. on Banking, Housing, and Urban Affairs, 105th Cong. (July 24, 1997) (transcript at 29) (prepared statement of Arthur Levitt, Chairman, SEC).
88 15 U.S.C. § 77p(c). An introductory clause was added to section 22(a), which now begins “Except as provided in section 77p(c) of this title....” 15 U.S.C. § 77v(a).
89 Id. §§ 77p(c), 78bb(f)(2)(2000).
A “covered class action” is one in which damages are sought on behalf of more than 50 people. A “covered security” is one traded nationally and listed on a regulated national exchange, or a security senior to a traded security, or one issued by a registered investment company.

Thus, SLUSA preempted claims involving “covered securities” when these claims were brought pursuant to state law. In the class action context, this left most investors with only federal remedies: the express remedies under the 1933 Act and the implied remedies under the 1934 Act. States no longer had “an unrestricted opportunity to correct for limitations imposed upon private lawsuits under federal law” under section 28 of the 1934 Act. In this respect, SLUSA put an abrupt end to both the dual federal and state regulation of securities claims and dual forum litigation for state-law claims concerning “covered securities.” Such a change was even more striking, as one commentator has noted, because the same Congress that enacted this “sweeping” federal preemption of state law remedies was “committed to federalism in almost every other area of legislation.” In passing SLUSA, Congress was motivated by the desire to control the plaintiffs’ bar and “plaintiff-friendly” state courts. Referring to the plaintiffs’ bar, one sponsor noted, “[Y]ou cannot use the State courts to do the same illicit, abusive strike suits that you were formerly doing in Federal court.”

Critically, however, SLUSA did not address the removal or preemption of several types of claims. First, SLUSA left intact state law standards for claims not falling within the definition of a “covered class action.” Second, SLUSA did not affect claims filed by exempt state and local governments and pension funds. Third, and more importantly, complete diversity of all

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93 15 U.S.C. §§ 77p(b), r(b).
94 Id. §§ 77p(b), 77p(c), 77v(a). Preemption is accomplished by the district court permitting the defendant to remove preempted claims, which the court must then dismiss. See Kircher, 547 U.S. at 644 (“If the action is precluded, neither the District Court nor the state court may entertain it, and the proper course is to dismiss. If the action is not precluded, the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it.”). See also Costa, supra note 8, at 1205-06 (noting that Congress chose removal to accomplish preemption “so that the federal judiciary would be the interpreter of the scope of SLUSA’s preemption.”).
95 See Painter, supra note 8, at 3.
96 See supra note 53; Painter, supra note 8, at 79; Costa, supra note 8, at 1205 (“SLUSA essentially preempted all state law class actions which fell within the scope of Rule 10b-5”). Such limitations expanded during the 1970s and 1980s, when the Supreme Court repeatedly cut back on the federal private right of action for securities fraud. See generally Painter, supra note 8, at 78-83.
97 See id. at 11.
98 Id. at 3, 86-87 (noting that both President Clinton and President and Congress “have cited federalism successfully in recent years as a powerful rationale for refusing to enact federal legislation that interferes with local autonomy”).
99 See supra note 8; Cook, supra note 23, at 637.
named plaintiffs and all defendants was still required to get into federal court, and each plaintiff class member still had to satisfy the jurisdictional amount in controversy separately.\textsuperscript{101}

Fourth, plaintiffs still could bring federal claims under the 1933 Act in state court. SLUSA’s removal provision, section 16(c), only allows for removal of the state-law class actions described in section 16(b), the preclusion provision: “Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) [i.e., ‘based upon the statutory or common law of any State’], shall be removable to the Federal district court . . . .”\textsuperscript{102} As Jeffrey Cook summarized, “Congress appears to have reached the anomalous result of authorizing the removal and preemption of state law claims, while keeping federal 1933 Act claims in state court.”\textsuperscript{103} This created an “upside-down effect”: district courts were to remand class actions alleging 1933 Act violations back to state courts, but retain jurisdiction over (and dismiss) precluded state-law class actions.\textsuperscript{104} Cook concludes that section 16(c), 15 U.S.C. § 77p(c),

was at least inartfully - or, given the repeated statements of intent to the contrary, perhaps mistakenly - drafted. For example, despite a slew of references to state versus federal courts as the relevant demarcation in the legislative history, the express rationale of SLUSA ended up being “to limit the conduct of securities class actions under State law, and for other purposes.” While making federal courts the exclusive forum for all claims involving national securities might have been the intent of Congress, the end result was another loophole . . .\textsuperscript{105}

One commentator has suggested that although SLUSA’s legislative history indicates that some members of Congress supported removal of all 1933 Act claims, for political reasons these legislators “may have balked at effectuating these intentions clearly in the statute” in order to assure passage.\textsuperscript{106}

\textsuperscript{101} See Sarah S. Vance, \textit{Class Actions in the Gulf South and Beyond: A Primer on the Class Action Fairness Act of 2005}, 80 Tul. L. Rev. 1617, 1620 (2006); 151 Cong. Rec. S1079 (daily ed. Feb. 8, 2005) (remarks of Senator Dodd) (“a case involving millions of plaintiffs from multiple States and billions of dollars in alleged damages is heard in State court, just because no plaintiff claims more than $ 75,000 in damages or because at least one defendant is from the same State of at least one plaintiff”).

\textsuperscript{102} 15 U.S.C. §§ 77p(b); \textit{Kircher v. Putnam Funds Trust}, 547 U.S. 633, 642-43 (2006) (“we read authorization for the removal in subsection (c), on which the District Court’s jurisdiction depends, as confined to cases ‘set forth in subsection (b),’ § 77p(c), namely, those with claims of untruth, manipulation, and so on. . . . And legislative history tends to show that this was just what Congress understood.”).

\textsuperscript{103} Cook, \textit{supra} note 23, at 638.


\textsuperscript{105} Cook, \textit{supra} note 23, at 638-39 (footnotes omitted).

\textsuperscript{106} Costa, \textit{supra} note 8, at 1196 (“the relevant inquiry here is not what Congress intended, but what it actually changed when it modified the removal provision of the Securities Act in SLUSA.”), 1222-24 (statements of some members of Congress are “insufficient to rebut the presumption that had Congress intended to change fifty-five years of judicial interpretation of the
Finally, SLUSA did not address individual actions brought under either state law or the 1933 Act. Such claims do not implicate 15 U.S.C. § 77p(b) and remain non-removable. As a result, plaintiffs’ lawyers could bring individual actions alleging only violations of the 1933 Act in state court. The Worldcom litigation, discussed below, is an example.

II
REMOVAL AFTER SLUSA: WORLDCOM AND OTHER LITIGATION

A. 1933 Act Class Actions in State Court

In the class action context, efforts by the plaintiffs’ bar to take advantage of SLUSA’s loopholes had mixed results. Where plaintiffs brought class actions in state court alleging only violations of the 1933 Act, district courts were split as to whether such claims could be removed. A district court’s order remanding a case to state court could not be appealed, which led to a lack of appellate decisions clarifying the situation and fostered district court splits and consequently additional forum shopping. Some district courts continued to remand claims brought under the 1933 Act, reasoning that the plain language of SLUSA only amended section 22(a)’s non-removal provision in the context of class actions brought under state law. For example, a New Hampshire district court, in In re Tyco International, remanded seven cases alleging only 1933 Act violations where defendant Tyco faced forty-seven separate lawsuits in several different

Securities Act, it would have done so overtly - or at least discussed doing so forthrightly.”). But see Snyder, supra note 62, at 681 (arguing “for an interpretation of §16(c) that reads the reference to §16(b) not as a limitation on the types of claims that may be removed, but as an express inclusion of state-law class actions in a larger category of claims that may be removed to federal court”).

Pub. L. No. 105-353 §§ 2(1)-(5) (1998) (“it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while . . . not changing the current treatment of individual lawsuits”); Worldcom, 368 F.3d at 98.

See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 87 (2006) (“SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims. The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist.”); Costa, supra note 8, at 1216.

See 28 U.S.C. § 1447(d) (2000); Costa, supra note 8, at 1206; Snyder, supra note 62, at 678 (describing a split between the Southern District of Texas, in favor of remand, and the Northern District of Texas, in favor of removal).

states for similar securities violations. The court “did not attempt ... to determine what Congress might have done if it had been asked to decide whether cases that are based exclusively on the Securities Act should be removable to federal court.” “Instead,” the court “made a contextual examination of the statutory language and a careful review of legislative history to determine the meaning of the statute that Congress actually passed.”

In contrast, other district courts denied plaintiffs’ motions to remand, reasoning that the congressional findings and plain language of SLUSA supported federal jurisdiction. Such courts relied heavily on the legislative history. For example, the District Court for the Northern District of Texas in Alkow v. TXU Corp. held that removal of a class action involving only 1933 Act claims was proper under SLUSA. The Alkow court stated that “the reference in [§16(c)] to subsection (b) includes state-law class actions among the cases that may be removed, but does not limit removal to just those cases.” The court rejected the plaintiffs’ argument that the exception in section 16(c) applied only to state law claims, reasoning that if section 16(c) applied only to state claims, “no claims arising under the 1933 Act would be removable.” The court noted that SLUSA was “drafted precisely to prevent these types of tactics employed ... to avoid federal court.” In 2006, the Supreme Court rejected this line of reasoning in Kircher v. Putnam Funds Trust, where the Court stated, “we read authorization for the removal in subsection (c), on which the District Court’s jurisdiction depends, as confined to cases ‘set forth in subsection (b),’ § 77p(c), namely, those with claims of untruth, manipulation, and so on.”

B. Individual Claims and “De Facto” Class Actions: The Worldcom Litigation

Outside of the class action context, plaintiffs’ attorneys flocked to state court by taking advantage of SLUSA’s loophole regarding the non-removability of claims brought under the 1933 Act. Here, the most notable litigation was California Public Employees’ Retirement System v. Worldcom, Inc. (“Worldcom”). Worldcom is an example of a “de facto” class action filed in state court that frustrated the parallel litigation consolidated in federal court.

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112 Id. at 121.
113 Id.
116 Id.
119 368 F.3d 86 (2d Cir. 2004).
120 In re WorldCom, Inc. Sec. Litig., 2003 WL 22701241, at 6.
Worldcom filed for Chapter 11 bankruptcy after announcing that it had improperly treated $3.8 billion in ordinary costs as capital expenditures. The plaintiffs’ firm Milberg Weiss Bershad Hynes & Lerach (“Milberg Weiss”) brought “scores” of individual actions in state courts around the country; between July 2002 and October 2003, Milberg Weiss filed at least forty-seven individual actions on behalf of over 120 plaintiffs in numerous state courts.\footnote{121} The firm “carefully selected”\footnote{122} individual plaintiffs, such as public and private pension funds with $2 to $3 billion in losses in WorldCom securities, and limited their complaints to individual 1933 Act claims, rather than class actions.\footnote{123}

Meanwhile, other Worldcom investors brought numerous securities fraud class actions in federal courts, including at least twenty in the District Court for the Southern District of New York, against WorldCom and its officers, directors, underwriters, accountants, and research analysts.\footnote{124} The Judicial Panel on Multidistrict Litigation consolidated thirty-nine nationwide class actions, along with those individual actions filed in federal court, in the Southern District of New York.\footnote{125}

The state court plaintiffs’ efforts to avoid federal jurisdiction were unsuccessful. Around the country, defendants were able to remove to federal court, where their suits were consolidated in the Southern District of New York.\footnote{126} With WorldCom in bankruptcy, defendants could remove investors’ claims under 28 U.S.C. § 1452(a),\footnote{127} which permits removal of actions that fall within the federal courts’ bankruptcy jurisdiction, as defined by 28 U.S.C. § 1334(b),\footnote{128} including actions that are “related to” a bankruptcy.\footnote{129} Thus § 1452(a) is in “direct conflict” with the anti-removal provision of the 1933 Act.\footnote{130}

\footnote{121}Worldcom, 368 F.3d at 91.
\footnote{122}Cook, supra note 23, at 654.
\footnote{124}See Worldcom, 368 F.3d at 91.
\footnote{125}In re WorldCom, Inc., Sec. & “ERISA” Litig., 226 F. Supp. 2d 1352 (J.P.M.L. 2002); Cook, supra note 23, at 653. For a description of the district court’s responses to Milberg Weiss’s maneuvering in state courts, see id. at 654-56.
\footnote{126}See Worldcom, 368 F.3d at 92.
\footnote{127}Section 1452(a) provides:

A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit’s police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.


