

ARTICLES

RERAFTING THE JURISDICTIONAL
FRAMEWORK FOR PRIVATE RIGHTS OF
ACTION UNDER THE FEDERAL
SECURITIES LAWS

JEFFREY T. COOK*

TABLE OF CONTENTS

Introduction.....	622
I. Legislative Background.....	627
A. The Securities Act of 1933 and the Securities Exchange Act of 1934.....	627
B. The Private Securities Litigation Reform Act of 1995	634
C. The Securities Litigation Uniform Standards Act of 1998.....	636
D. The Sarbanes-Oxley Act of 2002.....	639
E. The Class Action Fairness Act of 2005.....	642
II. Judicial Interpretation of the Amended Non-Removal Provision	646
A. Class Actions	647
B. Individual Actions.....	652
III. Proposed Amendment to the Non-Removal Provision of the 1933 Act.....	664
A. Legislative Use of the “Sound in Fraud” Demarcation.....	666
B. Judicial Use of the “Sound in Fraud” Demarcation.....	667
1. Rule 9(b): Pleading fraud with particularity	667
2. Section 804 of the Sarbanes-Oxley Act	669
C. Consistency with Legislative Intent.....	670

* J.D., *Harvard Law School*, 1998; A.B., *Princeton University* (Woodrow Wilson School of Public and International Affairs), 1994. I sincerely thank J. Michael Cook, Michael Leotta, Seth Pinsky, Soo-Mi Rhee, and Charles Yi for their invaluable comments to earlier drafts of this Article, and the editorial staff of the *American University Law Review* for their substantial contributions to its completion.

D. Avoiding Piecemeal Litigation under 28 U.S.C. § 1441(c)	675
E. Fairness to Defrauded Investors	678
Conclusion	679

INTRODUCTION

Congress recently enacted the Class Action Fairness Act of 2005 (“CAFA”)¹ to expand federal jurisdiction over class action lawsuits.² Congress was particularly alarmed by the targeting of plaintiff-friendly jurisdictions in state courts for the determination of lawsuits of national scope and interest.³ This type of forum shopping has thrived in recent years in the securities context. Stemming from the largest corporate frauds in history such as Enron and WorldCom, lawsuits have proliferated in state courts across the country for the sole purpose of avoiding federal court jurisdiction.⁴ Despite addressing these very concerns in the general class action context, Congress curiously exempted the federal securities laws from the provisions of CAFA.⁵ The explanation is apparent: an underappreciation of the overly nuanced jurisdictional framework for private rights of action under the federal securities laws.

Private rights of action have been an integral part of the federal securities enforcement scheme since its original formulation in the wake of the stock market crash of 1929.⁶ These provisions are, in essence, a means of investor protection. With the ebbs and flows of the securities markets, however, investor protection has been a fluctuating concept in the eyes of Congress. In bad times, investors merit protection from corporate wrongdoers and securities

1. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

2. *Id.* § 2(b)(2) (explaining that the purpose of CAFA is to grant federal courts the ability to consider interstate cases of national significance under diversity jurisdiction).

3. *See infra* notes 150-153 and accompanying text.

4. *See infra* Part II.B.

5. *See* Class Action Fairness Act of 2005 § 4(a)(2), 28 U.S.C.A. § 1332(d)(9)(A) (West Supp. 2005) (explaining that diversity jurisdiction, as provided under Section 1332(d)(2), is inapplicable to any class action that only involves a claim concerning a 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”) (citation omitted); *id.* § 5(a), 28 U.S.C. § 1453(d)(1) (exempting from removal to federal district court as provided under Section 1453 class actions that only involve a claim concerning a security “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”) (citation omitted).

6. *See* H.R. REP. NO. 73-85, at 9 (1933) (providing victims of fraudulent securities schemes with the ability to recover the securities’ purchase price or damages where the sellers made false statements, omissions, or otherwise failed to exhibit due care).

professionals manipulating the markets.⁷ In good times, investors become the pawns of plaintiffs' lawyers seeking to exploit their clients' misfortunes for their own gains.⁸ Under these competing forces, the evolution of the private rights of action under the federal securities laws is far from a model of clarity or consistency.

One form of investor protection has been particularly mangled in this tug-of-war: the non-removal provision of the Securities Act of 1933 ("1933 Act").⁹ Although state and federal courts have concurrent jurisdiction over 1933 Act claims,¹⁰ a defendant cannot remove 1933 Act claims filed in state court to federal court.¹¹ In effect, Congress took the unusual step of preventing federal claims from being heard in federal court.¹² Congress took the contrary position the following year when enacting the Securities Exchange Act of 1934 ("1934 Act"),¹³ by vesting the federal courts with exclusive jurisdiction over claims thereunder.¹⁴

7. See, e.g., S. REP. NO. 107-146, at 2 (2002) (commenting that the "Corporate and Criminal Fraud Accountability Act of 2002" plays an essential role in reestablishing trust in the financial markets by faithfully preventing, exposing, and prosecuting corporate fraud); *id.* at 17 (extending the statute of limitations for victims of securities frauds so as to prevent unduly burdening their right to recovery); S. REP. NO. 73-47, at 1 (1933) (describing the fundamental policy of the 1933 Act as protecting the public from fraud and misrepresentation in securities sales); H.R. REP. NO. 73-85, at 2 (recognizing that the "mass of essentially fraudulent securities" demanded congressional action); H.R. REP. NO. 73-152, at 1 (1933) (Conf. Rep.) (explaining that the purpose of the 1933 Act is to prevent fraudulent sales of securities in interstate or foreign commerce).

8. See, e.g., H.R. REP. NO. 104-369, at 32 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 731 (describing how investors are always the "ultimate losers" when issuers are victims of "extortionate 'settlements'"); 144 CONG. REC. H6059-60 (daily ed. July 21, 1998) (statement of Rep. Cox) (commenting that securities plaintiffs' lawyers brought lawsuits for their own benefit, not for their allegedly defrauded clients); *id.* (remarking that more than one half of the top 150 companies in Silicon Valley alone were victims of such exploitative suits and that plaintiffs received only between six and fourteen cents on the dollar in settlements).

9. Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-bbbb (2000)).

10. 15 U.S.C. § 77v(a).

11. *Id.*

12. Claims arising under federal law generally fall within the original jurisdiction of federal courts and are subject to removal. See 28 U.S.C. § 1331 (2000) (granting federal district courts with original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States"); *id.* § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.") (emphasis added).

13. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-mm (2000)).

14. 15 U.S.C. § 78aa.

This bipartite jurisdictional framework remains today, but with even greater nuance imposed by the recent wave of federal securities legislation. In 1995, Congress enacted the Private Securities Law Reform Act (“PSLRA”) ¹⁵ to add a number of procedural and pleading requirements on federal securities claims—particularly those under the 1934 Act. ¹⁶ It soon became obvious that plaintiffs could sidestep the PSLRA by filing actions under state law and/or in state court. ¹⁷ Congress quickly sought to close this loophole by enacting the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), ¹⁸ which subjected class actions “based upon the statutory or common law of any State” to removal to federal court and preemption by federal law. ¹⁹

However, state law was not the only loophole. The heart of the PSLRA—the heightened pleading requirements for securities fraud class actions—does not apply to 1933 Act claims. ²⁰ Nor does SLUSA, which by its plain language applies only to state law claims. ²¹ Via the non-removal provision, plaintiffs could therefore file 1933 Act claims in state court to seek recovery for the same securities fraud without the strictures of SLUSA and much of the PSLRA. ²² Indeed, purely for jurisdictional purposes, plaintiffs’ lawyers have filed scores of individual actions exclusively under the 1933 Act in state court as one segment of the massive litigation stemming from the largest corporate frauds in history. ²³ In the process, this “de facto class

15. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

16. See *infra* notes 102-112 and accompanying text.

17. See H.R. REP. NO. 105-803, at 14-15 (1998) (Conf. Rep.) (observing that plaintiffs’ lawyers have evaded the PSLRA’s provisions that protect against exploitative suits by filing “frivolous and speculative suits in State court, where essentially none of the [PSLRA]’s procedural or substantive protections against abusive suits are available”); Michael A. Perino, *A Census of Securities Class Action Litigation After the Private Securities Litigation Reform Act of 1995*, in 1015 CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES: SECURITIES LITIGATION, 1043, 1046 (Practising Law Institute 1997) (revealing that securities class action suits shifted significantly from federal to state court as a result of plaintiffs’ wishing to evade the “procedural and substantive hurdles” Congress created with the passage of the PSLRA).

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

19. 15 U.S.C. §§ 77p(b)-(c), 78bb(b)-(c) (2000).

20. See *id.* § 78u-4(b) (applying heightened pleading requirements to “any private action” arising under the 1934 Act).

21. See *infra* Part II.A.

22. See *infra* Part II.A-B.

23. For example, in the case of WorldCom, one law firm has filed at least forty-seven individual actions in state court on behalf of 120 plaintiffs in at least eight states. See *Cal. Pub. Employees’ Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 91 (2d Cir. 2004), *cert. denied*, 543 U.S. 1080 (2005); *In re WorldCom, Inc. Sec. Litig.*, No. Civ.02-3288, 2003 WL 22701241, at *5 n.1 (S.D.N.Y. Nov. 17, 2003) (recognizing that

action”²⁴ in state court has frustrated the parallel litigation consolidated in federal court.²⁵

Congress has not addressed this conspicuous loophole in the wake of SLUSA. Remarkably, despite enacting measures in CAFA that seem custom-made to combat this forum shopping,²⁶ Congress decided expressly to exempt the federal securities laws therefrom.²⁷ The stated reason for this exemption was “not to disturb the carefully crafted framework” of jurisdiction over securities claims established in SLUSA.²⁸ 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?

This Article offers a solution to this quagmire that continues to elude both Congress and the federal courts. Part I of this Article provides an overview of the sequence of legislation that has shaped private securities actions and, more specifically, their jurisdictional provisions. That sequence comprises: (1) the 1933 Act and the “interrelated” provisions of the 1934 Act;²⁹ (2) the substantial revisions to private securities litigation in the 1990s in the PSLRA and SLUSA;³⁰ and (3) the recent enactments of the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley Act”)³¹ and CAFA which, despite having less direct impact on private securities litigation, suggest how to remedy the federal securities jurisdictional framework in a manner consistent with current legislative intent.³²

plaintiffs’ law firm chose “to file as many cases as possible” for its clients in various states and sought to prevent removal and consolidation of the cases to a “single federal court by the MDL Panel”); *id.* (finding that the plaintiffs’ law firm, cognizant that filing 1934 Act claims would provide a basis for removal to federal court, avoided filing 1934 Act claims altogether, even if filing those claims would “increase a plaintiff’s leverage”).

24. *In re WorldCom, Inc. Sec. Litig.*, 2003 WL 22701241, at *6.

25. *See infra* Part II.B.

26. *See, e.g.*, Class Action Fairness Act of 2005 § 4(a)(2), 28 U.S.C. § 1332(d)(3) (West Supp. 2005) (delineating a number of qualitative factors federal courts may consider in exercising jurisdiction, including “whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction” and whether “other class actions asserting the same or similar claims on behalf of the same or other persons have been filed”).

27. *See supra* note 5 and accompanying text.

28. *See* S. REP. NO. 109-14, at 50 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 46-47 (revealing that the Committee’s desire to leave Congress’s previously enacted framework governing the adjudication of covered securities claims undisturbed prompted it to exclude such claims from jurisdiction conferred by Section 1332(b)).

29. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976) (characterizing private rights of action under the 1933 Act and the 1934 Act as “interrelated components of the federal regulatory scheme governing securities transactions”). *See infra* Part I.A.

30. *See infra* Part I.B-C.

31. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, 29 U.S.C.). *See infra* Part I.D.

32. *See infra* Part I.E.

Part II discusses recent judicial interpretations of the non-removal provision of the 1933 Act in light of its amendment by SLUSA. Courts have had to grapple with not only how to interpret the plain language of the amendment (especially in light of clear legislative intent to the contrary),³³ but also how to minimize the actual exploitation of its loopholes as highlighted in the massive litigation generated by the likes of Enron and WorldCom.³⁴ Judicial uncertainty on both issues—coupled with the expanse and impact of the exploitation—highlight the need for immediate legislative reform in the manner proposed here.

Part III details a proposed amendment to the non-removal provision of the 1933 Act as a means of harmonizing the overall jurisdictional framework for private rights of action under the federal securities laws. Specifically, the non-removal provision should be amended to permit removal of those 1933 Act claims which “sound in fraud”—that is, those premised on allegations of fraudulent conduct.³⁵ This proposal has a number of advantages. First, the proposal reinforces a growing trend in federal securities litigation and jurisprudence to apply certain federal procedural and securities provisions to claims of fraud in both form and substance.³⁶ Second, the proposal would make the federal securities jurisdictional framework consistent with various expressions of legislative intent by: (1) preserving a plaintiff’s choice of forum as presumably intended in the original enactment of the non-removal provision in 1933;³⁷ (2) curtailing the forum shopping targeted—but thus far missed—in the PSLRA and SLUSA in the 1990s;³⁸ and (3) reflecting a number of

33. See *infra* Part II.A.

34. See *infra* Part II.B.

35. See *infra* Part III. As discussed *infra*, plaintiffs can bring 1933 Act claims for misrepresentations and omissions on theories of fraud, negligence, or strict liability. See *infra* notes 49-65 and accompanying text. Regardless of the theory, 1933 Act claims are often premised on the same allegations of fraudulent conduct as an accompanying or substitute claim for fraud under the 1934 Act. See, e.g., *Crowe v. Deutsch Bank Alex Brown*, 330 F. Supp. 2d 813, 818 (S.D. Miss. 2004) (commenting that the alleged misconduct at issue in the plaintiff’s 1933 Act claim falls within the scope of the “alleged scheme or ‘course of conduct’ to defraud” that is the basis of the 1934 Act claim); *In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d 527, 537 (S.D.N.Y. 2004) (explaining that the 1933 Act claims against WorldCom in state court arose from the “same underlying financial fraud” that forms the basis of the 1934 Act claims in federal court); *In re WorldCom, Inc. Sec. Litig.*, No. Civ.02-3288, 2003 WL 22701241, at *5 n.1 (S.D.N.Y. Nov. 17, 2003) (recognizing the strategy to eschew the filing of 1934 Act claims that could have been brought along with or in lieu of 1933 Act claims based on fraud allegations).