\footnote{128}Section 1334(b) provides, in relevant part:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b) (emphasis added).

\footnote{129}Worldcom, 368 F.3d at 92.
\footnote{130}Id. at 90.
Worldcom was the first case that squarely presented the “close question” of “whether a federal district court may exercise bankruptcy jurisdiction over generally nonremovable claims brought under the Securities Act of 1933.” 131 Noting that its resolution of this statutory conflict would “determine whether scores of pending lawsuits are properly in federal court,” a two-judge Second Circuit panel held that the bankruptcy removal statute trumps the anti-removal provision of the 1933 Act. 132

After finding the plain language of the conflicting statutes unhelpful, the Second Circuit examined the specificity of each statute because, under Radzanower v. Touche Ross & Co., “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” 133 The court reasoned that both section 22(a) and § 1452(a) apply to a “defined class of claims,” rather than litigants, and that neither statute addressed a more specific class of claims than the other. 134 The court did not agree with plaintiffs that § 1452(a) is the less specific statute because it applies to “any claim” that “relates to” a bankruptcy proceeding, whereas section 22(a) addresses only a few types of substantive securities claims, such as individual claims or class actions brought under the 1933 Act in state court. 135

In search of sounder footing, the Second Circuit next posited that, “even if we were to conclude” that section 22(a) was more specific than § 1452(a), section 22(a) would “not necessarily control” if its application would “unduly interfere” with the operation of the Bankruptcy Code. 136 After describing Congressional intent to grant “comprehensive” jurisdiction to the bankruptcy courts to deal with “all matters connected with the bankruptcy estate,” 137 the Second Circuit concluded that “in its every detail, Section 1452(a) is designed to further Congress’s purpose of centralizing bankruptcy litigation in a federal forum.” 138 The court concluded its specificity analysis by declaring that “defendants with contribution rights . . . should not be subject to conflicting outcomes along with repetitive and time-consuming discovery proceedings in multiple state courts.” 139

The Second Circuit next examined the conflicting statutes under the “rule of recency” test: “when two statutes are in irreconcilable conflict, we must give effect to the most recently enacted statute since it is the most recent indication of congressional intent.” 140 The court rejected plaintiffs’ argument that “Section 22(a), which was amended by the SLUSA in 1998,

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131 Id.
132 Id. The third judge on the panel recused himself. Id. at 89 n.1.
134 Worldcom, 368 F.3d at 102-03.
135 See Cook, supra note 23, at 659.
136 Worldcom, 368 F.3d at 103 (citing Radzanower, 426 U.S. at 156) (where the application of a specific statute would “unduly interfere” with the operation of a general statute that was enacted subsequent to the specific statute, the more general statute controls)).
137 Id. (quoting Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995)).
138 Id.
139 Id. at 104 (emphasis added). For a detailed critique of the court’s reasoning under Radzanower, see Cook, supra note 23, at 657-59.
140 Worldcom, 368 F.3d at 104 (quoting In re Ionosphere Clubs, Inc., 922 F.2d 984, 991 (2d Cir. 1990)).
trumps Section 1452(a), which was enacted in 1984.”141 The court explained that the rule of recency was counterbalanced by the rule that “repeals by implication of jurisdictional statutes . . . are disfavored.”142 The court framed plaintiffs’ burden as follows: “In order to convince us that Section 22(a) trumps Section 1452(a) as a result of SLUSA, [plaintiffs] would need to show that, when it enacted SLUSA, Congress intended to give individual plaintiffs an absolute choice of forum for claims brought under the 1933 Act.”143

Plaintiffs could not meet this high burden because “nothing in the text or legislative history of SLUSA indicates that Congress intended to alter the jurisdictional scheme applicable to individual actions under the 1933 Act.”144 The court acknowledged that SLUSA, which left the 1933 Act’s non-removal provision intact, could not be used against the plaintiffs. “All we conclude here is that, in light of its complete silence in 1998 with respect to individual Securities Act claims that are related to a bankruptcy case, Congress did not alter any preexisting rule when it enacted SLUSA.”145

The court’s rule of recency analysis was oddly selective. First, although at the outset of its analysis the court noted that “we are mindful that ‘the defendant bears the burden of demonstrating the propriety of removal,’”146 the court expressly placed the burden of the rule of recency inquiry on the plaintiffs, without citing any authority. Second, the court chose to ignore the possibility that in enacting SLUSA in 1998, Congress chose to reaffirm the non-removability of individual actions brought under the 1933 Act. As the Supreme Court has instructed, courts may look at the “‘contemporary legal context’ in which Congress legislated” and “the fact that a comprehensive reexamination and significant amendment of [an Act] left intact the statutory provisions . . . is itself evidence that Congress affirmatively intended to preserve” the unamended provisions.147 Third, the court, having noted that that repeals by implication are disfavored, essentially held that § 1452(a) repealed section 22(a) by implication.148

Having concluded that the statutory language, specificity, and rule of recency either were inconclusive or weighed in favor of removal, the Second Circuit’s final focus of inquiry was the statutory framework. Here the court was less equivocal, finding a “crucial distinction” within the federal jurisdictional scheme of Title 28: “Unlike the general removal statute, 28 U.S.C. § 1441(a), Section 1452(a) contains no exception for federal claims that are expressly nonremovable under an Act of Congress.”149 According to the court, the “absence of such a crucial exception in the language of Section 1452(a) suggests that, in 1978, when it originally enacted Section 1452(a) as part of the Bankruptcy Code, Congress did not intend for section 22(a) and its analogues to bar removal of ‘related to’ claims.”150

141 Id.
142 Id. (quoting Henderson v. INS, 157 F.3d 106, 119 (2d Cir. 1998)).
143 Id. (emphasis in original).
144 Id. (emphasis in original).
145 Id. at 105.
146 Id. at 100 (quoting Grimo v. Blue Cross/Blue Shield of Vermont, 34 F.3d 148, 151 (2d Cir. 1994)).
148 See Cook, supra note 23, at 660.
149 Worldcom, 368 F.3d at 105 (emphasis in original).
150 Id. at 106.
In the Second Circuit’s analysis, the wording of § 1441(a) was key. The court reasoned that if section 22(a) were interpreted to trump § 1452(a), then the “savings clause” in § 1441(a) reading “except as otherwise provided by Act of Congress” would be surplusage. On the other hand, the court posited, “if we give effect to every clause in Section 1441(a), the statutory conflict between Section 1452(a) and Section 22(a) dissolves.” As a result, the Second Circuit concluded that except for its two enumerated exceptions, § 1452(a) supersedes section 22(a) and confers removal jurisdiction over “all claims ‘related to’ a bankruptcy case.” Absent from the Second Circuit’s strained contextual analysis was the well-established principle that “[i]n light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.” By stretching the plain language of §§ 1441(a) and (c) to undermine the plain language of section 22(a), the court also ignored the Supreme Court’s determination that section 22(a) gives plaintiffs “an absolute choice of forum, . . . in unmistakable terms.”

Notably, other district courts have declined to follow the Second Circuit’s reasoning in Worldcom, for a number of reasons. First, some district courts have applied the rule of recency but found that section 22(a) trumped § 1452(a) because “SLUSA, a 1998 statute amending the 1933 Act, is the relevant comparative statute, not the original 1933 Act.” Second, courts have disagreed with the Second Circuit’s specificity analysis, and found that section 22(a) is indeed more specific than § 1452. Third, courts have found that potential

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151 Id.
152 Id.
153 Id. at 107 (emphasis in original).
154 Id. (emphasis in original). For a discussion of the court’s misplaced reliance on Gonsalves v. Amoco Shipping Co., 733 F.2d 1020 (2d Cir. 1984), see Cook, supra note 23, at 661-62.
155 Lupo v. Human Affairs Int’l, 28 F.3d 269, 274 (2d Cir. 1994) (quoting Somlyo v. J. Lu-Rob Enters., Inc., 932 F.2d 1043, 1045-46 (2d Cir. 1991)). See also Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 109 (1941) (“the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation…. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”).
156 Breuer v. Jim’s Concrete of Brevard, Inc., 538 U.S. 691, 697 (2003) (emphasis added). See also id. at 696 (describing Section 22(a) as an “example[] of indisputable prohibitions of removal”); Cosme Nieves v. Deshler, 786 F.2d 445, 451 (1st Cir. 1986) (contrasting “ambiguous” concurrent-jurisdiction language in the Fair Labor Standards Act with the “unmistakable terms” and “absolute choice of forum” in section 22(a)).
157 See generally Cook, supra note 23, at 662-64.
indemnification claims against the bankruptcy estate, to be brought in a separate lawsuit, are not “related to” the bankruptcy, and hence there is no conflict between section 22(a) and section 1452(a).  

As I will explain below, despite its flaws Worldcom influenced later decisions in the Second and Seventh Circuits where courts found that CAFA’s removal provision, like § 1452(a), supersedes section 22(a).

III

THE CLASS ACTION FAIRNESS ACT OF 2005 & ITS IMPACT ON REMOVAL UNDER SECTION 22(A)

A. The Class Action Fairness Act of 2005

After “a grinding eight-year effort,” Congress enacted CAFA in 2005 to provide for “federal court consideration of interstate cases of national importance under diversity jurisdiction.” President Bush stated that CAFA was rooted in “the framers’ view of how a fair system is to work.” Congress’s disapproval of state courts’ handling of securities class actions, and its distaste for the alleged abuse of the jurisdictional loopholes by the plaintiffs’ bar, inspired CAFA. “Congress found it particularly troubling that ‘certain favored judges’ in state courts were ‘hearing nationwide cases and setting policy for the entire country,’ with ‘an almost anything goes’ approach that remedies virtually any controversy subject to certification as a class action.” The Report of the Senate Judiciary Committee (“Senate Report”) found that class

1334(b) and 1452”); Tenn. Consol. Ret. Sys., 2003 WL 22190841, at 3 (“As a special statute, the relevant rule of statutory construction requires that Section 22(a), as amended, control over 28 U.S.C. § 1334(b)and 1452, general statutes”).

See, e.g., Ariail Drug Co., Inc. v. Lease Partners Corp., No. CIV. A. 96-G-0708-S, 1996 WL 1060890, at 3 (N.D. Ala. May 23, 1996) (refusing to accept that a lawsuit regarding debtor’s interests against third party was “related to” bankruptcy proceedings); In re VideOcart, Inc., 165 B.R. 740, 744 (Bankr. D. Mass. 1994) (remanding without addressing the removal conflict because action by “non-debtor against non-debtors” is not closely enough “related to” the court’s jurisdiction as it only concerns potential claims), as quoted in Cook, supra note 23, at 663 n.293.

Edward A. Purcell, Jr, The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform, 156 U. PA. L. REV. 1823 (2008). “The political battle lines were clear and sharp, and some observers attributed the bill’s final passage to Republican congressional gains in the 2004 election.” Id. at 1861. Republic support for the bill was virtually unanimous: 229 Republicans supported it in the House, while 1 opposed; in the Senate, 53 Republicans voted in favor and none against. Id.


Remarks in a Discussion on Class-Action Lawsuit Abuse, 41 Weekly Comp. Pres. Doc. 200, 204 (Feb. 9, 2005). Not everyone shared this view. National organizations that represented all state judges and all state legislators opposed the legislation and the Judicial Conference of the United States warned that CAFA’s provision were “inconsistent with principles of federalism.” Purcell, supra note 161, at 1863.

actions were subject to “state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation.” The Senate Report depicted plaintiffs and their attorneys as users of “judicial blackmail” to collect on “frivolous” claims.

To combat such abuses, Congress abolished two rules that had thwarted federal jurisdiction over class actions: the rule that required complete diversity of all named plaintiffs and all defendants, and the rule that each plaintiff class member had to satisfy the jurisdictional amount in controversy separately. CAFA establishes original jurisdiction in federal courts for certain types of class actions:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

These cases are removable under CAFA’s new removal provision, 28 U.S.C. § 1453. Further, Congress abolished three rules that had thwarted removal in many class actions: the rule requiring a defendant to obtain the consent of all defendants to remove; the bar on a defendant removing a class action even if there was an in-state defendant; and the ban on a defendant


Purcell notes that “CAFA’s supporters commonly slighted or assumed away such issues as the wrongfulness of defendants’ underlying conduct, the salutary deterrent effects of the suits, the general social value of ensuring that legal norms were enforced, and the basic question of whether class members - and the broader general public - were safer, more fairly treated, or otherwise better off as a result of the suits than they would have been without them.” Purcell, supra note 161, at 1881.

167 See Vance, supra note 101, at 1620.
removing a class action more than one year after the action was commenced. As such, CAFA confers on defendants “a vastly expanded privilege of forum choice.”

CAFA is silent regarding which party has the burden of proof when a defendant removes a case to federal court and the plaintiff files a motion to remand. The Senate Report, “strongly favor[s] the exercise of federal diversity jurisdiction,” states that CAFA’s jurisdictional grant should be read broadly, its exclusions should be interpreted narrowly, and the burden of proof should be allocated to the party challenging federal jurisdiction. However, Congress chose not to include such directives in the legislation itself.

CAFA extends diversity jurisdiction over a new category of multi-party actions called “mass actions.” “Mass actions” are defined as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact,” as long as such joinder is not proposed by defendants or solely for purposes of pretrial proceedings. This closed a potential loophole for plaintiffs seeking to evade the new jurisdictional provisions, and mirrored a similar loophole-closing measure in SLUSA in defining “covered class actions” to cover more than traditional class actions. The new removal rules apply to mass actions as well.

Hence, CAFA represents a vast expansion of federal jurisdiction; one federal judge labeled the Act “the largest expansion of federal jurisdiction in recent memory.”

169 Id. § 1453(b). Section 1453(b) states:
A class action may be removed to a district court of the United States in accordance with section 1446 [28 USCS § 1446] (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

See also Vance, supra note 101, at 1630-31.


171 See Vance, supra note 101, at 1637.


173 Id. at 42.

174 Id.

175 Id. at 43; see Vance, supra note 101, at 1637.

176 See id. at 1629.


178 See Securities Litigation Uniform Standards Act of 1998 101(a)(1), (b)(1), 15 U.S.C. §§ 77p(f)(2)(A)(ii), 78bb(f)(5)(B)(ii) (2000) (defining “covered class actions” as “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”); Cook, supra note 23, at 643-44.


180 Vance, supra note 101, at 1643. See also Purcell, supra note 161, at 1857-58 (“the statute and its underlying theory construed the Constitution in a way that would allow Congress to extend federal jurisdiction to any case involving any kind of state law claim or any particular
Nevertheless, CAFA has several exemptions.\textsuperscript{181} For example, CAFA grants district courts discretion to decline to exercise jurisdiction in limited circumstances, such as “local” controversies.\textsuperscript{182}

Most significantly, for our purposes, Congress expressly exempted certain securities claims from the scope of CAFA. Section 1332(d)(9)(A) directs that CAFA’s expansion of diversity jurisdiction over class actions “shall not apply to any class action that solely involves a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934.”\textsuperscript{183} Section 1332(d)(9)(B) exempts state-law corporate governance claims. Also exempted, under § 1332(d)(9)(C), are claims that solely “relate[] to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security” as defined under the 1933 Act.\textsuperscript{184} Corporate governance litigation is exempted under § 1332(d)(9)(B). CAFA excludes the same categories of securities cases from its removal rules: § 1453(d)(1)-(3), listing the exceptions to removal, have the same functional language as § 1332(d)(9)(A)-(C).\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{181} 28 U.S.C. §§ 1332(d)(3)-(4), (9), (11), 1453(d). Burbank critiques “CAFA’s exceedingly narrow exceptions . . . as another depressing example of legislative overreaching by those who invoke the virtues of federalism when it is convenient to do so.” Burbank, supra note 170, at 1542.
\item \textsuperscript{182} Under 28 U.S.C. § 1332(d)(3), a district court may, “in the interests of justice and looking at the totality of the circumstances” decline to exercise jurisdiction over a class action “in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.” (footnotes omitted) (emphasis added).
\item \textsuperscript{183} 28 U.S.C. § 1332(d)(9)(A). See also id. § 1453(d)(1); S. Rep. No. 109-14, at 29 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 28 (CAFA “excludes from its federal jurisdiction grant . . . any securities class actions covered by [SLUSA]”).
\item \textsuperscript{184} 28 U.S.C. § 1332(d)(9)(C).
\item \textsuperscript{185} Id. §§ 1453(d),1332(d)(9); see Vance, supra note 101, at 1631.
\end{itemize}
The Senate Report justified the securities exemptions by noting that it did not want “to disturb the carefully crafted framework” of jurisdiction over securities claims established in SLUSA and the PSLRA.\textsuperscript{186} Given the significant loopholes in SLUSA (and the PSLRA), this reluctance to disturb SLUSA’s jurisdictional framework is curious.\textsuperscript{187}

The effect of CAFA’s securities exemptions on section 22(a) is uncertain and controversial. In a view endorsed by the Seventh Circuit in \textit{Katz v. Gerardi}, the securities industry asserts that CAFA presumptively confers federal jurisdiction on any civil action meeting CAFA’s requirements of $5 million amount in controversy, 100 or more proposed class members, and minimal diversity. If these requirements are met, defendants argue, plaintiffs must show that their claims fit within CAFA’s securities exemptions. Defendants contend that because CAFA expressly exempts claims solely involving “covered securities,” Congress necessarily meant to include cases not involving “covered securities” (or implicating CAFA’s other exemptions) within CAFA’s expansion of removal jurisdiction. From this perspective, Congress drafted CAFA’s exemptions with precision, fully aware that claims it did not expressly exempt would be removable. Defendants emphasize that the legislative history of CAFA spells out Congress’s unmistakable intent to grant federal courts with “sweeping removal power” for “all securities cases that have national impact,” and as result courts should interpret CAFA’s exemptions narrowly.\textsuperscript{188}

The plaintiffs’ bar responds that the exemptions enumerated under CAFA are not exclusive and Congress “would have had to have been much more specific in overriding §22(a), had it intended to do away with 75 years of non-removal of federal-question claims via a general, diversity-centric removal vehicle.”\textsuperscript{189} Under this view, endorsed by the Ninth Circuit in \textit{Luther v. Countrywide Home Loans Servicing LP}, even if a claim does not fit within one of CAFA’s exemptions, so long as it fits within section 22(a) it is still non-removable. Plaintiffs also argue that courts must respect the traditional rule that removal statutes are to be interpreted narrowly, and hence CAFA’s exemptions to removal should be interpreted broadly. Finally, plaintiffs assert that defendants should bear the burden of proof to show that CAFA’s exemptions do not apply.

In sum, CAFA represents the latest iteration of Congress’s repeated inability to clarify the status of the 1933 Act’s non-removal provision. As with previous jurisdictional reforms, in 2005 Congress did not expressly overrule (or even mention) section 22(a), yet enacted legislation whose purpose arguably was to increase federal jurisdiction over such claims. As the following discussion illustrates, judicial resolution of the conflict between section 22(a) and CAFA’s

\textsuperscript{187} See \textit{Cook, supra} note 23, at 625 (“Given the obvious shortcomings of SLUSA, however, this exemption begs the question: what exactly does Congress intend its jurisdictional ‘framework’ for securities claims to be?”). I discuss the implications of Congress’s decision \textit{infra} notes 305-14 and accompanying text.
\textsuperscript{188} \textit{Harborview}, 2008 U.S. Dist. LEXIS 72039, at **18-19.
removal provision has varied widely. Does Congress’ grant of removal for “any civil action” meeting CAFA’s jurisdictional requirements supersede Congress’s longstanding mandate that “no case” arising under the 1933 Act may be removed? Does the legislative intent underlying CAFA override Congress’s failure to expressly amend section 22(a)? Does CAFA repeal section 22(a) by implication? Can a claim that alleges only 1933 Act violations, and meets CAFA’s jurisdictional requirements, but does not concern a “covered security,” be removed? What claims fit within CAFA’s exception for class actions that solely “relate[] to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security”?

Which party has the burden of proof in a motion for remand? To answer such questions, district and appellate courts have applied the full assortment of tools of statutory construction, to varying degrees of success and persuasiveness.

B. Luther: The Ninth Circuit Holds that Section 22(a) Trumps CAFA

In Luther v. Countrywide Home Loans Servicing LP, the Ninth Circuit affirmed a district court’s remand order and held “that the Class Action Fairness Act of 2005, which permits in general the removal to federal court of high-dollar class actions involving diverse parties, does not supersede § 22(a)’s specific bar against removal of cases arising under the 33 Act.” The opinion of the Ninth Circuit reveals reasoning in accord with the plain language of the relevant statutes and the longstanding rules that removal statutes are to be strictly construed against removal, with any doubt being resolved against removability. As I will discuss below, the straightforwardness of Luther stands in contrast to a line of decisions from the Second Circuit, yet Luther failed to address some important questions.

David Luther filed a class action in California state court, alleging that Countrywide Home Loans Servicing LP, CWALT, Inc. (“Countrywide Alternative Loan Trust”), several subsidiaries, alternative loan trusts, officials, and underwriters had violated the 1933 Act. Luther brought the action “on behalf of all persons and entities who acquired hundreds of billions of dollars worth of mortgage pass-through certificates from CWALT, Inc. between January 2005 and June 2007.” Specifically, Luther alleged that defendants violated sections 11, 12(a)(2), and 15 of the 1933 Act by issuing false and misleading registration statements and prospectus supplements for the mortgage pass-through certificates. Notably, Luther’s complaint “expressly ‘excludes and disclaims’ allegations of fraud or intentional or reckless misconduct,” so only implicated the 1933 Act.