36. See *infra* Part III.A-B.

37. See *infra* notes 89-95 and accompanying text.

38. See *infra* Part I.B-C.

the measures recently implemented in CAFA in 2005.³⁹ Third, this proposal would nullify yet another byproduct of forum shopping: piecemeal litigation of “otherwise non-removable” claims under Section 1441(c) of the general removal statutes.⁴⁰ Fourth, the proposal would promote both judicial economy and fairness to investors by streamlining the “race for [the] assets”⁴¹ in securities fraud litigation under uniform standards in federal court.⁴²

I. LEGISLATIVE BACKGROUND

A. *The Securities Act of 1933 and the Securities Exchange Act of 1934*

The 1933 Act was the federal legislative entrée into the realm of securities regulation. Although state regulation was pervasive at that time, new legislation at the federal level was deemed necessary to protect and restore investor confidence in the wake of the stock market crash of 1929.⁴³ Congress expressed particular concern over fraudulent activities in the securities markets.⁴⁴

In calling for legislative action, President Franklin D. Roosevelt implored Congress to “add[] to the ancient rule of caveat emptor, the further doctrine ‘let the seller also beware.’”⁴⁵ In response, Congress sought to establish a regulatory framework ensuring the exchange of reliable and honest information in the securities

39. See *infra* Part III.C.

40. See *infra* Part III.D. 28 U.S.C. § 1441(c) (2000) provides:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

41. See *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 334 (S.D.N.Y. 2003) (remarking that unconsolidated litigation in different fora is “duplicative and wasteful,” that it inevitably promotes a “race” for the finite funds available for the victims involved, and possibly deprives victims of the recovery to which they are entitled).

42. See *infra* Part III.E.

43. See S. REP. NO. 73-47, at 2 (1933) (explaining that “dire national distress” after the investment of “billions of dollars” in worthless securities demanded congressional action); H.R. REP. NO. 73-85, at 2 (1933) (finding that legislation was necessary in light of the fact that half of securities offered in 1920s were worthless); see also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976) (commenting that the federal regulation of securities transactions ensued in the wake of the stock market crash of 1929).

44. See S. REP. NO. 73-47, at 1 (remarking that the 1933 Act aimed to protect the public from “further exploitation” by preventing the future sales of “unsound, fraudulent, and worthless securities”); H.R. REP. NO. 73-152, at 1 (1933) (Conf. Rep.) (describing the purpose of the 1933 Act as preventing fraudulent sales of securities in interstate commerce); H.R. REP. NO. 73-85, at 2 (noting the devastating repercussions of the sale of fraudulent securities).

45. H.R. REP. NO. 73-85, at 2.

markets.⁴⁶ Specifically, its primary objectives were the “full disclosure of every essentially important element attending the issue of a new security,” and a “demand that persons, whether they be directors, experts, or underwriters, who sponsor the investment of other people’s money should be held to the high standards of trusteeship.”⁴⁷

The 1933 Act effectuated these goals by imposing a flurry of requirements upon issuers, underwriters, and dealers to make full and fair disclosures in securities offerings.⁴⁸ The 1933 Act provides for express private rights of action as part of its enforcement scheme. Under Section 11 of the 1933 Act (“Section 11”), purchasers of securities may sue for material misrepresentations or omissions in registration statements as long as they did not know of the misrepresentation or omission at the time of purchase.⁴⁹ The purchaser may sue the following under Section 11: (1) any person who signed the registration statement;⁵⁰ (2) any person who was a director or partner of the issuer at the time of the filing of the registration statement;⁵¹ (3) any person listed in the registration statement as a soon-to-be director or partner;⁵² (4) any person who has prepared or certified any part of the registration statement, such as accountants, engineers, appraisers, or other professionals (e.g., lawyers);⁵³ or (5) any underwriter of the securities.⁵⁴ Under Section 12 of the 1933 Act (“Section 12”), a purchaser of securities may sue the offeror or seller for any material misrepresentation or omission in prospectuses or oral communications.⁵⁵

46. *Aaron v. SEC*, 446 U.S. 680, 705-06 (1980) (Blackmun, J., concurring in part and dissenting in part).

47. H.R. REP. NO. 73-85, at 3.

48. *See, e.g.*, 15 U.S.C. § 77g (2000) (specifying information required to be disclosed in registration statements); *id.* § 77j (specifying information required to be disclosed in prospectuses); *id.* § 77aa (specifying schedules of information required in registration statements).

49. *Id.* § 77k.

50. The 1933 Act requires the registration statement to be signed by:

[E]ach issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer). . . .

Id. § 77f.

51. *Id.* § 77k(a)(2).

52. *Id.* § 77k(a)(3).

53. *Id.* § 77k(a)(4).

54. *Id.* § 77k(a)(5); *see also* *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 n.22 (1983) (noting that other corporate officers, lawyers “not acting as ‘experts,’ and accountants with respect to parts of a registration statement which they are not named as having prepared or certified” are not subject to liability under Section 11).

55. 15 U.S.C. § 77l.

Congress based the 1933 Act in large part on pre-existing state statutory and common law, but imposed fewer pleading requirements as a form of greater investor protection from fraud.⁵⁶ Specifically, the 1933 Act deviated from common-law fraud principles by not requiring plaintiffs to prove reliance (except in one circumstance),⁵⁷ loss causation,⁵⁸ or any particular state of mind of any defendant.⁵⁹ “This throws upon originators of securities a duty of competence as well as innocence which the history of recent spectacular failures overwhelmingly justifies.”⁶⁰ These special rules also reflected the inferior access of purchasers to information regarding securities.⁶¹ While liability under these civil liability provisions is “virtually absolute” for the issuer “even for innocent misstatements,”⁶² other defendants have a “due diligence” affirmative defense of varying degrees⁶³ depending on their importance in this “scheme of

56. See *Aaron v. SEC*, 446 U.S. 680, 711 (1980) (Blackmun, J., concurring in part and dissenting in part) (noting that securities fraud was not a novel problem in 1933, but that many States had tried to remedy it by enacting “blue sky” statutes); *id.* (explaining further that when Congress addressed this issue, it “explicitly drew” from the experience of the States).

57. See 15 U.S.C. § 77k(a) (requiring that a Section 11 plaintiff prove reliance on alleged misrepresentation or omission only if “such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement”).

58. Plaintiffs need not prove loss causation under Sections 11 and 12. *Id.* §§ 77k(e), 77l(b). Rather, defendants may assert loss causation as an affirmative defense—namely, that a lower stock value did not result from the alleged misrepresentations or omissions. *Id.*

59. See *Herman & MacLean*, 459 U.S. at 382 (finding that a plaintiff who has purchased a security pursuant to a registration statement need only show a “material misstatement or omission” to make his prima facie case); *Wilko v. Swan*, 346 U.S. 427, 431 (1953) (finding that the 1933 Act differs greatly from common-law action by creating a right to recover for misrepresentation where it is the *seller* who has the burden of proving “lack of scienter”), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

60. H.R. REP. NO. 73-85, at 9 (1933); see also *id.* (explaining that Section 11 creates “correspondingly heavier legal liability” in line with responsibility of issuers and securities professionals to the investing public).

61. See *Wilko*, 346 U.S. at 435 (reasoning that because issuers and securities professionals have “better opportunities” to research and evaluate the “prospective earnings and business plans affecting securities” than buyers, it is entirely reasonable for Congress to place buyers of securities “covered by the [1933] Act on a different basis from other purchasers”); *Securities Act: Hearings on S. 875 Before the S. Comm. on Banking and Currency*, 73d Cong., 1st Sess. 207 (1933) (statement of Hon. Alexander Holtzoff) (framing the question on who should bear the burden of liability as follows: “Let us assume that an innocent mistake is made and an investor loses money because of it. Now, who should suffer? The man who loses the money or the man who puts the mistake in circulation knowing that other people will rely upon that mistaken statement?”); H.R. REP. NO. 73-85, at 9 (concluding that it is necessary to place the burden of disproving responsibility for fraudulent acts of “omission or commission” on those who issue statements to the public).

62. *Herman & MacLean*, 459 U.S. at 382.

63. 15 U.S.C. §§ 77k(b), 77l(a)(2).

distribution.”⁶⁴ This essentially created a negligence standard for these other actors.⁶⁵

The following year, Congress enacted the 1934 Act in order to protect investors from fraudulent practices in securities exchanges and over-the-counter markets.⁶⁶ For example, Section 10(b) of the 1934 Act (“Section 10(b)”) makes it unlawful “[t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”⁶⁷ Although Congress did not establish express civil remedies under Section 10(b), courts have since firmly established implied private rights of action for violations thereof and of Securities and Exchange Commission (“SEC”) Rule 10b-5 (“Rule 10b-5”),⁶⁸ which was later promulgated in 1942.⁶⁹

Sections 11 and 12 of the 1933 Act and Section 10(b) of the 1934 Act are “interrelated components of the federal regulatory scheme governing transactions in securities.”⁷⁰ While the same conduct may be actionable under either statute, “the two provisions involve distinct causes of action and were intended to address different types of wrongdoing.”⁷¹ Indeed, both Congress and the courts have defined the contours of the implied Section 10(b) claim largely in light of what is expressly provided with respect to 1933 Act claims.⁷² As a

64. H.R. REP. NO. 73-85, at 9.

65. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976).

66. *See* S. REP. NO. 73-792, at 1-2 (1934) (responding to President Franklin Roosevelt’s concern that “naked speculation has been made far too alluring and far too easy for those who could and for those who could not afford to gamble. Such speculation has run the scale from the individual who has risked his pay envelop [sic] or his meager savings on a margin transaction involving stocks with whose true value he was wholly unfamiliar, to the pool of individuals or corporations with large resources, often not their own, which sought by manipulation to raise or depress market quotations far out of line with reason, all of this resulting in loss to the average investor, who is of necessity personally uninformed.”).

67. 15 U.S.C. § 78j(b).

68. 17 C.F.R. § 240.10b-5 (2004).

69. *See, e.g., Ernst & Ernst*, 425 U.S. at 196 (noting that although Section 10(b) does not on its face create an express civil remedy, nor is there any indication that Congress intended such a remedy, the existence of a private cause of action under the Section 10(b)/Rule 10b-5 is well-established (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 150-54 (1972); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971))).

70. *Id.* at 206.

71. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983).

72. *See id.* at 384 (noting the “cumulative construction of the remedies under the 1933 and 1934 Acts”).

result, plaintiffs face a far different set of procedural and substantive requirements for each cause of action.⁷³

While Sections 11 and 12 are limited to certain parties and forms of disclosure, Section 10(b) is a “catchall” antifraud provision applicable to “any person” having used “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of “any security.”⁷⁴ To provide some control over this wide range of potential claims, courts have imposed a number of substantive burdens on Section 10(b) plaintiffs, including a scienter and loss causation requirement.⁷⁵ While lacking these substantive requirements, “each of the express civil remedies in the 1933 Act allowing recovery for negligent conduct is subject to significant procedural restrictions not applicable under § 10(b).”⁷⁶ Specifically, unlike their Section 10(b) counterparts, Section 11 and 12 plaintiffs must post security for costs and satisfy an express statute of limitations.⁷⁷ These unique features of 1933 Act and 1934 Act claims serve to counterbalance each other.⁷⁸ For example, without the substantive requirements read into Section 10(b) claims, plaintiffs could just proceed thereunder and avoid the 1933 Act procedural requirements, “thereby nullify[ing] the effectiveness of the carefully drawn procedural restrictions on these express actions.”⁷⁹

73. See *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 466 (1969) (recognizing an “interdependence of the various sections of the securities laws” but reaffirming that even particular phrases may have different meanings between the 1933 and 1934 Acts).

74. 15 U.S.C. § 78j(b) (2000); 17 C.F.R. § 240.10b-5 (2004). See *Herman & MacLean*, 459 U.S. at 382 (describing plaintiff’s burden under Section 10(b)).

75. See *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627, 1633 (2005) (stating that plaintiffs are required to prove that their economic loss was proximately caused by the defendant’s misrepresentation or fraud for all Section 10(b) claims); *Ernst & Ernst*, 425 U.S. at 193 (holding that an allegation of “scienter” intent to deceive, defraud or manipulate is required for Section 10(b)/Rule 10b-5 private actions for damages).

76. *Ernst & Ernst*, 425 U.S. at 208-09 (citations omitted).

77. See 15 U.S.C. §§ 77k(e), 77m. Congress added these requirements just one year after enacting the 1933 Act to deter actions being brought solely for settlement value. See 78 CONG. REC. 8668 (1934) (statement of Sen. Fletcher) (noting criticisms that the 1933 Act “is too drastic, and is interfering with business. We have tried to meet those objections by this amendment”); *id.* at 8669 (statement of Sen. Fletcher) (emphasizing that amendments to Section 11 of the 1933 Act served as “a defense against blackmail suits as well as a defense against purely contentious litigation on the part of the defendant”); 78 CONG. REC. 10185 (1934) (statement of Sen. Byrnes) (arguing that “[t]here can be no doubt that the provisions of the existing law caused many men who were serving as directors of corporations to fear that they might be subjected to so-called ‘strike suits’ as the result of the administration of that law”).