191  533 F.3d 1031, 1032 (9th Cir. 2008).
192  Luther, 533 F.3d at 1032.
193  Id.
194  15 U.S.C. §§ 77k, 77(a)(2) and 77o, respectively.
195  Luther, 533 F.3d at 1032-33. Luther alleged that the risk of the investments was significantly higher than defendants represented, in part because the statements and prospectuses “omitted and misstated the credit worthiness of the underlying mortgage borrowers.” Id. at 1033.
196  Id.
Defendants removed the action to the U.S. District Court for the Central District of California pursuant to CAFA.\textsuperscript{197} The district court granted Luther’s motion for remand pursuant to section 22(a) of the 1933 Act, after acknowledging that Luther had “stretched every pleading limit to remain in state court. In doing so, he has presented the court with a rather novel set of removal issues under the securities laws.”\textsuperscript{198} Because the mortgage pass-through certificates were not “covered securities” under 15 U.S.C. § 77p(c), there was no basis for removal under SLUSA.\textsuperscript{199}

Addressing CAFA’s legislative history, the district court noted that Congress intended for CAFA to “make[] it harder for plaintiffs’ counsel to ‘game the system’ by trying to defeat diversity jurisdiction,” and that the legislative history was “replete with references to this problem.”\textsuperscript{200} Rather than rely on the legislative history, however, the district court followed \textit{Radzanower v. Touche Ross & Co.}\textsuperscript{201} and applied the “basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”\textsuperscript{202} The court refused “to apply the broad, diversity-based removal provision of CAFA over the specific and express prohibition of removal contained in the 1933 Act on claims brought under that chapter.”\textsuperscript{203} Defendants had failed to show that Congress had a “clear intention” to override or nullify the specific anti-removal provision of the 1933 Act.\textsuperscript{204}

In rejecting the defendants’ position that 28 U.S.C. § 1453 was more specific than section 22(a), the court reasoned that CAFA “appears directed towards a different problem - plaintiffs’ artful circumvention of the diversity requirements - whereas the 1933 Act specifically forbids removal of cases brought pursuant to its provisions.”\textsuperscript{205} The court reiterated that there is a presumption against removability due to the “limited” jurisdiction of federal courts, and the court harbored “significant doubt” about CAFA’s scope.\textsuperscript{206} As a result, the court did not address the alternative issue of whether the claim fit within the exception set forth in 28 U.S.C. § 1332(d)(9)(C).

\textsuperscript{197} The district court consolidated numerous securities class action suits against Countrywide, its affiliates, and the underwriter defendants, alleging misrepresentations and omissions in connection with loan origination practices and risks associated with the mortgage securities publicly offered by Countrywide. These class actions involved combinations of claims under the 1933 and 1934 Acts as well as state common law. The same attorneys who represented Luther represented certain plaintiffs in the other actions.\textsuperscript{199} \textit{Luther v. Countrywide Home Loans Servicing}, 2008 U.S. Dist. LEXIS 26534 (C.D. Cal. Feb. 28, 2008).

\textsuperscript{198} \textit{Id.} at **4-6 (citing 15 U.S.C. § 77p(f)(2)(A)). Neither party contested this finding. \textit{Luther}, 533 F.3d at 1033.


\textsuperscript{200} \textit{Radzanower v. Touche Ross & Co.}, 426 U.S. 148, 153 (1976)).

\textsuperscript{201} \textit{Luther}, 2008 U.S. Dist. LEXIS 26534, at *9 (quoting \textit{Radzanower}, 426 U.S. at 153).

\textsuperscript{202} \textit{Id.} at *8.

\textsuperscript{203} \textit{Id.} at *9 (quoting \textit{Radzanower}, 426 U.S. at 153).

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Id.} (citing \textit{Kokkonen v. Guardian Life Ins. Co. of Am.}, 511 U.S. 375, 377 (1994); \textit{Gaus v. Miles}, 980 F.2d 564, 566 (9th Cir. 1992)).
The Ninth Circuit affirmed. The court first noted that, although defendants seeking removal have the burden “to establish that removal is proper,” plaintiffs seeking remand have the burden “to prove that an express exception to removal exists.” The court found that plaintiffs had met this burden, pursuant to section 22(a)’s non-removal provision.

Like the district court, the Ninth Circuit based its holding on the rule of specificity set forth in *Radzanower*. The court reasoned that the 1933 Act “is the more specific statute; it applies to the narrow subject of securities cases and § 22(a) more precisely applies only to claims arising under the Securities Act of 1933. CAFA, on the other hand, applies to a ‘generalized spectrum’ of class actions.” As a result, the court held that “CAFA’s general grant of the right of removal of high-dollar class actions does not trump § 22(a)’s specific bar to removal of cases arising under the Securities Act of 1933.” For the Ninth Circuit, a claim covered by section 22(a) is non-removable regardless of whether it fits within one of CAFA’s exceptions; whether Luther’s claim fit under 28 U.S.C. § 1332(d)(9)(C) was irrelevant.

Defendants unsuccessfully relied on a recent Second Circuit case, *Estate of Pew v. Cardarelli*, the first (and only) federal appellate court decision to construe the reach of CAFA’s statutory exception for actions that “relate to the rights, duties, and obligations relating to or created by or pursuant to any security.” In *Pew*, a divided Second Circuit panel reversed the district court’s remand order, holding that the securities exception in § 1332(d)(9)(C) did not cover an action alleging only violations of a state consumer-fraud statute. The *Luther* court reasoned that *Pew* was not on point, because the Second Circuit “did not address the interplay between CAFA and § 22(a),” since the *Pew* plaintiffs had proceeded under state law, not the 1933 Act.

The *Luther* court rejected several of the defendants’ arguments that expressly relied upon the Second Circuit’s reasoning in *Worldcom*. First, the Ninth Circuit was not persuaded by defendants’ argument that even if section 22(a) was more specific than CAFA, under *Radzanower* (and in accord with *Worldcom*) CAFA should control because application of section 22(a) would “unduly interfere” with the operation of CAFA. Unfortunately, the Ninth Circuit chose not address this argument, but it apparently found that the policy objective of centralizing securities litigation in federal court would not be significantly undermined if class actions brought under the 1933 Act concerning “noncovered securities” remained in state court.

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207 *Luther*, 533 F.3d at 1034.
208 *Id.* (citing *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003)). But see infra notes 323-31 and accompanying text.
209 *Luther*, 533 F.3d at 1034 (citing 15 U.S.C. § 77v(a)).
210 *Id.* (quoting *Radzanower*, 426 U.S. at 153).
211 *Id.*
212 *Id.*
213 527 F.3d 25 (2d Cir. 2008). *Pew* is discussed in more detail infra, Part III.C.1.
215 *Pew*, 527 F.3d at 33 (majority).
216 *Luther*, 533 F.3d at 1034.
217 *Radzanower*, 426 U.S. at 156 (where the application of a specific statute would “unduly interfere” with the operation of a general statute that was enacted subsequent to the specific statute, the more general statute controls) (citing *Gordon v. New York Stock Exch.*, 422 U.S. 659, 686 (1975)).
Second, the \textit{Luther} court declined to follow \textit{Worldcom}'s reasoning that, had Congress intended for section 22(a) to trump CAFA, Congress would have added an exception to CAFA for section 22(a), or inserted a “savings clause” into CAFA’s removal provision for claims arising under other federal statutes that explicitly prohibit removal. Such a savings clause would mirror that found in 28 U.S.C. § 1441(a) that provides that state court cases over which the district courts have original jurisdiction may be removed, “[e]xcept as otherwise expressly provided by Act of Congress.” Defendants unsuccessfully argued that Congress, “[h]aving specifically addressed the subject matter of the exceptions to removability of securities cases in CAFA, . . . cannot be presumed to have intended other exceptions involving the very same subject matter.” Finally, the Ninth Circuit was not persuaded by defendants’ argument that CAFA was the more specific statute because the 1933 Act claims allegedly removable under CAFA are a subset of all 1933 Act claims, whereas section 22(a) applies to all 1933 Act claims.

Thus, in \textit{Luther} we see a statutory analysis guided by, on the one hand, \textit{Radzanower}'s specificity analysis, and, on the other hand, precedent mandating that courts “strictly construe the removal statute against removal jurisdiction” and that “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” The opinion would have been strengthened had the court expressly addressed some of defendants’ arguments described above, particularly regarding the function of CAFA’s enumerated securities exemptions.

The Ninth Circuit was respectful of, but not controlled by, CAFA’s legislative history. As we shall see, courts in the Second Circuit took a different approach.

\textbf{C. The Second Circuit’s Broad View of Removal}

\textbf{1. Pew: A Divided Second Circuit Struggles over the Scope of CAFA}

As discussed above, \textit{Estate of Pew v. Cardarelli} did not involve claims brought under the 1933 Act. Rather, \textit{Pew} involved a putative class action filed in New York state court in which plaintiffs asserted a fraud claim under New York’s consumer fraud statute, alleging that the defendants failed to disclose that the issuer of money market certificates was insolvent at the time the issuer was marketing the certificates. The \textit{Pew} plaintiffs’ central allegation was that defendants operated a Ponzi scheme that could only meet its payment obligations to certificate holders by issuing new certificates to new holders. After the defendants removed the case pursuant to CAFA, the district court granted plaintiffs’ motion to remand, finding that defendants failed to establish that the action fell outside 28 U.S.C. § 1332(d)(9)(C). A divided Second Circuit panel reversed, holding that CAFA’s statutory exception for actions that “relate to the

\footnote{SIFMA Brief, supra note 17, at *20 (citing \textit{Tucker v. Alexandroff}, 183 U.S. 424, 436 (1901)).}

\footnote{\textit{Gaus v. Miles, Inc.}, 980 F.2d 564, 566 (9th Cir. 1992) (citing \textit{Boggs v. Lewis}, 863 F.2d 662, 663 (9th Cir. 1988); \textit{Takeda v. Northwestern Nat’l Life Ins. Co.}, 765 F.2d 815, 818 (9th Cir. 1985); \textit{Libhart v. Santa Monica Dairy Co.}, 592 F.2d 1062, 1064 (9th Cir. 1979)).}

\footnote{527 F.3d 25 (2d Cir. 2008).}

\footnote{N.Y. Gen. Bus. Law § 349.}

\footnote{\textit{Estate of Pew v. Cardarelli}, 2006 U.S. Dist. LEXIS 89025 (N.D.N.Y Dec. 6, 2006). 28 U.S.C. § 1332(d)(9)(C) exempts from CAFA claims that “relate[] to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security” as defined under the 1933 Act.}
rights, duties, and obligations relating to or created by or pursuant to any security” did not cover an action alleging only violations of a state consumer-fraud statute.\(^{223}\)

The *Pew* majority found that the exception to removal under § 1332(d)(9)(C) applies to suits asserting that the promises made in securities have not been honored, but does not apply to suits asserting fraud or other misconduct in the sale of securities. The court found that § 1332(d)(9)(C) “should be reserved for ‘disputes over the meaning of the terms of a security,’ such as how interest rates are to be calculated.”\(^{224}\) According to the court, the terms “rights,” “duties,” and “obligations” have specific and limited meanings, and taken together they cannot mean that plaintiffs have the right to except from CAFA any cause of action that relates to a security.\(^{225}\) The court inferred that Congress intended to distinguish “obligations” and “rights”; “obligations” are those created by instruments (this would distinguish the term from duties), and “rights” are those of security holders to whom the duties and obligations run.\(^{226}\)

The *Pew* majority conceded that its interpretation “arguably renders the words ‘relating to’ superfluous.”\(^{227}\) To support its position, the majority relied on CAFA’s Senate Report, which indicated legislators’ objective to broaden federal jurisdiction over class actions.\(^{228}\) Consequently, the court ruled that the exception to removal under 28 U.S.C. § 1332(d)(9)(C) was inapplicable because the lawsuit did not “relate to” the rights created by the certificates. Although the certificates created “obligations,” and “rights” for the holders, the majority held that the lawsuit “does not ‘relate[]’ to those rights; rather, it is a state-law consumer fraud action alleging that [defendant] fraudulently concealed its insolvency when it peddled the Certificates.”\(^{229}\)

Under the Second Circuit’s analysis, claims that “‘relate[] to the rights . . . and obligations’ ‘created by or pursuant to’ a security must be claims grounded in the terms of the security itself,” such as “the kind of claims that might arise where the interest rate was pegged to a rate set by a bank that later merges into another bank, or where a bond series is discontinued, or where a failure to negotiate replacement credit results in a default on principal.”\(^{230}\) In contrast, the claim before the court, alleging that a debt security was fraudulently marketed by an insolvent enterprise, did “not enforce the rights of the Certificate holders as holders, and therefore [did] not fall within § 1332(d)(9)(C) and § 1453(d)(3).”\(^{231}\)

The *Pew* majority’s interpretation prompted a strong dissent. The dissent concluded that the “majority has simply departed from the statutory text in favor of a dubious consideration of

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\(^{223}\) *Pew*, 527 F.3d at 33.