78. Indeed, the bond requirement and express statute of limitations in the 1933 Act were enacted in conjunction with the 1934 Act. See Pub. L. No. 73-291, §§ 206, 207, 48 Stat. 881, 907-08 (1934).

79. *Ernst & Ernst*, 425 U.S. at 210.

Most relevant to this Article, 1933 Act and 1934 Act claims also differ in terms of their respective jurisdictional provisions. Section 22 of the 1933 Act provides that federal courts and state courts have concurrent jurisdiction over any private cause of action under the 1933 Act.⁸⁰ However, “no case arising under [the 1933 Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”⁸¹ Conversely, Congress expressly provided for exclusive federal jurisdiction of claims brought under the 1934 Act.⁸²

As numerous commentators have noted, there is little—if any—legislative history underlying the non-removal provision of the 1933 Act.⁸³ The grant of exclusive federal jurisdiction for 1934 Act claims just one year later casts an even darker shadow.⁸⁴ Indeed, in 1934, Congress acknowledged the conflict between the non-removal

80. 15 U.S.C. § 77v(a). The jurisdictional provisions of the 1933 Act also apply to the Trust Indenture Act of 1939. *Id.* § 77vv(b).

81. *Id.* § 77v(a).

82. *See id.* § 78aa (stating that federal courts have exclusive jurisdiction over violations of the 1934 Act). Federal courts also have exclusive jurisdiction over SEC actions for breach of fiduciary duty under the Investment Advisers Act of 1940. *Id.* § 80a-35. Other federal securities laws have hybrid jurisdictional provisions of concurrent jurisdiction with no limitations on removal to federal court. *See* Public Utility Holding Company Act of 1935, 15 U.S.C. § 79y; Investment Company Act of 1940, 15 U.S.C. § 80a-43; Investment Advisers Act of 1940, 15 U.S.C. § 80b-14.

83. *See, e.g.,* Allan Horwich, *Section 11 of the Securities Act: The Cornerstone Needs Some Tuckpointing*, 58 BUS. LAW. 1, 40 n.241 (2002), citing Paul Horton, *Section 17(a) of the 1933 Securities Act—The Wrong Place for a Private Right*, 68 NW. U. L. REV. 44, 56 n.32 (1973) (noting the lack of legislative history explaining Section 22 of the Securities Act).

84. The grant of exclusive federal jurisdiction was heavily debated in Congress. *See, e.g.,* 78 CONG. REC. 8099, 8571 (1934). However, the legislative history is silent as to the reason for the grant of exclusive federal jurisdiction. *See* Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 383 (1996) (“The legislative history of the [1934] Act elucidates no specific purpose on the part of Congress in enacting [the exclusive federal jurisdiction provision].”). Courts have been left to infer that the purpose of this provision was “to achieve greater uniformity of construction and more effective and expert application of that law.” *Id.* (quoting *Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985)). Some commentators have suggested that Congress granted exclusive federal jurisdiction in order 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. *See* Margaret V. Sachs, *Exclusive Federal Jurisdiction for Implied Rule 10b-5 Actions: The Emperor Has No Clothes*, 49 OHIO ST. L.J. 559, 580-81 (1988) (arguing that the heavy burden of proof required by sections 9(e) and 18(a) of the 1934 Act may have caused Congress to grant exclusive jurisdiction to federal courts under the assumption that these courts would be sensitive to underlying federal policies and could provide investors with a viable remedy); Louis Loss, *The SEC Proxy Rules and State Law*, 73 HARV. L. REV. 1249, 1275 (1960) (“The 1934 act is considerably more technical, and contains some provisions . . . which go much further beyond the common law than anything in the 1933 act. The logical inference from these Delphic indications is that the exclusive-federal-jurisdiction provision in the 1934 act was motivated by a desire to achieve a greater uniformity of construction, and perhaps a more sympathetic judicial approach . . .”).

provision of the 1933 Act and the exclusive federal jurisdiction provision of the 1934 Act,⁸⁵ and even considered an amendment to grant exclusive federal jurisdiction over 1933 Act claims.⁸⁶ However, Congress did not amend the non-removal provision of the 1933 Act at that time.⁸⁷ “So far as the legislative history shows, the difference in these two related statutes is pure happenstance.”⁸⁸

It is surprising that Congress would have been silent in its legislative history when taking the unconventional measure of preventing the removal of federal law claims to federal court. Indeed, that provision of the 1933 Act is in a rather exclusive club of federal non-removal provisions.⁸⁹ Despite their substantive dissimilarities, these similarly unique provisions, for which there are indications of legislative intent, may shed light on the rationale behind the non-removal provision of the 1933 Act.

Courts have generally noted that such “allocations of jurisdiction have been carefully wrought to the realities of power and interest and national policy.”⁹⁰ One such “reality” is a “complementary, historic interacting federal-state relationship” over a particular subject, with state authority not to be disturbed by removal of related actions to federal court.⁹¹ Other interests served in federal non-removal provisions include reducing the burdens on federal courts,⁹²

85. See 78 CONG. REC. 8571 (1934) (statement of Sen. Byrnes) (noting that the Senate version of the bill is identical to the 1933 Act in terms of jurisdiction, but that in contrast, the House bill gives exclusive jurisdiction to federal courts).

86. See *id.* at 8717 (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).

87. As discussed *infra*, the non-removal provision of the 1933 Act remained unchanged until 1998. See Securities Litigation Uniform Standards Act of 1998 § 101(a)(3), 15 U.S.C. § 77v (2000) (amending 15 U.S.C. § 77v by adding “[e]xcept as provided in Section 77p(c) of this title”).

88. A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 183 (1969).

89. See, e.g., 15 U.S.C. § 3612 (2000) (claims under the Condominium and Cooperative Abuse Relief Act of 1980); 28 U.S.C. § 1333 (2000) (admiralty actions under the “saving to suitors” clause); *id.* § 1445(a) (actions under the Federal Employers Liability Act); *id.* § 1445(b) (certain actions against common carriers under the Interstate Commerce Act); *id.* § 1445(c) (actions arising under state worker’s compensation laws); *id.* § 1445(d) (actions arising under the Violence Against Women Act); 46 U.S.C. app. § 688(a) (2000) (actions arising under the Jones Act); 46 U.S.C. § 761 (2000) (actions under the Death on the High Seas Act).

90. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 375 (1959).

91. See *id.* at 372 (noting that the “unquestioned aim” of the “saving to suitors” clause’s prohibition of removal of certain admiralty matters was to prevent “considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters”); *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 313 (1955) (explaining that the federal government has left significant regulatory power with the states, especially in the fields of maritime contracts and torts).

92. See, e.g., Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence*

preserving a plaintiff's choice of forum,⁹³ and preventing the "federalization" of traditional areas of state law.⁹⁴ Applying these rationales to the 1933 Act and its overall pro-plaintiff nature, one court concluded that the non-removal provision of the 1933 Act, "like others of the same genre, has the evident purpose of favoring plaintiffs' choice of forum."⁹⁵

B. The Private Securities Litigation Reform Act of 1995

Private rights of action under the federal securities laws remained mostly untouched for decades, until Congress embarked on a series of securities legislation in 1995 with the passage of the PSLRA.⁹⁶ This legislation was heralded as "the most momentous event in the history of securities regulation since the adoption of the Securities Acts in 1933 and 1934,"⁹⁷ and was intended to curb abuses in private securities litigation.⁹⁸ Securities fraud actions were the main culprit. "These suits, which unnecessarily increase the cost of raising capital and chill corporate disclosure, are often based on nothing more than a company's announcement of bad news, not evidence of fraud."⁹⁹ As

Against Women Act: A Defense, 37 HARV. J. ON LEGIS. 1, 26 (2000) (recognizing concerns at both the state and federal level that the creation of a civil rights remedy in the Violence Against Women Act would unnecessarily burden the courts); *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 351 (1961) (noting that Section 1445(c) reflects congressional concern for congestion in federal courts); S. REP. NO. 85-1830, at 9 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3105-06 (justifying the prohibition on removing workman's compensation claims to federal courts under Section 1445(c) because such a prohibition would help alleviate the burden on the federal courts).

93. See *Horton*, 367 U.S. at 351-52 (noting congressional concern for heavier trial burdens on worker's compensation plaintiffs in federal court); S. REP. NO. 85-1830, at 9, as reprinted in 1958 U.S.C.C.A.N. 3099, 3106 (stating that Section 1445(c) intended to preserve worker's compensation plaintiffs' choice to avail themselves of procedural advantages of proceeding in state court the non-removal provision gives the plaintiff the option of filing his claim in state or federal court).

94. See *Biden*, *supra* note 92, at 26 (noting, for instance, that Section 1445(d) was enacted to prevent federalization of domestic relations law); S. REP. NO. 85-1830, at 3106 (noting that worker's compensation cases exist only by virtue of state law and involve no federal question).

95. *Pinto v. Maremont Corp.*, 326 F. Supp. 165, 167 n.2 (S.D.N.Y. 1971) (stating that federal non-removal provisions apply to "tort actions in which Congress wishes to give the plaintiff an absolute choice of forum" (citing WRIGHT, FEDERAL COURTS § 38 n.28 (2d ed.))).

96. Brian S. Sommer, *The PSLRA Decade of Decadence: Improving Balance in the Private Securities Arena with a Screening Approach*, 8 WASHBURN L.J. 413 (2005) (noting that the PSLRA brought sweeping changes to the procedural rules for securities claims).

97. Harold S. Bloomenthal, *The Private Securities Litigation Reform Act—How Safe Is the Safe Harbor?*, SEC. & FED. CORP. L. REP., Jan. 1996, at 1.

98. See generally S. REP. NO. 104-98 (1995), as reprinted in 1995 U.S.C.C.A.N. 679; H.R. REP. NO. 104-369 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730.

99. S. REP. NO. 104-98, at 4, as reprinted in 1995 U.S.C.C.A.N. 679, 683; see also *id.* at 692 (strengthening Rule 11 sanctions to reduce any incentive to file frivolous

in the 1930s, the protection of investors was again touted as the impetus for legislative action—but this time from lawyers acting purportedly on their behalf in filing meritless lawsuits.¹⁰⁰ “Investors always are the ultimate losers when extortionate ‘settlements’ are extracted from issuers.”¹⁰¹

The PSLRA made significant changes to private causes of action under the 1933 Act and, even more significantly, the 1934 Act. First, the PSLRA added a safe-harbor provision to both the 1933 Act and 1934 Act for “forward-looking statements.”¹⁰² Plaintiffs now must allege that a defendant made a forward-looking statement with actual knowledge of its falsity—even under the “strict liability” provisions of the 1933 Act for which no showing of scienter is otherwise required.¹⁰³

The PSLRA also contained a number of procedural amendments to class actions under both the 1933 Act and 1934 Act. Securities class actions now require the appointment of the “most adequate plaintiff,” which is presumed to be the investor with the “largest financial interest in the relief sought by the class.”¹⁰⁴ This measure served to protect the class from its own lawyers, as “courts could be more confident settlements negotiated under the supervision of institutional plaintiffs were ‘fair and reasonable’ than is the case with settlements negotiated by unsupervised plaintiffs’ attorneys.”¹⁰⁵

The PSLRA also mandated a stay of discovery while a motion to dismiss is pending—absent the need to preserve evidence or prevent undue prejudice—to reduce the costs of meritless actions.¹⁰⁶ The PSLRA also required stricter application of Rule 11 of the Federal Rules of Civil Procedure for the imposition of sanctions¹⁰⁷ in order to “reduce significantly the economic incentive [of plaintiffs’ lawyers] to file meritless lawsuits without hindering the ability of the victims of fraud to pursue legitimate claims.”¹⁰⁸

Given the focus on abuses in securities fraud litigation, the PSLRA also contained amendments unique to fraud claims under the 1934 Act. The PSLRA imposed heightened pleading requirements on

lawsuits while allowing victims of fraud to pursue their legitimate claims).

100. See *id.* at 685 (noting that the legislation was designed to encourage the pursuit of valid securities fraud claims by plaintiffs’ lawyers and to promote the fight of abusive claims by defendants).

101. H.R. REP. NO. 104-369, at 32, as reprinted in 1995 U.S.C.C.A.N. 730, 731.

102. 15 U.S.C. §§ 77z-2(c)(1)(A), 78u-5(c)(1)(A) (2000).

103. *Id.* §§ 77z-2(b), 78u-5(b).

104. *Id.* §§ 77z-1(a)(3)(B)(iii)(I), 78u-4(a)(3)(B)(iii)(I).

105. S. REP. NO. 104-98, at 11, as reprinted in 1995 U.S.C.C.A.N. 679, 690.

106. 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3).

107. *Id.* §§ 77z-1(c)(1), 78u-4(c)(1).

108. S. REP. NO. 104-98, at 13, as reprinted in 1995 U.S.C.C.A.N. 679, 692.

securities fraud claims under the 1934 Act consistent with a “stringent” reading of Rule 9(b) of the Federal Rules of Civil Procedure.¹⁰⁹ Specifically, 1934 Act plaintiffs must “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”¹¹⁰ Plaintiffs must also “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”¹¹¹ Where a plaintiff fails to meet either of these heightened pleading requirements, a court “shall” grant a motion to dismiss the 1934 Act claim.¹¹²

C. *The Securities Litigation Uniform Standards Act of 1998*

The PSLRA did not modify the jurisdictional provisions of the federal securities laws, including the non-removal provision of the 1933 Act. As a result, plaintiffs’ lawyers—the PSLRA’s main target—could still file either 1933 Act claims¹¹³ or state law claims in state court in order to sidestep the new pleading and procedural requirements.¹¹⁴ Despite inconclusive evidence as to the actual exploitation of this loophole,¹¹⁵ Congress passed SLUSA in order to

109. H.R. REP. NO. 104-369, at 41 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 740. Rule 9(b) requires that “all averments of fraud and mistake . . . shall be stated with particularity.” FED. R. CIV. P. 9(b).

110. 15 U.S.C. § 78u-4(b)(1).

111. *Id.* § 78u-4(b)(2).

112. *Id.* § 78u-4(b)(3)(A).

113. As described *supra*, state courts have concurrent jurisdiction only over 1933 Act claims, not 1934 Act claims. Moreover, it is unclear to what extent the PSLRA’s procedural requirements apply to 1933 Act claims brought in state court, as many apply only to class actions filed “pursuant to the Federal Rules of Civil Procedure.” *Id.* §§ 77z-1(a), 78u-4(a); see also Nicholas E. Chimicles, *The Future of Securities Litigation Under the Private Securities Litigation Reform Act of 1995*, SA90 ALI-ABA 465, 477 (1996) (noting that “[t]he [PSLRA]’s procedural changes only apply to cases brought in Federal court”). Compare *id.* §§ 77z-1(c)(1), 78u-4(c)(1) (requiring court findings of compliance “with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure”), with *id.* §§ 77z-1(b), 78u-4(b)(3) (applying to “any private action arising under this subchapter”).

114. See H.R. REP. NO. 105-803, at 14-15 (1998) (Conf. Rep.) (noting that “since passage of the [PSLRA], plaintiffs’ lawyers have sought to circumvent the [PSLRA]’s provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the [PSLRA]’s procedural or substantive protections against abusive suits are available”); S. REP. NO. 105-182, at 1 (1998); see also Perino, *supra* note 17, at 1046 (noting “a significant shift of activity from federal to state court in an apparent attempt by plaintiffs to avoid the procedural and substantive hurdles Congress created when it passed the [PSLRA]”).

115. Compare Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 302 (1998) (finding “a significant shift in litigation from federal to state court” despite lack of “attempt[] to

curb such forum selection and promote national standards for securities traded on national exchanges.¹¹⁶

The target again was the plaintiffs' bar: "[W]e are here tonight to perfect [the PSLRA], to say you cannot use the State courts to do the same illicit, abusive strike suits that you were formerly doing in Federal court."¹¹⁷ Actions "alleging fraud" were again seen as the main conduit for abusive litigation.¹¹⁸ Moreover, given that strike suits were primarily brought as securities fraud class actions for maximum effect, Congress did not change the treatment of individual lawsuits.¹¹⁹

In an attempt to close this jurisdictional loophole, SLUSA added Section 77p(c) and 78bb(f) to the 1933 Act and 1934 Act, respectively, which provide: "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."¹²⁰ In turn, "subsection (b)" provides:

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.¹²¹

quantify pre-[PSLRA] levels of state court activity in order to measure the exact size of this shift"), with Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 42-45 (1998) (reviewing research on statistical data involving state court claims made after passage of the PSLRA and noting that the data did not provide strong evidence of filings in state court to avoid the PSLRA's requirements).

116. 143 CONG. REC. S10477 (daily ed. Oct. 7, 1997) (statement of Sen. Dodd).

117. 144 CONG. REC. H6058 (daily ed. July 21, 1998) (statement of Rep. Tauzin); see also 144 CONG. REC. S12445 (daily ed. Oct. 13, 1998) (statement of Sen. D'Amato) ("[W]e should not condone little more than a judicially sanctioned shakedown that only benefits strike lawyers."); 144 CONG. REC. H6059-60 (daily ed. July 21, 1998) (statement of Rep. Cox) ("The stockholders here are being taken advantage of by lawyers who bring lawsuits for their own benefit, and that is what the [PSLRA] was all about."); *id.* at H6063 (statement of Rep. Oxley) (commenting that "shareholders and employees lose every time that the company has to pay off a passel of lawyers just to settle").

118. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2 ¶ 5, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

119. H.R. REP. NO. 105-803, at 2; see also S. REP. NO. 105-182, at 6 (noting that individual state actions would not be affected by SLUSA).

120. 15 U.S.C. §§ 77p(c), 78bb(f)(2) (2000).

121. *Id.* §§ 77p(b), 78bb(f)(3).

SLUSA amended the non-removal provision of the 1933 Act by adding the exception “as provided in section 77p(c) of this title.”¹²² This amendment is hardly a model of clarity. Combining the cross-referenced provisions, the 1933 Act now permits removal of class actions based on the statutory or common law of a state involving a covered security.¹²³ By the plain language of these provisions, 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.

The legislative history provides no clear guidance on the parameters of SLUSA’s amendment to the non-removal provision of the 1933 Act. The amendment 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,¹²⁴ the express rationale of SLUSA ended up being “to limit the conduct of securities class actions *under State law*, and for other purposes.”¹²⁵ 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: this time, permitting the filing of 1933 Act claims in state court seeking recovery on the same

122. Securities Litigation Uniform Standards Act of 1998 § 101(a)(3), 15 U.S.C. § 77v(a).

123. 15 U.S.C. §§ 77p(b), 77p(c), 77v(a).

124. See, e.g., H.R. REP. NO. 105-803, at 13 (stating that the purpose of SLUSA is to prevent plaintiffs from evading federal protections against abusive litigation by filing claims in state, rather than federal, court); *id.* (“Under [SLUSA], class actions relating to a ‘covered security’ . . . alleging fraud or manipulation must be maintained pursuant to the provisions of Federal securities law, in Federal court (subject to certain exceptions).”); H.R. REP. NO. 105-640, at 8-9 (1998) (same); 144 CONG. REC. H10779 (daily ed. Oct. 13, 1998) (statement of Rep. Oxley) (“The conference report prevents lawyers from evading the protections of the [PSLRA] by filing their lawsuit in State court.”); *id.* at H10780 (statement of Rep. Eshoo) (commenting that SLUSA is intended to “assur[e] that lawsuits involving nationally traded securities remain in Federal courts where they have always been heard”); *id.* at H10771 (statement of Rep. Bliley) (“This legislation we are considering today will eliminate State court as a venue for meritless securities litigation The premise of this legislation is simple: lawsuits alleging violations that involve securities that are offered nationally belong in Federal court.”); 144 CONG. REC. H6060 (daily ed. July 21, 1998) (statement of Rep. Cox) (“[T]his legislation will make federal courts the exclusive venue for large-scale securities fraud lawsuits”); 143 CONG. REC. S10475 (daily ed. Oct. 7, 1997) (statement of Sen. Gramm) (“[I]f a stock is traded on the national market, . . . then the class-action suit has to be filed in federal court.”). This confusion was also apparently shared by then-SEC Commissioner Arthur Levitt. See 144 CONG. REC. S12444-45 (daily ed. Oct. 13, 1998) (letter from Arthur Levitt to Senators D’Amato, Gramm, Dodd) (stating that “the bill generally provides that class actions can be brought only in federal court where they will be governed by federal law”).

125. Securities Litigation Uniform Standards Act of 1998, Introductory Statement (emphasis added).

allegations of fraud as 1934 Act claims subject to the heightened pleading requirements of the PSLRA.

D. The Sarbanes-Oxley Act of 2002

Whereas the latter half of the 1990s was marked by corporate—and investor—prosperity, the new millennium commenced with a severe downturn in the stock market and the revelation of massive, multi-billion-dollar corporate frauds. Congress reacted to fraud scandals such as Enron and WorldCom with the swift passage of the Sarbanes-Oxley Act in 2002. As with the securities legislation in both the 1930s and 1990s, fraud was the primary impetus for the enactment of the Sarbanes-Oxley Act.¹²⁶ This time, however, the tides of investor protection had turned. The investing public now had to be protected not from lawyers filing fraud actions on their behalf (as with the PSLRA and SLUSA), but (as with the 1933 Act and 1934 Act) from issuers and their directors, officers, and agents committing the frauds in the first place.¹²⁷

The scope of Congress's reaction matched that of the frauds being targeted, with amendments scattered among many titles of the United States Code. The Sarbanes-Oxley Act added a number of new disclosure and certification requirements to the regulatory framework of the federal securities laws. Specifically, the chief executive and financial officers of the issuer must now certify that each periodic report “fully complies with the requirements of section 13(a) or 15(d) of the [1934 Act] and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.”¹²⁸ Congress added teeth to these disclosure requirements in the form of hefty criminal penalties—up to \$5,000,000 and 20 years

126. See S. REP. NO. 107-146, at 2 (2002) (“This bill contains a number of provisions intended to increase the criminal penalties for serious fraud, ensure that evidence—both physical and testimonial—is preserved and available in fraud cases, provide prosecutors with the tools they need to prosecute those who commit securities fraud, and make sure that victims of securities fraud have a fair chance to pursue their claims and recoup their losses.”); 148 CONG. REC. S6526 (daily ed. July 10, 2002) (statement of Sen. McConnell) (noting “today’s stories of corporate fraud, deception, and outright theft that we all cite as the real motivation behind the underlying bill”).

127. See S. REP. NO. 107-146, at 2 (“This bill would play a crucial role in restoring trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted.”); *id.* at 17 (extending limitations period for claims involving fraud as not to “unfairly limit recovery for defrauded investors”).

128. Sarbanes-Oxley Act of 2002 § 906(a), 18 U.S.C.A. § 1350(b) (Supp. II 2002) (citation omitted).

imprisonment for willful violations.¹²⁹ Congress also established new federal crimes for obstruction of justice¹³⁰ and securities fraud,¹³¹ increased the penalties for some existing crimes,¹³² and either directed or requested review of the Federal Sentencing Guidelines for other crimes.¹³³

The Sarbanes-Oxley Act's focus on fraud is made clear by its only reform to private rights of action¹³⁴—an extended limitations period as further protection to victims of fraud.¹³⁵ The 1933 Act contains an express limitations period for Section 11 and 12 claims,¹³⁶ while the Supreme Court transposed the one-year/three-year limitations period found elsewhere in the 1934 Act upon the implied rights of action under Section 10(b)/Rule 10b-5.¹³⁷ Congress heeded the warning

129. 18 U.S.C.A. § 1350(c)(2).

130. *Id.* §§ 1512, 1519, 1520(b).

131. *See id.* §§ 1348, 1349 (codifying crimes of conspiracy and attempt to commit securities fraud).

132. *See* 15 U.S.C.A. § 78ff(a) (West 2002) (criminal violations of the 1934 Act); 18 U.S.C.A. § 1341 (mail fraud); *id.* § 1343 (wire fraud); 29 U.S.C.A. § 1131 (West 2002) (ERISA).

133. *See* Sarbanes-Oxley Act of 2002 § 805 (directing the United States Sentencing Commission to review and amend the Federal Sentencing Guidelines for obstruction of justice and extensive criminal fraud); *id.* § 905 (directing review of sentencing guidelines relating to certain white-collar offenses); *id.* § 1104 (requesting review of sentencing guidelines for securities and accounting fraud).

134. *See* 28 U.S.C.A. § 1658(b) (West 2005) (establishing a statute of limitations of two years after the discovery of a violation or five years after a violation, whichever is earlier). Given the few protections afforded investors under the Sarbanes-Oxley Act with respect to private rights of action, the Shareholder and Employee Rights Restoration Act of 2003 was introduced in the House of Representatives “[t]o repeal the provisions of the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act that limit private securities actions . . .” H.R. 636, 108th Cong. (2003). This bill would have repealed SLUSA’s amendment to the non-removal provision of the 1933 Act. *Id.* § 2(c)(2). However, the last action taken on the bill was its reference to the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee in March 2003. *See* Thomas, The Library of Congress, <http://thomas.loc.gov/cgi-bin/bdquery/D?d108:636:./list/bss/d108HR.lst:@@X/TOM:/bss/108search.html> (last visited Nov. 19, 2005) (listing all actions taken on this bill).

135. *See* 148 CONG. REC. S1787 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy) (arguing “[i]t is time that the law be changed to give victims the time they need to prove their fraud cases.”).

136. *See* 15 U.S.C. § 77m (2000) (providing that “[n]o action shall be maintained to enforce any liability created under section 77k or 77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale.”).

137. *See* *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991) (holding that claims under Section 10(b)/Rule 10b-5 are subject to the statute of limitations in Section 9(e) of the 1934 Act). Section 9(e) of the 1934 Act

that, while the Court had adopted a limitations period for fraud claims from strict liability provisions of the 1934 Act, “[t]he most extensive and corrupt schemes may not be discovered within the time allowed for bringing an express cause of action under the 1934 Act.”¹³⁸

Entitled “Statute of Limitations for Securities Fraud,” Section 804 of the Sarbanes-Oxley Act created a new express limitations period applicable not to claims under any particular statute, but to any “private right of action that involves a claim of fraud . . . concerning the securities laws.”¹³⁹ Such claims “may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.”¹⁴⁰ Congress did not add this new limitations provision to the 1933 Act or 1934 Act, or elsewhere under Title 15, but to the catch-all limitations period for federal statutes under Title 28.¹⁴¹ That statutory placement suggests that Congress intended to protect plaintiffs of a certain substantive type (i.e., fraud victims), rather than plaintiffs asserting claims under any particular statutory provision.