\(^{225}\) Id. at 31.

\(^{226}\) Id.

\(^{227}\) Id. at 32 (quoting *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1187 (11th Cir. 2007)).

\(^{228}\) Id. at 32-33.

\(^{229}\) Id. at 31.

\(^{230}\) Id. at 31-32.

\(^{231}\) Id. at 32. The *Luther* defendants made a similar argument: “the 28 U.S.C. § 1332(d)(9)(C) exception is inapplicable because Plaintiff’s claims . . . do not concern the terms of the mortgage securities themselves, but rather disclosure duties externally imposed by the federal securities laws.” SIFMA Brief, *supra* note 17, n.15.
the supposed legislative intent of the statute’s drafters.” After reviewing the plaintiffs’ complaint, the dissent reasoned:

the applicability of the Section 1332(d)(9)(C) exemption appears to me to be obvious. By issuing the Certificates, [defendant] took on an obligation to pay interest and principal to the purchasers of the Certificates. These purchasers therefore possessed a corresponding right to receive these payments. The instant suit plainly concerns [defendant’s] failure to fulfill its obligations with respect to the Certificates and the plaintiffs’ consequent deprivation of their rights with respect to the same. If this suit therefore does not solely involve a claim ‘that relates to the rights . . . and obligations relating to or created by or pursuant to” the Certificates, I am at a loss to understand why.

The dissent found the majority’s categorization of what claims fall within the exception to be “purely of its own invention” and an “act of judicial re-drafting of CAFA.” The majority’s distinction between the present suit, a state-law consumer fraud action, and other cases that “seek to enforce the terms of instruments that create and define securities,” was faulty:

the terms of CAFA simply do not contain any indication that this distinction has any import whatsoever. Under those terms, all that matters is that the suit is one in which securities holders are seeking the enforcement of rights created by, or relating to, the securities they hold. If this condition is met, our inquiry is finished.

The Pew dissent also attacked the majority’s reliance on the “dubious” legislative intent behind § 1332(d)(9)(C). The dissent quoted the Seventh Circuit, which assessed the oft-quoted Senate Report as having “no more force [as a source of legislative intent] than an opinion poll of legislators-less really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.” The dissent argued that the Report’s assertion regarding the limited scope of § 1332(d)(9)(C) “has no relation” to the enacted text, which contains “not a word” suggesting that the exception only applies to disputes over the terms of securities.

Hence, in Pew, we see divergent judicial interpretations of CAFA’s ambiguous wording. Notably, the Pew majority failed to follow or even acknowledge its own precedent holding that

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232 Pew, 527 F.3d at 33 (Pooler, C.J., dissenting).
233 Id. at 35.
234 Id. at 36.
235 Id.
236 Id. at 37. See also Lonny Sheinkopf Hoffman, Burdens of Jurisdictional Proof, 59 ALA. L. REV. 409, 445 (2008) (“Untethered, if not disdainful of the actual text that was enacted into law, [reliance on CAFA’s ‘Findings and Purposes’ section] seems little different from treating Congress’s passage of the statute as a blank check on which the most expansionist hopes and dreams of CAFA’s proponents can endlessly draw.”).
237 Pew, 527 F.3d at 37 (Pooler, C.J., dissenting) (quoting Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005)).
238 Id.
[i]n light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.” The majority also implicitly departed from the district court in terms of which party has the burden of proof regarding the applicability of CAFA’s exceptions: the district court followed the traditional rule that the party seeking removal (i.e., the defendant) has the burden, whereas the Second Circuit seemingly placed the burden on plaintiffs to establish that their claims fit within 28 U.S.C. § 1332(d)(9)(C). The dubious reasoning of the Pew majority would have immediate implications in restricting plaintiffs’ choice of forum in the Second Circuit.

2. Harborview: An Expansive View of Removal Takes Hold in the Second Circuit

In New Jersey Carpenters Vacation Fund v. Harborview Mortgage Loan Trust 2006-4 (“Harborview”), a district court in the Southern District of New York addressed the same question that the Ninth Circuit faced in Luther but came to the opposite conclusion. As the Harborview court noted, “whether the removal provision of the Class Action Fairness Act of 2005 trumps the anti-removal provision of Section 22(a) of the Securities Act of 1933” was “an issue of first impression” in the Second Circuit. The plaintiffs in Harborview filed suits in New York state court and alleged that defendants violated the 1933 Act by making misrepresentations in the prospectuses and registration statements of a bond issuance. The plaintiffs filed three separate actions, with the same allegations, against separate defendants, including the issuer, depositors, investment banks, and credit ratings agencies. Plaintiffs alleged three fraudulent offerings totaling over $6.3 billion. Defendants removed the cases to the district court pursuant to CAFA. Relying on the Ninth Circuit’s recent decision in Luther, plaintiffs moved to remand the cases back to state court pursuant to section 22(a).

Like the Ninth Circuit in Luther, but unlike the Second Circuit in Pew, the Harborview court began its analysis by noting the “strong presumption against removal jurisdiction and [that] any removal statute is to be construed narrowly, ‘resolving any doubts against removability.’” Next, the Harborview court emphasized the Congressional intent underlying CAFA’s removal provisions. The court noted Congress’s view that class actions, an “otherwise helpful

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239 Lupo v. Human Affairs Int’l, 28 F.3d 269, 274 (2d Cir. 1994) (quoting Somlyo v. J. Lu-Rob Enters., Inc., 932 F.2d 1043, 1045-46 (2d Cir. 1991)).
240 Estate of Pew v. Cardarelli, 2006 U.S. Dist. LEXIS 89025, at *10 (N.D.N.Y Dec. 6, 2006) (citing Miedema v. Maytag Corp., 450 F.3d 1322, 1328 (11th Cir. 2006); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 686 (9th Cir. 2006); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005)).
242 Id. at *3 (internal citations omitted).
243 Id.
244 Id. at **3, 11 & n.5.
245 Id. at *11 & n.5.
246 Id. at *3 (citing 28 U.S.C. §§ 1332(d)(2), 1453 (b)).
247 Id. at *3-4.
248 Id. at *4 (quoting Lupo v. Human Affairs Int’l, Inc., 28 F.3d 269, 274 (2d Cir. 1994)).
249 Id. at *9 (citing S. Rep. 109-14 at 4-5).
device[,] had been co-opted by unscrupulous attorneys who aggressively forum shopped to ‘magnet’ or ‘magic’ State jurisdictions.” Focusing on legislative intent, rather than the statute itself, the court explained that CAFA was particularly applicable to the instant case:

The Plaintiffs explicitly recognize that its [sic] claims address head on an issue of national, if not global, importance—the mortgage-backed securities crisis. . . . Given the scale of damages and the vital importance of the issues raised by the case to the national economy, this case fits easily within the goals expressed in the debates that resulted in CAFA legislation.

Having found that CAFA was applicable, next the court addressed whether CAFA overrode the 1933 Act’s anti-removal provision. After summarizing Luther, the court discussed at length the Second Circuit’s opinion in Worldcom. As discussed above, Worldcom addressed a similar issue: whether removal provision in the Bankruptcy Code superseded section 22(a) of the 1933 Act. Relying on Worldcom’s presumption that Congress intended “sweeping removal power” in bankruptcy litigation, the Harborview court opined that

[s]imilarly, here, one could argue that CAFA, which targets only diversity cases that are class actions, also has sweeping removal power and like the bankruptcy removal provisions, CAFA’s sole limitations are those exclusively listed in the defined exceptions such as Home State, Local Controversies, and the three securities and corporate governance exceptions. Had Congress wanted to treat CAFA like the general removal statute of § 1441(a) and leave intact other statutory regimes, it could easily have done so.

Apparently unconvinced by what “one could argue,” the Harborview court identified a “more important[ ]” foundation for finding that CAFA’s removal provision trumped section 22(a). The court quoted the Second Circuit’s recent Pew opinion:

Review of SLUSA and CAFA confirms an overall design to assure that the federal courts are available for all securities cases that have national impact (including those that involve securities traded on national exchange), without impairing the ability of state courts to decide cases of chiefly local import or that concern traditional statute regulation of the state’s corporate creatures.

Unless a case fit within one of CAFA’s limited exceptions under 28 U.S.C. § 1332(d)(9), the Harborview court found, Congress intended to grant federal jurisdiction – specifically

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250 Id. at **9-10 (citing Representative F. James Sensenbrenner, (R-WI), 151 Cong. Rec. H723-01, 726 (daily ed. Feb. 17, 2005); Senator Charles Grassley, 151 Cong. Rec. S1086-01, S1103 (daily ed. Feb. 8, 2005)).
251 Id. at **11-12 (footnotes and citations omitted) (emphasis added).
252 Id. at **15-18.
253 Id. at **16-18.
254 Id. at *18 (citation omitted) (emphasis added).
255 Id. at **18-19 (quoting Pew, 527 F.3d at 32).
diversity jurisdiction – to “all large, non-local securities class actions.”

Thus, the court ruled that “CAFA overrides the Securities Act’s anti-removal provision because this case involves exactly the type of case CAFA was concerned about—a large, non-local securities class action dealing with a matter of national importance, the mortgage-backed securities crisis that is currently wreaking havoc with the national and international economy.”

Having concluded that the defendants met their burden for removal under § 1453(b), the Harborview court proceeded to analyze whether plaintiffs could meet their burden to show that the case fit within § 1332(d)(9)(C). Again relying on the Senate Report, the court determined that CAFA’s exceptions are to be interpreted narrowly. The court relied on Pew’s distinction between claims “based solely on ‘the rights arising out of the terms of the securities issued by business enterprises,’” and claims that “do not implicate the terms or meaning of” securities. The Harborview court found that the certificates at issue fit within this latter category, and thus were removable under Pew. As a result, the court denied plaintiffs’ motion for remand.

Interestingly, at the outset of the opinion, the district judge had written that, in light of the Second Circuit precedent and CAFA’s legislative history, he was “constrained to follow, what at least in [his] view, comports more closely with the decisions in this Circuit and deny the motion.” Were it not for Pew and Worldcom, might the court might have ruled the other way? The legacy of Pew and Worldcom is the Second Circuit’s focus on the legislative history of CAFA (particularly the Senate Report) and SLUSA, respectively, to justify expansive interpretations of removal statutes at the expense of the plain language of section 22(a).

Another influence of Worldcom (and arguably Pew) on Harborview was the Second Circuit’s placement of the burden on plaintiffs to prove that one of CAFA’s exemptions was applicable, once defendants successfully argued that Congress intended to confer federal jurisdiction. Yet in CAFA, Congress did not specify which party bears the burden of proving that federal jurisdiction exists. Traditionally, of course, such a burden rests on the party

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256 Id. at *19 (quoting Pew, 527 F.3d at 32) (emphasis added).
257 Id.
258 Id. at *20.
259 Id. at **20-22 (quoting S. Rep. 109-14 at 45) ("The Committee intends that this exemption be narrowly construed.").
260 Id. at *25 (quoting S. Rep. 109-14 at 45).
261 Id. at *26.
262 Id.
263 Id.
264 Id. at *4 (emphasis added).
265 Id. at *20 ("the burden shifts to the Plaintiffs to show whether a CAFA exception applies").
266 See Hoffman, supra note 236, at 412; Morgan v. Gay, 471 F.3d 469, 473 (3d Cir. 2006) ("The only section of CAFA that might be applicable to this debate is its ‘Findings and Purposes,’ which broadly indicates an intent by Congress to make federal courts more available to class action litigants. However, the Findings and Purposes say nothing about burden-shifting, and should not be taken by this Court as an indication that Congress intended to shift a long- and well-established burden.").

For further critique of judicial reliance on CAFA’s legislative history, see Stephen B. Burbank, Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy, 106
seeking to litigate in federal court. But the Harborview court and most other courts adjudicating jurisdictional disputes under CAFA have not applied this maxim, but rather shifted the burden to the party opposing federal jurisdiction – almost always the plaintiff, since a jurisdictional challenge typically arises following a defendant’s removal.

Such a shift “constitutes a sea-change of enormous proportions.” Indeed, as in Harborview, plaintiffs bearing the burden of jurisdictional proof have been unsuccessful in attaining remand: “[w]hen there was such a shift in the burden of proof, the party desiring to litigate in federal court prevailed on the forum contest in 80% of the cases reviewed.” Thus the re-allocation of the jurisdictional burden may be “virtually dispositive in terms of forum selection outcomes.”

D. Katz: The Seventh Circuit Rejects Luther & Follows the Second Circuit

In Katz v. Gerardi, the Seventh Circuit held that “securities class actions covered by [CAFA] are removable, subject to the exceptions in §1332(d)(9) and §1453(d).” In so holding, the court expressly rejected the reasoning of the Ninth Circuit in Luther and followed the Second Circuit in Pew and Worldcom.


269 Hoffman, supra note 236, at 411.

270 Id.

271 Id. at 412. I discuss the inappropriateness of such a burden shift in more detail infra notes 323-31 and accompanying text.

Katz was a putative class action brought in Illinois state court pursuant to the 1933 Act. The lead plaintiff contributed interests in real property to a real estate investment trust, in exchange for interests called “A-1 Units.” After the REIT merged into another entity, holders of the A-1 Units were offered a choice of cash or “preferred units” in the new entity; plaintiff accepted the cash payment. Plaintiff contended that the merger violated the terms of the A-1 Units, because neither cash nor the preferred units offered investors the same tax benefits as the A-1 Units. The defendants removed the case to the District Court of the Northern District of Illinois pursuant to CAFA.

The district court granted plaintiff’s motion to remand. The court noted that plaintiff alleged only violations of the 1933 Act; to stay out of federal court, plaintiff had raised a novel, yet “not necessarily . . . factually persuasive” argument in an attempt to fit within the 1933 Act’s requirement that he “acquired” or “purchased” securities, given that he had received cash for his investment. Quoting Luther at length, the court expressly followed the Ninth Circuit: “Section 22(a), the more specific statute governing securities actions, controls this situation, not the CAFA, which generally governs large class actions.” Although the court expressed doubt about the merits of plaintiff’s claims under the 1933 Act, it acknowledged that “a plaintiff is the master of his complaint.”

The Seventh Circuit vacated the judgment. On the merits, the court noted that the plaintiff had sold his securities for cash and had never purchased the interests in the A-1 Units; as such he was not a purchaser of securities under the 1933 Act. Hence, plaintiff had no cause of action under the 1933 Act, and section 22(a) was inapplicable. However, the court chose to address the conflict between section 22(a) and CAFA because “it is possible for a private party to suffer an injury covered by the securities laws even though there is no private right of action to vindicate the investor’s entitlements.”

The Seventh Circuit applied the Radzanower specificity test, but found it inconclusive. The court disagreed with Luther’s finding that section 22(a) is the more specific statute, because in the Seventh Circuit’s view, the specificity canon is only applicable “when one statute is a subset of the other.” Citing Worldcom, the court explained:

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273 Two members of the putative class, represented by the same attorneys as Katz, brought a similar action in district court in Colorado but alleged only state law claims. Those plaintiffs alleged that federal jurisdiction was proper under CAFA. Defendants alleged that Katz filed suit “in a transparent attempt to avoid the stay” of discovery in the Colorado action. See Motion to Remand, Katz v. Gerardi, 2008 LEXIS U.S. Dist. Ct. Motions 4035, **8-9 (2008).


276 Id.

277 Id. at **12-13.

278 Id. at *11.


280 Id. at *5 (noting that a “pleader cannot block removal by specifying inapplicable legal theories”).

281 Id. at *6 (citing Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006)).

282 Id. at *7 (noting that “an older law [i.e., section 22(a)] maintains its vitality when it is more specific than a newer one [i.e., 28 U.S.C. § 1453]”).

283 Id. at **7, 10.
§22(a) of the 1933 Act is not a subset of the 2005 Act. Section 22(a) covers only securities actions, but it includes all securities actions--single-investor suits as well as class actions, small class actions as well as large multi-state ones. [CAFA], by contrast, covers only large, multi-state class actions. Is the 1933 Act more specific because it deals only with securities law, or is [CAFA] more specific because it deals only with nationwide class actions? There is no answer to such a question, which means that the canon favoring the specific law over the general one won’t solve our problem. 284

Whatever the merits of this logic, the Seventh Circuit’s specificity analysis misstated the standard. Nothing in Radzanower requires that one statute must be, or apply to, a subset of another statute to be more “narrow, precise, and specific,”285 and Katz cites no authority for such a proposition.286 Indeed, in Radzanower the Supreme Court held that the National Bank Act’s venue provision was more specific than the venue provision in the 1934 Act, even though the former was in no way a subset of the latter. The Katz opinion more closely mirrors Justice Stevens’ dissent in Radzanower, which of course is not the law.287

Rather than the specificity test, the Seventh Circuit found that the plain language of CAFA’s exceptions was dispositive. “Section 1453(d) leaves no doubt about how the 1933 Act, 1934 Act, and [CAFA] fit together.”288 According to the court, CAFA’s enumerated exceptions for non-removable securities “tell[] us all we need to know. Claims listed in §1453(d) are not removable. Other securities class actions are removable if they meet the requirements of the 2005 Act (100 investors, $ 5 million in controversy, minimal diversity).”289 The court reasoned that to find – as the district court did in Katz and the Ninth Circuit did in Luther – that section 22(a) trumps CAFA regardless of whether a claim fits within CAFA’s exemptions “would be to make most of §1453(d) pointless.”290

The court admitted that there is “some incongruity” in removing a securities claim under CAFA, which creates a species of diversity-of-citizenship jurisdiction, while the 1933 Act

284 Id. at **7-8 (citing Worldcom, 368 F.3d 86).
285 See Radzanower, 426 U.S. at 153 (“It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”).
286 The only authority this author could find was, perhaps not surprisingly, another opinion by Judge Easterbrook, Hemenway v. Peabody Coal Co., which also cited no authority. 159 F.3d 255, 264 (7th Cir. 1998) (“Take the maxim that the more specific statute prevails. That’s all well and good when one statute is a subset of another.”).
287 See Radzanower, 426 U.S. at 159 (Stevens, J., dissenting) (“Most litigation against national banks does not arise under the Securities Exchange Act; and most litigation arising under the Securities Exchange Act does not involve national banks. Thus, with equal logic we might describe either statute as creating an exception from the somewhat more general provisions of the other.”).
289 Id. at *9.
290 Id.
creates a federal claim. 291 But such incongruity did not bother the court given that § 1453(b) and (d) indicate that CAFA is applicable to claims that arise under federal law. 292

Having held that section 22(a) does not trump CAFA, the Seventh Circuit proceeded to examine whether the claim fit within one of CAFA’s exceptions. The A-1 Units at issue were not “covered securities” under § 1453(d)(1) (functionally identical to § 1332(d)(9)(A)). Nor did the plaintiff’s claim fit under § 1453(d)(3), the counterpart to § 1332(d)(9)(C). Here, the Seventh Circuit (and the parties) followed the analysis of the Pew majority. Plaintiff argued that his claim rested on the “terms” of the A-1 Units and thus “relate[d] to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security.” 293 Defendants countered that the claim rested on an assertion of fraud or deceit in the merger and the related transactions, and thus did not fit the CAFA exception according to Pew. 294 Although the court found plaintiff’s position “inconsistent” with his reliance on the 1933 Act, the court observed that the “characterization of an ambiguous claim is closer to a question of fact than to one of law.” 295

As a result, the Seventh Circuit remanded the case to the district court to decide if the claim fit within § 1453(d)(3). 296 The court noted that if the claim did fit within § 1453(d)(3), “[t]his also would mean that the suit might be removed under some other statute, for a suit to enforce a security’s terms does not arise under the 1933 Act.” 297 In other words, the exemption from removal under §§ 1453(d)(3) and 1332(d)(9)(C) cannot implicate the non-removal regime of section 22(a). 298

The Seventh Circuit did not discuss which party has the burden to show that an exemption to CAFA is applicable. But the opinion implies that such a burden rests on the plaintiff. The court noted that the claim “comes within federal jurisdiction…because [plaintiff] has citizenship different from some of the defendants, the proposed class contains more than 100

291 Id. at *10.
292 Id.
295 Id.
296 Id. at *14.
297 Id. at *13 (emphasis in original).
members, and the stakes exceed $5 million.” In other words, a presumption of federal jurisdiction existed because the claim met CAFA’s jurisdictional requirements, unless it could be shown (presumably by the plaintiff) that an exception to CAFA applied. In the court’s view, class action plaintiffs can no longer rely on section 22(a) as an exception to removal; they must prove their claims fit within §§ 1332(d)(9) and 1453(d).

*Katz* is a cogent resolution of the removal conflict, for several reasons. First, unlike in *Luther*, the court addressed the interplay of section 22(a), § 1332(d)(2), and § 1332(d)(9). Indeed, the Seventh Circuit’s argument that *Luther’s* broad reading of section 22(a) makes “most of §1453(d) pointless” is difficult to rebut. Second, the Seventh Circuit was not overly deferential to CAFA’s legislative history, particularly the dubious Senate Report. Third, the court did not blindly follow the *Pew* majority’s application of § 1332(d)(9)(C) but rather remanded to the district court for further analysis.

However, the Seventh Circuit’s decision has its own flaws. First, *Katz* failed to acknowledge the traditional rules that courts must narrowly construe removal statutes and repeals of jurisdictional statutes by implication are disfavored. Second, the *Katz* court accused the Ninth Circuit of “not understand[ing]” the interplay between CAFA’s securities exemptions and the conflict with section 22(a), and not “even acknowleg[ing the] existence” of CAFA’s exemptions. By upholding the non-removability of 1933 Act class actions not involving “covered securities,” the Ninth Circuit’s interpretation does render § 1332(d)(9)(A)’s exemption for “covered securities” superfluous. However, the *Luther* court was well aware of CAFA’s securities exemptions, yet found that nothing in CAFA expressly altered section 22(a)’s longstanding non-removal regime.