Section 804 of the Sarbanes-Oxley Act is riddled with ambiguity.¹⁴² First, there is no indication how this provision interrelates with (i.e., supersedes) any of the express limitations provisions elsewhere in the 1933 Act and 1934 Act.¹⁴³ Moreover, Section 804 of the Sarbanes-Oxley Act provides no definition of the term “private right of action that involves a claim of fraud” and makes no reference to any particular federal statutes under which such private right of action may arise.¹⁴⁴ Regardless, courts thus far have agreed that this

provides: “No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.” 15 U.S.C. § 78(i)(e).

138. *Lampf*, 501 U.S. at 377 (Kennedy, J., dissenting).

139. 28 U.S.C.A. § 1658(b) (West 2005). The term “securities laws” includes both the 1933 Act and the 1934 Act as defined in 15 U.S.C. § 78c(a)(47). *Id.*

140. *Id.*

141. *See id.* § 1658 (providing for “[t]ime limitations on the commencement of civil actions arising under Acts of Congress”).

142. The Sarbanes-Oxley Act—Section 804 in particular—has been widely criticized for being hastily and poorly drafted. *See, e.g.*, John C. Coffee, Jr., *A Brief Tour of the Major Reforms in the Sarbanes-Oxley Act*, SH097 ALI-ABA 151, 171-72 (2002) (arguing that because the Act was passed quickly and many of the important provisions were added by floor amendments and without hearings, it is not surprising that it contains ambiguities and has had some unintended consequences).

143. *See* Michael A. Perino, *Enron’s Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN’S L. REV. 671, 693 (2002) (arguing that Section 804 is “poorly drafted” for being “inconsistent with express statutes of limitation already contained in the federal securities laws and is likely to create significant interpretational difficulties for courts”).

144. 28 U.S.C.A. § 1658(b).

extended limitations period applies to Section 10(b)/Rule 10b-5 claims.¹⁴⁵ No court has yet found this extended limitations period applicable to 1933 Act claims.¹⁴⁶ However, this unanimity is misleading given that the Sarbanes-Oxley Act has been interpreted only with respect to 1933 Act claims of a certain nature.¹⁴⁷

E. The Class Action Fairness Act of 2005

Class action litigation reform had been simmering in Congress in recent years,¹⁴⁸ culminating in the recent enactment of CAFA in February 2005.¹⁴⁹ As it had recently attempted to achieve in the securities arena with SLUSA, Congress targeted forum shopping in the filing of class action lawsuits of all substantive sorts in state courts.¹⁵⁰ Congress found it particularly troubling that “certain favored judges” in state courts were “hearing nationwide cases and setting policy for the entire country,”¹⁵¹ with “an almost ‘anything goes’ approach that remedies virtually any controversy subject to certification as a class action.”¹⁵²

Like SLUSA, CAFA handicaps plaintiffs because of the jurisdictional tactics of their lawyers.¹⁵³ One noted maneuver was

145. See, e.g., *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 365 n.16 (D. Md. 2004) (noting that Section 804 “applies to claims which are fraud-based, such as § 10(b) and Rule 10b-5 claims”); *Nw. Human Servs., Inc. v. Panaccio*, No. Civ.A. 03-157, 2004 WL 2166293, at *18 n.72 (E.D. Pa. Sept. 24, 2004) (stating that “[s]ection 804 of the Sarbanes-Oxley Act of 2002 extended section 10(b)’s statute of limitations and repose from the one-year/three-year period outlined in *Lampf* to a two-year/five-year period”).

146. See *infra* note 321 and accompanying text.

147. See *infra* note 322 and accompanying text (noting that these holdings only pertain to claims that do not allege fraud).

148. See H.R. 3789, 105th Cong. (1998) (introducing the Class Action Jurisdiction Act of 1998). The Class Action Jurisdiction Act of 1998 sought class action reform of the sort eventually enacted in the form of CAFA. Similar reforms were reintroduced multiple times in subsequent sessions of Congress. See, e.g., H.R. REP. NO. 106-320 (1999) (proposing the Interstate Class Action Jurisdiction Act of 1999); S. REP. NO. 106-420 (2000) (introducing the Class Action Fairness Act of 2000); S. REP. NO. 108-123 (2003) (discussing the Class Action Fairness Act of 2003).

149. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

150. See 151 CONG. REC. S1076 (daily ed. Feb. 8, 2005) (statement of Sen. Specter) (explaining that “[t]he class action bill has as its central focus to prevent judge shopping to various States and even counties where courts and judges have a prejudicial predisposition on cases.”); *id.* at S1081 (statement of Sen. Lott) (addressing “a dramatic rise in the number of interstate class actions being filed in State courts, particularly in what are called magnet jurisdictions”); 151 CONG. REC. H748 (daily ed. Feb. 17, 2005) (statement of Rep. Blunt) (arguing that “[l]awyers who now manipulate this system often do anything to stay out of Federal court”).

151. 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

152. *Id.* at H727 (statement of Rep. Boucher).

153. See *id.* at H726 (statement of Rep. Sensenbrenner) (targeting “aggressive

preventing removal of class actions by bringing only state law claims and artfully pleading around the requirements for diversity jurisdiction.¹⁵⁴ That is, plaintiffs' lawyers would name parties of certain state citizenship to destroy complete diversity and/or seek less than the requisite amount-in-controversy for any one plaintiff in order to remain in state court.¹⁵⁵

Accordingly, CAFA expanded diversity jurisdiction—the original tool against local favoritism in state courts—over class actions.¹⁵⁶ Echoing SLUSA, the goal was to allow class actions of a “truly national” nature to be heard in federal court.¹⁵⁷ Congress extended CAFA to “mass actions”¹⁵⁸ which class action lawyers might have otherwise filed to sidestep the new jurisdictional provisions.¹⁵⁹

forum shopping by trial lawyers to find courts and judges who will act as willing accomplices in a judicial power grab”); *id.* at H729 (statement of Rep. Sensenbrenner) (stating that legislative action is an “attempt to put an end to the type of gaming engaged in by plaintiffs’ lawyers to keep cases in state court”); *id.* at H735 (statement of Rep. Keller) (noting that “crafty lawyers are able to game the system by filing large, nationwide class action suits in certain preferred State courts”); 151 CONG. REC. S1084 (daily ed. Feb. 8, 2005) (statement of Sen. Cornyn) (noting class action abuses by “a handful of aggressive personal injury lawyers to pursue abusive litigation and junk lawsuits”).

154. *See* 28 U.S.C. § 1332(a) (2000) (providing that federal courts have jurisdiction over suits between parties of diverse citizenship with in excess of \$75,000 in controversy).

155. *See* 151 CONG. REC. S1079 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd) (“[P]laintiffs’ lawyers have been able to keep class actions out of Federal court, even those that are precisely the kind of cases for which diversity jurisdiction was created, because of their interstate character. They do this by adding named plaintiffs or defendants solely based on their State of citizenship in order to defeat the diversity requirement. Alternatively, they allege an amount in controversy that does not trigger the \$75,000 threshold for removing cases to Federal court. The result is frequently an absurd one. A slip-and-fall case in which a plaintiff alleges, say, \$76,000 in damages can end up in Federal court. At the same time, 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.”).

156. *See* Class Action Fairness Act of 2005 § 2(b)(2) (providing that the purpose of CAFA is to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction”).

157. 151 CONG. REC. S1077 (daily ed. Feb. 8, 2005) (statement of Sen. McConnell) (noting that legislation would still allow local controversies to be heard in state courts).

158. *See* Class Action Fairness Act of 2005 § 4(a)(2), 28 U.S.C.A. § 1332(d)(11)(B)(i) (defining a “mass action” for purposes of CAFA 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).

159. *See id.* § 1332(d)(11)(A) (providing that “a mass action shall be deemed to be a [removable] class action”); *see also* 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott) (explaining that the mass action provision “will ensure that class action-like cases are covered by the bill’s jurisdictional provisions even if the cases are not pleaded as class actions”); 151 CONG. REC. H732 (daily ed. Feb. 17,

Indeed, Congress had adopted a similar loophole-closing measure in SLUSA in defining “covered class actions” to cover more than traditional class actions.¹⁶⁰

As a result, federal courts now have diversity jurisdiction over a class action or mass action if the amount in controversy alleged by all plaintiffs collectively exceeds \$5,000,000 and any member of the plaintiff class is a citizen of a foreign state or a different state from any defendant.¹⁶¹ However, to allow “primarily intrastate actions that lack national implications” to remain in state court,¹⁶² CAFA exempts from this jurisdictional reach cases in which at least two-thirds of the plaintiff class and primary defendants are citizens of the state in which the action is filed.¹⁶³

In addition, CAFA accords federal courts the discretion to decline jurisdiction “in the interests of justice” where the local or national nature of the case is less obvious.¹⁶⁴ Specifically, if greater than one-third but fewer than two-thirds of the plaintiff class and primary defendants are citizens of the state in which the action is filed, the federal court may decline to exercise jurisdiction based on six factors: (1) whether the suit presents issues of significant national or interstate interest; (2) whether the claims will be governed by laws other than those of the forum state; (3) whether the case has been pleaded so as to avoid federal jurisdiction; (4) whether there is a “distinct” nexus between the state forum and the plaintiff class, the alleged harm, or the defendants; (5) whether the citizenship of the members of the proposed plaintiff class is widely dispersed among states and higher in the forum state than any other single state; and (6) whether other similar class actions have been recently filed to allow for coordination of parallel actions.¹⁶⁵ This last factor is to be

2005) (statement of Rep. Sensenbrenner) (characterizing “mass actions” as “class actions in disguise . . . result[ing] in the same abuses as class actions”); *id.* at H729 (statement of Rep. Sensenbrenner) (noting that a mass action “will be treated as a class action for jurisdictional purposes”).

160. 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 not only actions brought on behalf of a plaintiff class, but also “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”).

161. 28 U.S.C.A. § 1332(d)(2).

162. 151 CONG. REC. S1079 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd).

163. 28 U.S.C.A. § 1332(d)(4)(B).

164. *Id.* § 1332(d)(3).

165. *Id.*

broadly interpreted so that plaintiffs cannot “plead around it with creative legal theories” to avoid jurisdiction.¹⁶⁶

Securities class actions are expressly addressed in CAFA—but only to be exempted therefrom.¹⁶⁷ The massive corporate frauds underpinning the Sarbanes-Oxley Act were often invoked by opponents to CAFA as evidence that plaintiffs needed more—or at least not less—protection in the class action context.¹⁶⁸ This was met with reassurance from CAFA’s proponents that securities fraud was expressly exempted from the legislation.¹⁶⁹

Notably, however, this carve-out for securities class actions was part of the original class action reform proposals predating the stock market downturn in 2000 and the massive frauds of the likes of Enron and WorldCom.¹⁷⁰ Therefore, the purpose of the securities exception in CAFA appears not primarily to have been for the protection of investors from securities fraud. Rather, its intent was to preserve the “carefully crafted” jurisdictional framework over securities claims established in SLUSA.¹⁷¹ Indeed, the desire to

166. 151 CONG. REC. H728 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

167. See 28 U.S.C.A. § 1332(d)(9)(A) (providing that Section 1331(d)(2) “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”) (citation omitted); *id.* § 1453(d)(1) (providing that Section 1453 “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”); see also S. REP. NO. 109-14, at 29 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 28 (noting that the legislation “excludes from its federal jurisdiction grant . . . any securities class actions covered by [SLUSA]”).

168. See 151 CONG. REC. H727 (daily ed. Feb. 8, 2005) (statement of Rep. Conyers) (arguing that “[i]f we have learned anything from the Enron, Tyco, Firestone, and other legal debacles, it is that our citizens need more protection against wrongdoers in our society, not less”); 151 CONG. REC. H742 (daily ed. Feb. 17, 2005) (statement of Rep. Meehan) (arguing against CAFA by reference to “corporate crooks at Enron, WorldCom, and other companies” and “unscrupulous mutual fund managers”); *id.* (statement of Rep. Stark) (warning that “the accountability of companies like Enron [sic] would be held less accountable”); *id.* at H748 (statement of Rep. Pelosi) (cautioning that CAFA “would help shield large corporations from any accountability for Enron-style shareholder fraud”).

169. See 149 CONG. REC. H5282 (daily ed. June 12, 2003) (statement of Rep. Sensenbrenner) (noting that draft legislation “specifically excludes a number of Federal securities and State-based corporate fraud lawsuits”); 148 CONG. REC. H840 (daily ed. Mar. 13, 2002) (statement of Rep. Pryce) (stating that “[t]his has nothing to do with Enron. . . . [S]ecurities litigation is carved out entirely by this legislation. It would not cover Enron”).

170. See, e.g., H.R. REP. NO. 106-320, at 3 (1999) (providing that the Interstate Class Action Jurisdiction Act of 1999 “shall not apply to any claim concerning a covered security as that term is defined in [the 1933 Act and 1934 Act]”).

171. S. REP. NO. 109-14, at 50 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 46-47; see also 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that “[t]he purpose of this provision is to avoid disturbing

preserve this “framework” was reiterated throughout the class action bill’s history up through its enactment in the form of CAFA in 2005.¹⁷²

II. JUDICIAL INTERPRETATION OF THE AMENDED NON-REMOVAL PROVISION

In this set of legislation over the past decade, Congress has reset the balance between federal and state jurisdiction to address “windfall settlements for trial attorneys, forum shopping, and the need for more of these large interstate class actions cases to be in Federal court.”¹⁷³ In the securities context, Congress made express amendments to removal jurisdiction in SLUSA in order to create national standards for securities class actions,¹⁷⁴ and expressly opted not to disrupt its “carefully crafted” framework when drafting CAFA.¹⁷⁵ Although Congress appears certain of the fruits of its efforts, its amendment to the non-removal provision in SLUSA has in fact wreaked havoc on this “framework.”