Third, and related, the Seventh Circuit’s conclusion that § 1453(d) leaves “no doubt” about how to resolve the conflict between section 22(a) and CAFA oversimplifies that conflict and gives too much credit to Congress. CAFA is no model of clarity; courts have described parts of the legislation as “entirely illogical,” suffering from “imperfect wording,” “imperfect drafting,” “cryptic text,” and “muddled” and “bewildering language.” Thus,


300 *Id.* at *9.


303 See *Luther*, 533 F.3d at 1034 (addressing defendants’ reliance on 28 U.S.C. § 1332(d)(9)(C)).


305 *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1146 (9th Cir. 2006).

306 *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008).


for the \textit{Katz} court to adopt the view that Congress carefully drafted the securities exemptions in
CAFA to replace section 22(a), without ever announcing its intention to repeal most of section
22(a), overlooks Congress’s history of unsuccessfully “reforming” the jurisdictional framework
for securities litigation by passing legislation that fails to accomplish what its sponsors intended,
either due to poor drafting or inadequate political support.

Contrary to the view of the Seventh Circuit, other explanations for the uncertain interplay
of section 22(a) and CAFA’s exemption for “covered securities” suggest that Congress may not
have intended for removal of 1933 Act class actions involving “non-covered securities.” In this
respect, while \textit{Luther} may have rendered parts of §§ 1332(d) and 1453(d) superfluous, doing so
was the most prudent option.

First, given CAFA’s objective to expand federal jurisdiction over “interstate cases of
national importance,” why would Congress exempt 1933 Act claims for “covered securities,”
i.e., securities traded nationally and listed on a regulated national exchange, but choose not to
exempt “non-covered securities,” such as those at issue in \textit{Katz}, \textit{Harborview}, and \textit{Luther}? If
anything, one would expect the opposite: lawsuits alleging fraud related to securities traded on a
national exchange are far more likely to be of “national importance,” and hence deserving of
removal. If, as the Senate Report suggests, Congress added the “covered security” exemption so
as not to “disturb the carefully crafted framework” of jurisdiction over securities claims
established in SLUSA and the PSLRA, then the omission of “non-covered securities” from
CAFA’s exemptions has nothing to do with alleged Congressional intent for the removal of such
claims; the omission of an enumerated exemption for “non-covered securities” was simply an
oversight. Alternatively, legislators may have believed that CAFA completely exempted
securities class actions.

Second, the confusion may be the result of political expediency. As one commentator
explained CAFA’s ambiguities, “[h]aving worked hard to close off avenues of forum choice that
are available in the jurisdictional regime that CAFA largely replaces for class actions, CAFA’s
architects were forced by the need to compromise (and perhaps inclined by a strategic preference
for ambiguity) to leave some questions implicating forum allocation unanswered.” CAFA’s
supporters needed eight years to pass the legislation; CAFA’s opponents attained an express
exemption for “covered securities” because in their view, in light of corporate scandals such as
Enron and Worldcom, investors (as potential class action plaintiffs) needed more protection,
rather than less. If CAFA’s supporters were aware that section 22(a) was in limbo, they may

\begin{footnote}
this provision is to avoid disturbing in any way the Federal vs. State court jurisdictional lines
already drawn in the securities litigation class action context by the enactment of [SLUSA]”).
310 See Thomas Lee Hazen, Allocation of Jurisdiction Between the State and Federal Courts for
(proposing that inconsistencies among jurisdictional provisions of the federal securities laws are
“the result of unfortunate legislative apathy or inattention”).
litigation is \textit{carved out entirely} by this legislation.”) (emphasis added).
312 Burbank, \textit{supra} note 170, at 1444.
(statement of Rep. Conyers) (“if we have learned anything from the Enron, Tyco, Firestone, and

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have chosen to leave resolution of its status to the courts, rather than risk derailing passage of the Act as a whole. This is, of course, pure speculation. The point is that crediting Congress with deciding that CAFA should supersede section 22(a), leaving only 1933 Act class actions involving “covered securities” non-removable, requires speculation as well.

In sum, the Seventh Circuit’s resolution of the removal debate in *Katz* is a sound analysis, strengthened by a more nuanced approach than the Ninth Circuit presented in *Luther*. Yet the confident tone of *Katz* underestimates the reasoning behind *Luther* and understates the confusion Congress created in CAFA.

**IV**

**THE IMPLICATIONS OF LUTHER, HARBORVIEW, & KATZ**

In the wake of *Luther*, is the sky falling in the Ninth Circuit, as the securities industry argues? Characterizing the forum issue as one of “exceptional importance to the entire securities industry,” the *Luther* defendants insisted that the case “likely will affect all future 1933 Act cases brought in state courts both in this Circuit and throughout the country” The amicus brief of the Securities Industry and Financial Markets Association in *Luther* predicted that remand would “wreak havoc with the policy objectives underlying the statutory schemes at issue in this case.” In this final section, I address the recurring themes – concerning both statutory interpretation and policy – that arise when defendants use CAFA (and the PSLRA and SLUSA) to remove litigation brought by investors in state court pursuant to the 1933 Act or state laws.

It is useful to summarize exactly which types of claims remain in dispute in terms of plaintiffs’ choice of forum. Congress has been clear on several fronts. Under CAFA’s securities exemptions and SLUSA, defendants cannot remove class actions brought under the 1933 Act that solely concern “covered securities.” These are securities traded nationally and listed on a regulated national exchange, or securities senior to a traded security, or ones issued by a

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314 SIFMA Brief, supra note 17, at *3.
316 SIFMA Brief, supra note 17, at *4. “The waste, duplication and conflicting outcomes that inevitably would result from litigating the same matters in multiple courts across the country would increase litigation costs, undermine the strong federal interest in maintaining uniformity and integrity in the interpretation and application of the federal securities laws, and leave unchecked the abuses in state court class action litigation that Congress sought to avoid.” *Id.* at *16.
registered investment company. 317 Under SLUSA, class actions that are based on state law and involve “covered securities” are removable and preempted; litigation concerning “covered securities” is not removable if plaintiffs file individual actions under the 1933 Act or state law. Thus, at issue now – in cases such as Luther, Katz, and Harborview – are securities class actions brought in state court, solely under the 1933 Act, that do not involve “covered securities.”

Does section 22(a)’s non-removal provision trump CAFA, despite CAFA’s express exemptions for certain securities claims? On the one hand, CAFA’s drafters were – or should have been – aware that courts are to construe removal statutes strictly against federal jurisdiction and that repeals of jurisdictional statutes by implication are disfavored. 318 The inability of the PSLRA and SLUSA to limit plaintiffs’ options to the extent the reformers had hoped was well known. 319 Had Congress wished to – or been able to – overturn section 22(a)’s long-standing non-removal regime, it could have done so expressly in CAFA. On the other hand, as emphasized by the Seventh Circuit in Katz, the express, enumerated exemptions for securities claims in CAFA would have little purpose if section 22(a) trumps CAFA in its entirety. And the Luther court’s failure to address that issue was less than convincing.

Other federal appellate courts likely will weigh in soon. Given its pro-removal precedent in Worldcom and Pew, the Second Circuit inevitably will issue an opinion in line with Katz and Harborview confirming that CAFA does supersede section 22(a). In addition, the split between the Seventh and Ninth Circuits makes it plausible that the Supreme Court will intervene and grant certiorari. Below I address what courts should consider when deciding whether to follow Luther or Katz.

First, as Judge Harold Leventhal once observed, citing legislative history to support one’s statutory interpretation is akin to “looking over a crowd and picking out your friends.” 320 The Second Circuit’s reliance on select portions of the legislative history of CAFA (and the Bankruptcy Code in Worldcom) is unfortunate. Courts should not respect CAFA’s supporters’ attempt to use the legislative history, rather than the legislation itself, “to assist state court defendants in crossing the default regime’s other hurdles to removal.” 321 The Supreme Court has “powerfully denounced the view that whatever advances a statute’s purposes must influence judicial interpretation of ambiguous statutory terms.” 322 Selecting portions of the legislative history of CAFA and similar statutes to interpret section 22(a) is unhelpful; what is relevant is not what certain legislators said but the language of the statutes enacted.

Second, plaintiffs should not bear the burden to prove that removal is improper because their claims fit within one of CAFA’s exemptions. In CAFA (and the PSLRA and SLUSA), Congress did not specify which party bears the burden of proving that federal jurisdiction

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318 See Burbank, supra note 170, at 1518.
319 See id. at 1526.
321 See Burbank, supra note 170, at 1519.
322 Hoffman, supra note 236, at 422 (citing Norfolk S. Ry. Co. v. Sorrell, 127 S. Ct. 799, 808 (2007) (quoting Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam) and the Court’s observation that “it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primarily objective must be the law’’)).
exists.\textsuperscript{323} Traditionally, such a burden rests on the party seeking to litigate in federal court.\textsuperscript{324} But courts across the country have shifted the burden to the party opposing federal jurisdiction.\textsuperscript{325}

Courts shifting the burden in this way have relied on "Breuer v. Jim’s Concrete of Brevard, Inc.", where the Supreme Court held that when a defendant removes a case under 28 U.S.C.\textsuperscript{326} § 1441(a), the burden is on a plaintiff to find an express exception to removal. However, "Breuer" is not on point, since that case addressed removal under the Fair Labor Standards Act of 1938 ("FLSA"), which, like most statutes granting concurrent jurisdiction, but unlike the 1933 Act and CAFA, lacks an express exception to removal.\textsuperscript{327} Indeed, "Breuer" specifically contrasted section 22(a)’s “indisputable prohibition[] of removal” from the FLSA.\textsuperscript{328} Thus, "Breuer" is irrelevant as to who has the burden of proof to show that, as a factual matter, the elements of § 1332(d)(2) or (9) are satisfied.\textsuperscript{329} Even courts adopting the "Katz" holding should interpret § 1332(d)(9) as a “nonwaivable jurisdictional rule[] whose nonapplicability must be shown by the party seeking to litigate in federal court.”\textsuperscript{330} As one federal judge has concluded,

there is nothing in [CAFA] itself to suggest that Congress intended to upset the more basic, longstanding principles that underlie removal jurisdiction. In light of these considerations, it is not difficult to see why many courts are unwilling to saddle plaintiffs with the burden of negating federal jurisdiction, absent at least some indication in the statutory text to show that Congress intended CAFA to reverse the burden of proof in removal cases.\textsuperscript{331}

A third recurring theme is defendants’ reliance on “the belonging theory,” i.e., in the words of CAFA’s Senate Report, that “[b]ecause interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court.”\textsuperscript{332} The plaintiffs’ bar responds that our dual forum framework means that “many categories of cases

\textsuperscript{323} See supra note 171 and accompanying text.
\textsuperscript{325} See supra note 268.
\textsuperscript{326} 538 U.S. 691, 697-98 (2003).
\textsuperscript{327} 29 U.S.C. § 216(b) (2000) (“an action to recover [under the statute] may be maintained . . . in any Federal or State court of competent jurisdiction.”); Breuer, 538 U.S. at 696; Hoffman, supra note 236, at 425-27.
\textsuperscript{328} Breuer, 538 U.S. at 696.
\textsuperscript{329} See Hoffman, supra note 236, at 428.
\textsuperscript{330} Id. at 443. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.”) (internal citations omitted).
\textsuperscript{331} Vance, supra note 101, at 1640.
within federal jurisdiction - including both federal question and diversity cases - ‘belong[]’ every bit as much in the state courts as they [do] in federal courts. The securities industry is correct that Congress expanded federal jurisdiction under CAFA for cases of “national importance,” but overlooks two considerations. First, actions under the 1933 Act also were regarded as having “national importance” during the Great Depression, when Congress expressly granted concurrent jurisdiction and non-removability to claims brought under the 1933 Act. Second, in light of CAFA’s exemption for 1933 Act class actions involving “covered securities,” i.e., those traded on a national exchange, one may plausibly conclude that 1933 Act actions concerning securities not traded on national exchanges out to be exempt as well; this latter group certainly has less “national importance.”