Federal courts have been sharply divided in interpreting just how SLUSA amended the non-removal provision of the 1933 Act. By its plain language, SLUSA did not completely close the loophole originally opened by the PSLRA with respect to either class or individual actions. In terms of class actions, some courts have remanded 1933 Act claims to state court based on their reading of SLUSA as amending the express prohibition on removal only as to class actions “based upon the statutory or common law of any State”¹⁷⁶ Other courts have denied motions to remand 1933 Act class actions to state court “[b]ased on the language of the statute and the congressional findings in SLUSA.”¹⁷⁷

in any way the Federal vs. State court jurisdictional lines already drawn in the securities litigation class action context by the enactment of [SLUSA]).

172. See S. REP. NO. 109-14, at 50, *as reprinted in* 2005 U.S.C.C.A.N. 3, 46-47; S. REP. NO. 108-123, at 22 (2003) (noting that CAFA will not affect the jurisdictional lines already established for securities class actions by SLUSA); S. REP. NO. 106-420, at 34 (2000) (same); H.R. REP. NO. 106-320, at 22 (1999) (noting that “[t]he Committee recognizes that Congress has previously enacted legislation governing the adjudication of these claims [the PSLRA and SLUSA] So as not to disturb the carefully crafted framework for litigating in this context, claims involving covered securities are not included in the new section 1332(b) jurisdiction”) (citations omitted).

173. 151 CONG. REC. H746 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner); *see also* H.R. REP. NO. 105-803, at 13 (1998) (Conf. Rep.) (noting that SLUSA is intended “to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court”).

174. H.R. REP. NO. 105-803, at 2.

175. *See supra* notes 171-172.

176. 15 U.S.C. § 77p(b) (2000). *See infra* notes 185-91 and accompanying text.

177. *Alkow v. TXU Corp.*, Nos. 3:02-CV-2738-K, 3:02-CV-2739-K, 2003 WL

In terms of individual actions, SLUSA was intended not to change their treatment for purposes of jurisdiction¹⁷⁸—and accordingly more conspicuously left open the possibility that they could still be filed in state court. Taking this safer route, or perhaps as a result of their own misreading of the convoluted statutory language, some plaintiffs’ lawyers have filed individual 1933 Act claims in state court against the same defendants on the same essential allegations of fraud as many actions filed and consolidated in federal court.¹⁷⁹

This well-orchestrated strategy has been brought into the spotlight by the filing of a large number of individual claims in state courts across the country in connection with the largest corporate frauds in history, with real consequences on the administration of parallel federal litigation. In response, the federal courts handling the consolidated actions have invoked various sources of judicial authority to try to effectuate Congress’s stated—yet otherwise unrealized—goals to combat forum shopping.¹⁸⁰ These efforts have had mixed success, either ending in reversal or resting on shaky legal grounds in defiance of fundamental principles regarding the interpretation of federal removal statutes.¹⁸¹

Courts have had to grapple not only with the plain meaning of SLUSA’s amendment to the non-removal provision of the 1933 Act with respect to class actions, but also the practical effects of its loopholes with respect to individual actions as exacerbated in litigation stemming from large-scale corporate frauds. With judicial discord on both fronts, this “carefully crafted framework” in fact appears to be in need of further crafting to close the remaining loopholes existing both in theory and practice.

A. Class Actions

As discussed earlier, SLUSA amended the non-removal provision of the 1933 Act to read as follows: “*Except as provided in section 77p(c) of this title, 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.*”¹⁸² Section 77p(c) permits the removal of “[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section,” which in turn

21056750, at *2 (N.D. Tex. May 8, 2003). See *infra* notes 192-200 and accompanying text.

178. See *supra* note 119 and accompanying text.

179. See *infra* notes 220-222 and accompanying text.

180. See *infra* Part II.B.

181. See *infra* Part II.B.

182. 15 U.S.C. § 77v(a) (2000) (emphasis added to reflect amendment).

implicates only class actions “based upon the statutory or common law of any State or subdivision thereof.”¹⁸³ Accordingly, the plain language of the non-removal provision, as amended, indicates that class actions based on federal law fall outside the purview of Section 77p(c).¹⁸⁴

Only a handful of courts have directly interpreted SLUSA’s effect on the removability of class actions under the 1933 Act. The majority of those courts have adopted this plain reading of the statute in remanding 1933 Act class actions to state court.¹⁸⁵ Despite recognizing contrary signals in the legislative history,¹⁸⁶ courts have not seen fit to modify the statute to coincide with Congress’s intent where the language is clear, and where removal statutes require strict construction.¹⁸⁷ These courts even find some support for this strict

183. *Id.* §§ 77p(b), (c).

184. Numerous courts have implicitly recognized this plain language reading in dicta. *See, e.g.,* *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 298 (3d Cir. 2005) (noting that SLUSA “creates an express exception to the well-pleaded complaint rule, conferring federal removal jurisdiction over a unique class of state law claims”); *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 33 (2d Cir. 2005) (directing that “the action must be based on state or local law” to be removable under SLUSA), *cert. granted*, 126 S. Ct. 34 (2005); *Popp Telecom, Inc. v. Am. Sharecom, Inc.*, 361 F.3d 482, 488 (8th Cir. 2004) (explaining that SLUSA “provides for removal to federal court and dismissal of certain class actions brought under state law”); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1342 (11th Cir. 2002) (stating that “in order to remove an action to federal court under SLUSA, the removing party must show [inter alia] that . . . the plaintiffs’ claims are based on state law”).

185. *See, e.g.,* *Higginbotham v. Baxter Int’l, Inc.*, No. 04 C 4909, 04 C 7096, 2005 WL 1272271, at *2 (N.D. Ill. May 25, 2005) (remanding a case containing only Section 11 claim because statutory language unambiguously limits removal to “certain class actions containing state law claims”); *Zia v. Medical Staffing Network, Inc.*, 336 F. Supp. 2d 1306, 1310 (S.D. Fla. 2004) (remanding a case comprising only 1933 Act claims because removal requires plaintiff’s claims to be based in state law); *In re Tyco Int’l, Ltd.*, 322 F. Supp. 2d 116, 121 (D.N.H. 2004) (finding that SLUSA’s text and legislative history do not support removal of 1933 Act claims under Section 77p(c)); *Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03CV0714BTM, 2003 WL 23509312, at *2 (S.D. Cal. Aug. 27, 2003) (holding that “the plain language of section 77p(c) limits removal to class actions that are based upon state claims.”); *Nauheim v. Interpublic Group of Cos.*, No. 02-C-9211, 2003 WL 1888843, at *3-4 (N.D. Ill. Apr. 16, 2003) (deciding that the 1933 Act clearly permits the removal of only class actions based on state law); *Martin v. Bellsouth Corp.*, No. 03-CV-728-WBH, slip op. at 5 (N.D. Ga. July 7, 2003) (remanding 1933 Act claim based on SLUSA’s plain language despite express legislative intent to prevent plaintiffs from abusively litigating by filing in state court); *In re Waste Mgmt. Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 593 (S.D. Tex. 2002) (concluding that SLUSA’s amendment to the non-removal provision only applies to class actions asserting state statutory or common law claims and not to those based solely on federal law like the 1933 Act).

186. *See Haw. Structural Ironworkers*, 2003 WL 23509312, at *2; *In re Tyco Int’l, Ltd.*, 322 F. Supp. 2d at 121 n.9.

187. *Haw. Structural Ironworkers*, 2003 WL 23509312, at *2; *Martin*, slip op. at 5; *In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d at 592 (stating that removal statutes should be strictly construed to preclude removal to federal court).

construction in the legislative history, as the stated purpose of SLUSA ended up being “to limit the conduct of securities class actions *under State law*.”¹⁸⁸ Moreover, the removal provisions in SLUSA were precisely drawn, and no express statement was made by Congress modifying the traditional rule prohibiting the removal of cases brought under the 1933 Act.¹⁸⁹ “Congress could have easily made a statement in SLUSA expressly modifying this provision had it so intended.”¹⁹⁰ Rather, the plain language of the statute closes only the loophole created by state law claims, not all claims filed in state court.¹⁹¹

Other courts have reached the opposite conclusion by effectively rewriting the SLUSA amendment in light of the broader intent expressed throughout its legislative history.¹⁹² While legislative history is typically ignored where the relevant statute is unambiguous,¹⁹³ it may be considered where there is a clearly expressed contrary legislative intent that would warrant a different construction of the statute.¹⁹⁴ It is on this basis that, despite the plain meaning of the statute, these courts have sought to correct the “inartfully (or even inaccurately) worded” provision of SLUSA in light of various conflicting passages in its legislative history.¹⁹⁵ One such passage is

188. *Nauheim*, 2003 WL 1888843, at *5 (quoting Securities Litigation Uniform Standards Act of 1998 § 2).

189. *See In re Waste Mgmt. Sec. Litig.*, 194 F. Supp. 2d at 596.

190. *Id.*

191. *See In re Tyco Int'l, Ltd.*, 322 F. Supp. 2d at 120 (noting SLUSA was designed to address state law claims rather than claims under the 1933 Act).

192. *See Lowinger v. Johnston*, No. 3:05CV316-H, 2005 WL 2592229, at *4 (W.D.N.C. Oct. 13, 2005) (holding that the removal of 1933 Act claims from state court was consistent with Congress's intent); *In re King Pharms., Inc.*, No. 2:03-CV-77, slip op. at 4 (E.D. Tenn. Feb. 6, 2004) (determining that legislative history supports the removal of state class actions asserting claims exclusively under the 1933 Act to federal court); *Kulinski v. Am. Elec. Power Co.*, No. Civ.A.C-2-03-412, 2003 WL 24032299, at *3 (S.D. Ohio Sept. 19, 2003) (noting that “covered class actions” are “clearly” removable to federal court); *Alkow v. TXU Corp.*, Nos. 3:02-CV-2738-K, 3:02-CV-2739-K, 2003 WL 21056750, at *2 (N.D. Tex. May 8, 2003) (stating that Congress intended SLUSA to prevent tactics employed by plaintiffs to avoid federal court); *Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122, 1124 (C.D. Cal. 2003) (concluding that class actions brought under the 1933 Act are removable).

193. *See, e.g., Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 730 (1995) (Scalia, J., dissenting) (noting that legislative history can be used only to clarify, not contradict, an unambiguous statutory text).

194. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *see Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (stating that statutory interpretations leading to absurd results should be avoided if an alternative interpretation is consistent with the stated legislative purpose).

195. *Brody*, 240 F. Supp. 2d at 1123. Numerous courts and commentators have simply assumed that SLUSA renders all 1933 Act claims removable without analysis. *See, e.g., Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 98-101 (2d Cir. 2004) (noting that in addition to state law claims, 15 U.S.C. § 77p(c) removes class actions filed in state court from the purview of the non-removal provision), *cert.*

the expressed intent to end the shift to state courts by “enact[ing] national standards for securities class action lawsuits involving nationally traded securities.”¹⁹⁶ If lawsuits involving nationally traded securities belong in federal court, and if state law claims are removable to federal court under SLUSA, then federal law claims under the 1933 Act logically must belong in federal court as well.¹⁹⁷ “[T]hat SLUSA meant to authorize removal of only securities litigation brought pursuant to state law is simply irreconcilable with these findings.”¹⁹⁸ Otherwise, “SLUSA did not counteract the shift in cases to state courts that Congress determined had frustrated the intent of PSLRA.”¹⁹⁹

Some courts and commentators argue one step further that, “[i]f § 77p(c) applies only to state law claims,” SLUSA’s amendment to the non-removal provision would be meaningless because no claim under the 1933 Act would be removable.²⁰⁰ However, these commentaries overlook the fact that the non-removal provision prevents removal of

denied, 543 U.S. 1080 (2005); *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 327 (S.D.N.Y. 2003) (finding that Sections 16 and 22 of the 1933 Act make federal court the forum for class actions involving covered securities with few limited exceptions); David M. Brodsky, *Private Actions and Private Rights: Current Hot Trends in Securities Litigation*, in 1151 CORPORATE LAW AND PRACTICE HANDBOOK SERIES: 31ST ANNUAL INSTITUTE ON SECURITIES REGULATION 773, 806 (Practising Law Institute 1999) (commenting that SLUSA prevents 1933 Act actions from being heard in state court); Painter, *supra* note 115, at 2-3 (noting that SLUSA prevents “class actions in state court or under state law”) (emphasis added).

196. *Kulinski*, 2003 WL 24032299, at *4 (quoting Securities Litigation Uniform Standards Act of 1998 § 2, 15 U.S.C. § 78(a)).

197. *See id.* (quoting 144 CONG. REC. H11020 (daily ed. Oct. 15, 1998) (statement of Rep. Bliley)); *see also Lowinger*, 2005 WL 2592229, at *4 (finding that “removal of class actions consisting of 1933 Act claims is consistent with Congress’ express intention ‘to make Federal court the exclusive venue for securities fraud class action litigation’”) (quoting H.R. REP. NO. 105-640, at 10 (1998)); *Brody*, 240 F. Supp. 2d at 1124 (emphasizing that “[t]he purpose of this title is to prevent plaintiffs from seeking to evade the protections the Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court” (quoting H.R. REP. NO. 105-803, at 13 (1998) (Conf. Rep.))); H.R. REP. NO. 105-640, at 8-9 (1998) (determining that class actions relating to a “covered security” alleging fraud must be maintained in federal court pursuant to federal securities law).

198. *Brody*, 240 F. Supp. 2d at 1124; *see also In re King Pharms., Inc.*, No. 2:03-CV-77, slip op. at 4 (E.D. Tenn. Feb. 6, 2004) (holding that the legislative history and common sense allow the removal of 1933 Act class actions filed in state court).