Likewise, the securities industry correctly asserts that the drafters of section 22(a) could not have envisioned the types of billion-dollar nationwide securities class actions and corresponding abuses that led to the enactment of CAFA, SLUSA, and the PSLRA. On the other hand, the drafters of CAFA and the other legislation presumably were well aware of section 22(a) and yet did not expressly amend it (except for SLUSA’s provision requiring removal for certain state-law based class actions).

Fourth, defendants persuasively argue that remand hurts “judicial efficiency.” As CAFA’s Senate Report noted,

[I]t is not uncommon to see twenty, thirty, or even 100 class actions filed on the same subject matter . . . . When these similar, overlapping class actions are filed in state courts of different jurisdictions, there is no way to consolidate or coordinate the cases. The result is enormous waste, to say nothing of the unfairness.

The plaintiffs’ bar responds that too much efficiency is not necessarily a good thing. As one commentator has noted,

by exalting the gathering powers of the federal courts, Congress has created incentives for litigants and courts to create ever bigger “litigations.” Whether in the form of multistate class actions or through nonclass aggregations, such litigation packages may replicate in federal court some of the supposed abuses in state court class actions to which CAFA supposedly responded, including the subordination of factual and legal differences of intense interest to individual states.

334 See Romine v. CompuServe Corp., 160 F.3d 337, 342 (6th Cir. 1998) (the 1933 Act’s grant of concurrent jurisdiction “bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of federal securities actions”).
336 Burbank, supra note 170, at 1447. See also id. at 1538 (“CAFA may result in the replication on a grander scale, under cover of settlement, of some of the supposed abuses in state court class actions that Congress said it wanted to stamp out. The difference would be that the balance of bargaining power in settlement would have shifted to defendants.”). Burbank warns that the increased federal caseload resulting from CAFA, in which district courts will face substantial
Whatever CAFA’s ultimate effect on the federal courts and aggrieved investors, the legal maneuvering by plaintiffs’ attorneys in cases such as Luther, Katz, and Worldcom is not symptomatic of an efficient dual forum framework. Luther and similar decisions allowing plaintiffs to “escape” removal provide incentive to class action plaintiffs to limit their state court claims to those arising under the 1933 Act. As a result, plaintiffs can proceed with their 1933 Act claims in one state court, while other claims, based on very similar factual and legal issues, proceed in different state and federal jurisdictions on different discovery and pre-trial schedules. Often, the same attorneys battle each other in the simultaneous lawsuits. This situation cries out for effective reform.

Plaintiffs defend the right – bestowed by Congress in 1933 and never expressly taken away – of aggrieved investors to litigate 1933 Act claims in the forum of their choice. The plaintiffs’ bar notes that forum shopping “based on lawful differences between federal and state courts was a long-established and long-accepted - indeed, an inherent and inevitable characteristic of the federal structure’s dual court system.” Indeed, is not a new trend and Congress (and the courts) were well aware of its virtues and drawbacks when the 1933 Act and CAFA were enacted. In turn, the securities industry attacks the pleading tactics and forum shopping of plaintiffs who file suit in state court, despite the clear intent of many reformers in Congress who voted for the PSLRA, SLUSA, and CAFA. The accusations against “unfair” state courts persist.

numbers of cases that are “notoriously demanding” and also of appeals from orders granting (or denying) motions to remand, may have unintended consequences. Id. “This aspect of CAFA raises most clearly the question whether the additional burdens that the statute imposes on the federal courts will adversely affect the quality of justice, not just in the cases that it allows to be brought to federal court, but also in the rest of the federal docket.” Id. at 1539.

The Federal Judicial Center may clarify this issue. The FJC is conducting a study of the impact of CAFA on the federal courts, including “CAFA’s impact on the number of class actions filed in or removed to federal courts and on the frequency, complexity and results of threshold jurisdictional motions, rulings on class certification, and activities related to disposing of class actions on the merits.” Vance, supra note 101, at 1641 n.175.

Burbank notes that CAFA’s ambiguities “guaranteed years of work for lawyers and courts that is unrelated to the merits of the underlying disputes.” Burbank, supra note 170, at 1444 (adding that CAFA’s ambiguities “guaranteed years of work for lawyers and courts that is unrelated to the merits of the underlying disputes”).

Purcell, supra note 161, at 1886; see also Debra Lyn Bassett, The Forum Game, 84 N.C. L. REV. 333, 395 (2006) ("Forum shopping is not a form of ‘cheating’ by those who refuse to play by the rules. Playing by the rules includes the ability of plaintiff’s counsel to select - and defense counsel to seek to counter - the set of rules by which the litigation ‘game’ will be played.").

See Burbank, supra note 170, at 1477.

For a historical perspective, see Purcell, supra note 161, at 1823 (“The amorphous nature of [diversity jurisdiction’s] rationale offered jurisdictional reformers a perennial opportunity. The complexities of legal processes and the variety of conditions that existed in the states made charges of bias or unfairness endemic, and repeat-player parties who preferred federal forums advanced them regularly. Further, diversity’s purported rationale could readily be stretched to any level of generality, for the dangers of bias or local prejudice could easily be broadened to
A related concern is uniformity. Defendants argue that national markets should be governed by uniform national standards, and that keeping litigation in federal court advances this objective. As the Supreme Court recently observed, the “magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.” But this argument is weaker in the litigation context than the regulatory context, because securities defendants can understand federal and state antifraud statutes “far easier because conduct that constitutes fraud under federal law is likely to constitute fraud under state law, and vice versa.”

Whether too much uniformity ultimately serves investors is debatable. In the class action context, the issue of class certification is critical. CAFA’s advocates as well as the plaintiffs’ bar know that federal courts are “much less likely to certify suits as class actions than were state courts and that denials of certification would, one way or another, quickly and abruptly end many, if not most, of them.” Since the mid-1990s, federal courts have “articulated an increasingly conservative class action jurisprudence that has directed federal courts to stringently scrutinize proposed litigation and settlement classes.” Thus, critics allege that removal of class actions under CAFA allows defendants to impose a “de facto federal certification requirement on state court class actions,” since defendants can remove depending on the state court’s class certification. Once class certification is denied, plaintiffs can always bring individual claims in state court, yet in that context defendants know “with statistical certainty that most potential plaintiffs would settle their suits relatively cheaply or, better, fail to file suits in the first place or, better yet, fail to secure lawyers to represent them in negotiations or, best of all, fail even to understand that they had cognizable claims to assert.”

On a broader level, the plaintiffs’ bar argues that Congress’s view of state courts is unnecessarily antagonistic, and that a legal framework that provides investors the protection of the dual forum framework may be viewed as “increas[ing] the size and breadth of a country’s

include a wide range of alleged flaws or inadequacies in state courts - including different procedures or institutional arrangements – that arguably caused risks to nonresident litigants and therefore demonstrated the need for federal jurisdiction.”).

See, e.g., The Securities Litigation Uniform Standards Act of 1997 - S. 1260: Hearings on S.1260 Before the Subcomm. on Sec. of the Senate Comm. on Banking, Housing, and Urban Affairs, 105th Cong. (July 24, 1997) (transcript at 53) (prepared testimony of Joseph A. Grundfest and Michael A. Perino, Professors of Law); Painter, supra note 8, at 60.


Purcell, supra note 161, at 1864-65 (noting “most plaintiffs’ attorneys were convinced that federal courts were less likely to certify and more likely to dismiss than were state courts”) (citing Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr., An Empirical Examination of Attorneys’ Choice of Forum in Class Action Litigation 31 & tbl.7 (2005)).


Id. at 1865.

Id. at 1876.
capital markets.” The securities industry counters that Luther and similar decisions will increase the risks and costs associated with underwriting a national securities offering, as defendants would have to defend “sprawling” litigation in state courts across the country. Such litigation may make access to U.S. capital markets more expensive as investors ultimately compensate financial institutions for soaring expenses. As defendants note, in many foreign markets private class actions are prohibited, or face higher burdens, thus putting U.S. companies at a competitive disadvantage. According to this view, enforcement of the non-removability provision of the 1933 Act “would continue to sabotage the competitive footing of U.S. capital markets.” Only time will tell if such dire forecasts are warranted.

What most observers agree upon is that CAFA is an extraordinary expansion of federal jurisdiction that gives a strategic edge to defendants. While CAFA’s critics may attack the motives of those seeking to expand federal jurisdiction, at least CAFA expressly sets forth most of the means through which Congress expanded federal jurisdiction. In contrast, CAFA’s effect on section 22(a) is far less certain.

Jurisdictional reform, Justice Frankfurter noted, “discloses in practice aptitudes or consequences not contemplated by its framers and wholly absent from the intention of law-makers.” This certainly held true in the PSLRA, SLUSA, and CAFA. The history of Congressional inaction (or inattention) regarding the persistence of section 22(a), and the difficulty in enacting CAFA in the first place, make it unlikely that Congress will act to clarify the status of section 22(a) in the class action context. If Congress were to act, one compromise would be legislation granting federal courts the discretion to remand 1933 Act class actions

349 Painter, supra note 8, at 76. Painter cites one study demonstrating “that countries with poorer investor protections, measured by both the character of legal rules and the quality of law enforcement, have smaller and narrower capital markets.” Id. at 76 n.396 (citing Rafael La Porta, LEGAL DETERMINANTS OF EXTERNAL FINANCE 1, 5 (Nat’l Bureau of Econ. Research Working Paper No. 5879, 1997)).
350 SIFMA Brief, supra note 17, at *7.
351 Id. at *8.
352 Id. See also Interim Report of the Committee on Capital Markets Regulation, at 11 (Dec. 5, 2006), available at http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf (“Foreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market.”); Stoneridge Invest. Partners, LLC. v. Scientific-Atlanta, Inc., 128 S. Ct 761, 772 (2008) (citing “practical consequences” of increased risks from securities claims as “raising the costs of doing business,” and noting that “[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here ... [t]his, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets”). See also Purcell, supra note 161, at 1855 (noting that CAFA’s proponents allege that “massive judgments could disrupt industries, destroy companies, and increase bankruptcies.”).
353 “The Federal Judicial Center found that defendants’ attorneys overwhelmingly favored the federal courts because they saw them as offering ‘an almost totally favorable legal environment for their clients’ - a legal environment marked by ‘a convergence of judicial receptivity, predispositions, and favorable substantive and procedural rules.’” Purcell, supra note 161, at 1887.
354 FRANKFURTER & LANDIS, supra note 20, at 103.
lacking national importance. This would allow district courts the flexibility to remand class actions concerning “non-covered securities” where appropriate, such as when plaintiffs’ attorneys had not brought simultaneous lawsuits in multiple jurisdictions alleging similar causes of action against the same defendants. For example, 28 U.S.C. § 1332(d)(3) grants courts discretion over to remand class actions “in the interests of justice” under very limited circumstances; a similar provision, less narrow in scope, for 1933 Act class actions involving “non-covered securities” could be a workable solution. As Professor Henry Hart observed, “legal problems repeatedly fail to come wrapped up in neat packages marked ‘all-federal’ or ‘all-state.’”

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355 See Painter, supra note 8, at 63 (discussing an analogous proposal by Geoffrey Miller following the enactment of SLUSA).
356 See supra note 182.