199. *Alkow v. TXU Corp.*, Nos. 3:02-CV-2738-K, 3:02-CV-2739-K, 2003 WL 21056750, at *2 (N.D. Tex. May 8, 2003).

200. *Id.* at *1; *see also Brody*, 240 F. Supp. 2d at 1124 (agreeing that plaintiff’s interpretation of Section 77p(b)-(c) would defeat the purpose of the amendment to Section 77v(a)); Andrew J. Morris & Fatima A. Goss, *Why Claims Under the Securities Act of 1933 Are Removable to Federal Court*, 36 Sec. Reg. & Law Rep. (BNA) No. 14, at 626 (Apr. 5, 2004) (claiming that the exception must extend beyond state-law claims, otherwise SLUSA’s amendment to the non-removal provision would be meaningless).

both claims and cases arising under the 1933 Act.²⁰¹ For example, a state law claim filed conjunctively with 1933 Act claims may fall within such a case.²⁰² Even state law claims alone may “arise under” federal law for purposes of removal if the complaint establishes a right to relief under state law which has a question of federal law in dispute.²⁰³ As a result, the plain language of the amendment to the non-removal provision does have meaning because a case may “arise under” the 1933 Act but still be based on state law. However, SLUSA’s amendment to the non-removal provision would then have the limited—and convoluted—purpose of allowing removal of only state law claims that turn on the 1933 Act.²⁰⁴ It is doubtful that Congress intended this anomalous result without any mention of its distinct and narrow contours anywhere in the legislative history.

Some commentators also offer an alternative reading of the plain language of SLUSA to subject 1933 Act claims to removal without resorting to legislative history.²⁰⁵ Their analysis is based on the placement of the phrase “as set forth in subsection (b)” in Section 77p(c)—saying that it modifies the immediately preceding term “covered security” as opposed to “covered class action.”²⁰⁶ Under that reading of the statute, whereas the term “covered class action” is modified by the phrase “based upon the statutory or common law of any State” in Section 77p(b), the term “covered security” is not. If the phrase “as set forth in subsection (b)” in Section 77p(c) modifies only the term “covered security,” “covered class actions” would be removable to federal court whether based on state or federal law.

However, this reading of the statute is invalidated by the operation of other provisions of SLUSA. If class actions under federal law were removable under Section 77p(c), they must also “be subject to subsection (b),”²⁰⁷ by which they could not subsequently “be

201. 15 U.S.C. § 77v(a) (2000).

202. See *In re Tyco Int'l, Ltd.*, 322 F. Supp. 2d 116, 120 (D.N.H. 2004) (determining that any case which contains a 1933 Act claim arises under the 1933 Act even in the presence of state law claims that might be a basis for removal).

203. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

204. *Id.* at 9.

205. See Jordan A. Costa, *Removal of Securities Act of 1933 Claims After SLUSA: What Congress Changed, and What It Left Alone*, 78 ST. JOHN'S L. REV. 1193, 1217 (2005) (arguing that 1933 Act claims filed in conjunction with state law claims in a state court are removable under SLUSA); Morris & Goss, *supra* note 200, at 626 (noting that all 1933 Act claims are removable based on plain language of SLUSA's amendment).

206. Morris & Goss, *supra* note 200, at 625-26.

207. 15 U.S.C. § 77p(c) (2000) (stating that “[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)”) (emphasis added); see Costa, *supra* note 205, at

maintained in any State or Federal court by any private party.”²⁰⁸ In other words, class actions removable under SLUSA are preempted by federal law.²⁰⁹ Yet it is nonsensical for federal claims to be preempted by federal law.²¹⁰ Nor is there any hint that Congress intended to alter the scope of available 1933 Act claims. Perhaps in focusing on preemption (limited to state law claims), Congress overlooked the nuance that SLUSA would thus not provide for the removal of otherwise non-removable federal law claims under the 1933 Act.

This wide disparity in judicial and academic interpretation mirrors the fissure between the statutory language and legislative history as to how SLUSA applies to 1933 Act claims. SLUSA itself contains the ambiguously expressed intent “to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA].”²¹¹ But are the referenced “State” suits those filed in state court, or just those based on state law? The legislative history strongly suggests the former, as members of Congress repeated time and again their intent to stop the shift from federal court to state court and to create national standards for cases of national interest.²¹² However, the plain language of SLUSA’s amendment to the non-removal provision provides only for the latter—that is, removing class actions based on state law to federal court while illogically allowing class actions based on federal law (i.e., the 1933 Act) to remain in state court. Naturally, while some courts faithfully adopt the plain language of the statute, others have seen fit to “correct” it to effectuate what Congress had repeatedly expressed as its overriding goals.

B. *Individual Actions*

SLUSA focused on the shift of class action suits from federal to state court in the wake of the PSLRA. As the discussion above makes clear, a non-obvious loophole remains for class actions under the

1217 (proposing removal of 1933 Act claims despite acknowledging that a case, to be removable, must be a covered class action, involve a covered security and be subject to Section 77p(b)).

208. 15 U.S.C. § 77p(b).

209. See *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 962-63 (9th Cir. 2004) (characterizing SLUSA as a “federal statute that preempts state-law securities actions”).

210. See *Morris & Goss*, *supra* note 200, at 626 (acknowledging that Section 77p(b) should be limited to state law claims, because only they can be preempted, but ignoring that all removable actions under Section 77p(c) must also be subject to Section 77p(b)).

211. Securities Litigation Uniform Standards Act of 1998 § 2, Pub. L. No. 105-353, 112 Stat. 3227 (codified at scattered sections of 15 U.S.C.).

212. See *supra* notes 116-117, 124-125 and accompanying text.

1933 Act. What is more obvious is that, in applying only to class actions, SLUSA expressly did not alter the treatment of individual suits.²¹³ Just as the PSLRA ignited a flight to state court for class actions, SLUSA has done the same for individual actions under both state law and the 1933 Act.

Although data on state court filings are not readily available,²¹⁴ plaintiffs' lawyers have brought practical meaning to this loophole by orchestrating a series of individual 1933 Act claims in state court in a very high-profile setting—the massive corporate frauds of the likes of Enron and WorldCom. Congress has not further amended the non-removal provision of the 1933 Act in reaction to this development.²¹⁵ Citing the rubric that “under the securities laws, federal jurisdiction is increasingly favored,”²¹⁶ courts have sought to close the more obvious loophole for individual 1933 Act claims despite the fact that the non-removal provision remains absolute with respect to such claims. The means utilized to achieve that end, however, have been questionable at best. Not surprisingly, this judicial effort has unfolded primarily in the wake of one of the largest corporate frauds and bankruptcies in United States history: the collapse of WorldCom.

In June 2002, WorldCom announced that it had improperly accounted for almost \$4 billion in costs, and soon thereafter filed for Chapter 11 bankruptcy.²¹⁷ Numerous securities fraud class actions—including at least twenty in the United States District Court for the Southern District of New York alone—were filed in federal court across the country against WorldCom and its officers, directors, underwriters, accountants, and research analysts.²¹⁸ In October 2002, the Judicial Panel on Multidistrict Litigation consolidated thirty-nine nationwide class actions, along with those individual actions filed in or removed to federal court, before Judge Denise Cote in the Southern District of New York.²¹⁹

213. Securities Litigation Uniform Standards Act of 1998 § 2.

214. See, e.g., Perino, *supra* note 115, at 302 (noting the lack of data on state class actions).

215. To the contrary, Congress expressly exempted the federal securities laws from CAFA to preserve the jurisdictional standards established in SLUSA. See *supra* notes 167-172 and accompanying text.

216. *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 325 (S.D.N.Y. 2003).

217. *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 91 (2d Cir. 2004), *cert. denied*, 543 U.S. 1080 (2005). WorldCom later restated its earnings for 2000 and 2001 by approximately \$76 billion. *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 476 (S.D.N.Y. 2005).

218. See *Cal. Pub. Employees' Ret. Sys.*, 368 F.3d at 91.

219. *In re WorldCom, Inc., Sec. & "ERISA" Litig.*, 226 F. Supp. 2d 1352 (J.P.M.L. 2002). The consolidated class actions had been filed in the Southern District of New York, the Southern District of Mississippi, the Southern District of Florida, the Northern District of California, and the District of the District of Columbia. *Id.* at

While many class actions were predictably filed in federal court under the mandates of the PSLRA and SLUSA, some plaintiffs' lawyers exploited the jurisdictional uncertainties stemming from that legislation by filing individual actions asserting only 1933 Act claims in state court. These parallel state actions arose from the underlying financial frauds that were the basis of the federal actions.²²⁰ These individual actions were not filed in individual fashion. One law firm, Milberg Weiss Bershad Hynes & Lerach, filed at least forty-seven individual actions on behalf of over 120 plaintiffs in at least eight states asserting claims exclusively under the 1933 Act.²²¹ Milberg Weiss even carefully selected its individual plaintiffs—"a coalition of public and private pension funds with \$2 to \$3 billion in losses" in WorldCom securities.²²²

The non-removal provision of the 1933 Act was the undisputed catalyst for this litigation strategy.²²³ Milberg Weiss encouraged large institutional investors to file individual actions instead of participating in class actions,²²⁴ and to coordinate litigation in state courts across the country apart from any class action suits in federal court.²²⁵

Judge Cote did not take kindly to this "de facto class action"²²⁶ being waged in state courts, and invoked a new judicial tool for each type of threat to the consolidated federal actions. First, Judge Cote granted relief to the lead plaintiff in the MDL litigation in connection with Milberg Weiss's letter campaign to prospective plaintiffs for individual state court actions.²²⁷ Judge Cote found that these letters did not present "a forthright description of the advantages and disadvantages of both the individual action and class

1352.

220. *In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d 527, 537 (S.D.N.Y. 2004).

221. *Cal. Pub. Employees' Ret. Sys.*, 368 F.3d at 91.

222. *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ.3288, 2003 WL 22701241, at *4 (S.D.N.Y. Nov. 17, 2003).

223. *See id.* at *5 n.1 (noting Milberg Weiss's strategy to file numerous claims in different states and to resist removal of any cases to federal court by "eschew[ing] the filing of [1934] Act claims even if such claims would increase a plaintiff's leverage, since the presence of [1934] Act claims would provide an independent basis for removal of the cases to federal court"); *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 315 (S.D.N.Y. 2003) (describing litigation strategy of Milberg Weiss).

224. *In re WorldCom, Inc. Sec. Litig.*, 2003 WL 22701241, at *6.

225. *Id.* at *4. Milberg Weiss itself attested that it would conduct the individual actions in a "coordinated cooperative manner so as to share the benefits of our investigatory efforts, discovery and other information, as well as experts, thus achieving economies of scale." *Id.* (quoting letter from Milberg Weiss to Asbestos Workers Local 12 Annuity Fund (May 23, 2003)).

226. *Id.* at *6.

227. *Id.* at *7.

action options.”²²⁸ For example, the letters did not inform investors of the more restrictive statute of limitations applicable to 1933 Act claims, nor certain protections afforded class members in federal court in terms of adequacy of representation, distribution of awards, and curbs on attorney’s fees.²²⁹ As a result, Judge Cote ordered not only curative notices to members of the certified class before her, but separate notices to investors who had filed or could file individual actions in other courts.²³⁰

Second, Judge Cote sought to neutralize the potentially disruptive effect of the pending individual actions in state courts on her management of the consolidated federal actions.²³¹ To that end, Judge Cote sent a proposed coordination order to state court judges presiding over individual actions²³² to prevent delay of or interference with the discovery and trial schedule for the consolidated actions in federal court.²³³ Specifically, her proposed order called for discovery in the federal and state actions to be coordinated, the PSLRA-mandated stay of discovery in the federal actions to apply to the state actions, and no trial in the state actions to be set before the scheduled trial date of the federal actions in January 2005.²³⁴

In defiance of this proposal, an Alabama state court judge set an individual case for trial beginning in October 2004.²³⁵ Judge Cote reasoned that this earlier trial in state court would delay the class action trial given the need for extensive motions practice to determine its collateral estoppel effect on the federal actions and the diversion of the time and energy of the defendants.²³⁶ Judge Cote resorted to invoking the All Writs Act²³⁷ to enjoin the state court trial

228. *Id.*

229. *Id.*

230. *Id.* at *8.

231. *In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d 527, 545 (S.D.N.Y. 2004).

232. *See id.* at 531 n.3, 536 (noting pendency of *Retirement Sys. of Ala. v. J.P. Morgan Chase & Co.*, No. CV 2002-1947(a)-PR (Ala. Cir. Ct. filed July 15, 2002)); *City of Birmingham Ret. & Relief Fund v. Citigroup Inc.*, No. 03-2373(HLB) (Ala. Cir. Ct. Apr. 15, 2003); *Standard Life Inv., Ltd. v. Ebbers*, No. 04-1938 (D.C. Super. Ct. Mar. 12, 2004); *Illinois Mun. Ret. Fund v. Citigroup Inc.*, No. 03 L 772 (Ill. Cir. Ct. filed June 18, 2003); and *Steelworkers Pension Trust v. Citigroup, Inc.*, No. 030303441 (Pa. Ct. Com. Pl. filed Mar. 21, 2003)).

233. *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ.3288, 2004 WL 817355 (S.D.N.Y. Jan. 30, 2004).

234. *Id.* at *2.

235. *See In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d at 538 (reviewing the scheduling actions of Judge Price in *Retirement Systems of Alabama*).

236. *Id.* at 545.

237. 28 U.S.C. § 1651(a) (2000) (permitting federal courts to issue writs if necessary to aid their jurisdictions).

until the conclusion of the federal class action trial.²³⁸ However, the Second Circuit quickly and soundly reversed that decision.²³⁹

Third, Judge Cote denied motions to remand individual 1933 Act actions removed to her from New York state court.²⁴⁰ Whereas plaintiffs' lawyers had artfully pleaded individual actions under the 1933 Act to remain in state court, the WorldCom Defendants²⁴¹ were equally clever in removing these individual actions to federal court. As discussed above, SLUSA amended the non-removal provision of the 1933 Act only in terms of class action suits—the non-removal provision was still absolute with respect to individual actions. Nonetheless, the WorldCom Defendants removed the individual actions to federal court as actions “related to” the WorldCom bankruptcy pursuant to 28 U.S.C. § 1452(a).²⁴² The alleged “relation” of these individual actions to the WorldCom bankruptcy was the potential for contribution, indemnification, and contractual reimbursement claims by the WorldCom Defendants against WorldCom in a subsequent, separate lawsuit if the WorldCom Defendants were in fact found liable in these individual actions.²⁴³

The plaintiffs filed motions for remand to state court on two grounds. First, they argued that the non-removal provision of the 1933 Act was absolute with no exception made for claims “related to” a bankruptcy.²⁴⁴ Second, they argued that, even if claims “related to” a bankruptcy could be removed in spite of the non-removal provision of the 1933 Act, their individual actions were not “related to” the WorldCom bankruptcy given the fact that WorldCom was not a defendant, and could be deemed effectively liable only in a separate subsequent action to be filed by the WorldCom Defendants against WorldCom.²⁴⁵ Judge Cote rejected both of these arguments, found no basis for abstention²⁴⁶ or equitable remand²⁴⁷ under the

238. *In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d at 551.

239. *See Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 421 (2d Cir. 2004) (holding that the “necessary in aid of its jurisdiction” exception to the Anti-Injunction Act does not allow a district court to preserve its trial date by enjoining state court proceedings).

240. *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308 (S.D.N.Y. 2003).

241. WorldCom filed for bankruptcy in July 2002. At that moment, the automatic stay provision of the Bankruptcy Code halted litigation against WorldCom. 11 U.S.C. § 362 (2000). However, plaintiffs proceeded with claims against WorldCom officers, directors, auditors, underwriters, and research analysts (hereinafter “WorldCom Defendants”).

242. *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. at 310-12.

243. *Id.* at 316.

244. *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 92 (2d Cir. 2004), *cert. denied*, 543 U.S. 1080 (2005).

245. *Id.*

246. *See* 28 U.S.C. § 1334(c)(1) (2000) (providing that a district court may, “in the

bankruptcy jurisdiction and removal statutes, and denied the motions for remand.²⁴⁸

The Second Circuit accepted an interlocutory appeal of the denial of the motions for remand solely on the first argument raised by the plaintiffs before Judge Cote.²⁴⁹ As a “case of first impression in the courts of appeals,” the Second Circuit addressed “whether a federal district court may exercise bankruptcy jurisdiction over generally nonremovable claims brought under the Securities Act of 1933.”²⁵⁰ This issue pitted two expressly conflicting provisions against each other: the non-removal provision (Section 22(a)) of the 1933 Act, and Section 1452 of the federal removal statutes, which permits removal of claims that are “related to” a federal bankruptcy case.²⁵¹

The Second Circuit began its analysis with a comparative overview of the two removal provisions. The bankruptcy removal provision was enacted in 1978 to “enable the bankruptcy courts . . . to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code,” and to save the estate “great cost and delay” by trying such actions in the bankruptcy, as opposed to state or federal district court.²⁵² Interestingly, the Second Circuit did not assess how the individual actions at issue would advance these forms of legislative intent.²⁵³ Indeed, the individual actions were before the district court—not the bankruptcy court administering the WorldCom estate—and resulted in no direct cost to WorldCom, which was not a named defendant.²⁵⁴

interest of justice,” abstain from hearing cases either relating to or arising out of Title 11); *id.* § 1334(c)(2) (providing that a district court shall abstain from hearing state cases “related to a case under title 11 but not arising under title 11 or arising in a case under title 11”).

247. *See id.* § 1452(b) (providing that if the bankruptcy claim is removed to district court, such district court may remand such a claim on “any equitable ground”).

248. *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. at 334.

249. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 95. The Second Circuit declined to review Judge Cote’s decision that the plaintiffs’ claims were “related to” the WorldCom bankruptcy “notwithstanding the tenuous connection between those claims and WorldCom’s reorganization process.” *Id.* at 96. In declining review, the Second Circuit stated that it was “not convinced [the Plaintiffs] raised a ‘question of law’” thus failing to meet the standard for interlocutory review under 28 U.S.C. § 1292(b). *Id.* Nor did the Second Circuit review Judge Cote’s decision that abstention and equitable remand were inappropriate pursuant to 28 U.S.C. §§ 1334(c), 1452(b), respectively. *Id.*

250. *Id.* at 90.

251. *Id.*

252. *Id.* at 96-97 (citing S. REP. NO. 95-989, at 153 (1977), as reprinted in 1978 U.S.C.C.A.N. 5787, 5939).

253. *See id.* at 97 (stating only generally that Sections 1452(a) and 1334(b) were intended to centralize bankruptcy-related litigation in bankruptcy courts and decrease litigation costs to the estate).

254. *See In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ.3288, 2003 WL 22953644, at

The Second Circuit then reviewed the history of the non-removal provision of the 1933 Act, specifically its having been amended for the first time by SLUSA and only with respect to class actions.²⁵⁵ The direct conflict thus arose: “While the bankruptcy removal statute unambiguously states that any civil action brought by a private party in state court . . . may be removed to federal court if the action is related to a bankruptcy case, Section 22(a) of the [1933] Act states, in equally unambiguous terms, that individual actions under the [1933] Act may not be removed to state court.”²⁵⁶

The Second Circuit employed a number of tools of statutory interpretation to address this conflict. Its first tool—the maxim *expressio unius est exclusio alterius*²⁵⁷—was inconclusive, as both statutes contained express exceptions exclusive of the other.²⁵⁸ The court placed greater attention on its second tool, specificity, stating that “[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.”²⁵⁹

The court first noted that neither statute was more specific directly in terms of the other: “just as Section 1452(a) applies to many claims that are not brought under the 1933 Act, Section 22(a) applies to many claims that are not ‘related to’ a bankruptcy.”²⁶⁰ The court also found that Section 22(a) and Section 1452(a) were of similar scope in applying to a defined class of claims—as opposed to one applying

*1 (S.D.N.Y. Dec. 16, 2003) (noting retention of individual actions against the WorldCom Defendants—not WorldCom—in federal district court).

255. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 98.

256. *Id.*

257. *See, e.g., United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001) (stating that, under this maxim, “[t]he logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned.”).

258. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 101. The bankruptcy removal statute contains exceptions for “a proceeding before the United States Tax Court [and] a civil action by a governmental unit to enforce such governmental unit’s police or regulatory power” 28 U.S.C. § 1452(a) (2000). The non-removal provision of the 1933 Act contains an exception “as provided in section 77p(c) of this title” 15 U.S.C. § 77v(a) (2000). In any event, this statutory maxim has been criticized as “a questionable one in light of the dubious reliability of inferring specific intent from silence.” Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2109 n.182 (1990). Indeed, courts ignore the maxim when its application would lead to results producing an opposite effect from that intended by the legislation. *See, e.g., Burns v. United States*, 501 U.S. 129, 136 (1991); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120 (1988) (clarifying that where Congress is silent on a certain statutory application, no inference drawn from such silence may be “credited when it is contrary to all other textual and contextual evidence of congressional intent”).

259. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 101 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

260. *Id.* at 102.

to a “broad universe of potential defendants” and the other to a “particularized” group.²⁶¹ However, the court did not consider just how expansive those classes of claims were, or how the particular claims before it fell specifically within those classes. For example, whereas Section 22(a) applies to just a few narrow substantive claims addressing specific subjects, Section 1452(a) applies to claims of all subjects—depending only on whether they relate or do not relate to a bankruptcy. Moreover, the claims at hand were specifically brought under the 1933 Act, and had at best a “tenuous connection” to the WorldCom bankruptcy.²⁶²

The court also determined that even if Section 22(a) were more “specific,” its application would “unduly interfere” with the workings of Section 1452(a).²⁶³ That interference was seen as undue particularly in Chapter 11 cases involving “repetitive and time-consuming discovery proceedings in multiple state courts.”²⁶⁴ However, the court spoke of the bankruptcy-“related” nature of the 1933 Act claims only in hypothetical terms—the *potential* for contribution and indemnification sought by defendants in separate actions against WorldCom which “can, in some circumstances, affect the administration of a bankrupt estate.”²⁶⁵ In other words, there was no mention as to how these actions would actually interfere with the administration of WorldCom, which was not even a named defendant in the removed actions. Moreover, the court did not address how the WorldCom estate would be affected any more or less if 1933 Act claims were remanded to and tried in state court versus remaining in federal district court. Indeed, regardless of where these predicate actions were tried, the WorldCom Defendants—if in fact found liable in those actions—would have to file separate subsequent actions for contribution or indemnification.

Ultimately, the Second Circuit found the “specificity” inquiry to be inconclusive.²⁶⁶ With no solution yielded from its first two analyses, the court turned to the “rule of recency,” namely that “when two statutes are in irreconcilable conflict, we must give effect to the most

261. *Id.* (quoting *Radzanower*, 426 U.S. at 148, 153-54).

262. *Id.* at 96.

263. *Id.* at 103 (citing *Radzanower*, 426 U.S. at 148, 156).

264. *Id.* at 104.

265. *Id.* The Second Circuit supported its decision on these observations despite elsewhere finding a “tenuous connection between those claims and WorldCom’s reorganization process,” *id.* at 96, and declining to address whether the claims in the case fell within the purview of 28 U.S.C. § 1452(a). *Id.* at 108.

266. *See id.* at 104 (abandoning the specificity analysis based on the conclusion that Section 22(a) is not more narrow in class coverage than Section 1452(a)).

recently enacted statute”²⁶⁷ Whereas the bankruptcy removal provision was enacted in 1978,²⁶⁸ Section 22(a) was enacted earlier in 1933 but amended later in 1998.²⁶⁹ The Court did not find the more recent amendment of Section 22(a) “particularly probative,” because Congress expressed an intent not to “alter the jurisdictional scheme applicable to *individual* actions under the 1933 Act.”²⁷⁰ At the same time, it can be said that in 1998 Congress simply reaffirmed the non-removal of all 1933 Act individual claims—even those “related to” a bankruptcy—as part of its complex amendment to Section 22(a).²⁷¹ Moreover, while the court acknowledged that repeals by implication are disfavored, its ultimate decision was in fact a repeal by implication of Section 22(a).²⁷²

Indeed, the Second Circuit found no basis for resolving the conflict in any of these maxims of statutory construction. Rather, the court resorted to a contextual analysis of Section 1452(a) as a component of the general removal jurisdiction scheme of Title 28.²⁷³ Section 1441(a) is the general removal statute, and allows for removal of cases over which the federal courts have original jurisdiction “[e]xcept as otherwise expressly provided by Act of Congress”—for example, Section 22(a) of the 1933 Act.²⁷⁴ Because Section 1452(a) contains no such exception, the court reasoned that “Congress did not intend for Section 22(a) and its analogues to bar removal of ‘related to’ claims.”²⁷⁵ In the court’s view, if the removal of a claim subject to a non-removal provision is by means of Section 1441(a), removal is not warranted given the exception in that provision.²⁷⁶ On the other

267. *Id.* (quoting *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 991 (2d Cir. 1990)).

268. The bankruptcy removal provision took its current form (28 U.S.C. § 1452) in the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 28 U.S.C.).

269. On November 3, 1998, Congress passed the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.).

270. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 104 (emphasis in original); *see also supra* note 119 (emphasizing that SLUSA focuses on class action litigation without intent to affect state individual lawsuits).

271. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) (stating that when Congress undergoes a “comprehensive reexamination and significant amendment” of a statute and leaves certain provisions “intact,” this serves to indicate that Congress “affirmatively intended” preservation of such provision).

272. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 104 (quoting *Henderson v. INS*, 157 F.3d 106, 119 (2d Cir. 1998)); *see Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (stating the “cardinal rule” that “repeals by implication are not favored”).

273. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 105.

274. 28 U.S.C. § 1441(a) (2000).

275. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 106.

276. *Id.* at 107.

hand, “[i]f removal is being effectuated through a provision that confers *additional* removal jurisdiction [i.e., Section 1452(a)], and that provision contains no exception for non-removable federal claims, the provision should be given full effect.”²⁷⁷ Otherwise, if Section 22(a) were to trump Section 1452(a), the exception in Section 1441(a) “would serve no apparent purpose.”²⁷⁸

The Second Circuit justified this contextual analysis primarily on its prior holding that another removal statute without the exception found in Section 1441(a), Section 1441(c), trumped a federal non-removal provision.²⁷⁹ Despite this one similarity of omission, Section 1441(c) and Section 1452(a) have a far more significant substantive distinction of greater relevance to the issue before the Second Circuit. Unlike any other removal statute, Section 1441(c) expressly permits the removal of “otherwise non-removable claims” such as those under the 1933 Act.²⁸⁰ In providing for the removal of otherwise non-removable claims, it is inconceivable that Section 1441(c) would also contain the Section 1441(a) exception. Therefore, the absence of the Section 1441(a) exception from Section 1441(c) should be considered inapposite. Moreover, in *Gonsalves v. Amoco Shipping Co.*, the decision on which it was relying, the Second Circuit had emphasized that the specific statutory conditions must be met “before the force of section 1441(c) can defeat the congressional preference expressed in [the federal non-removal provision].”²⁸¹ Here, conversely, the Second Circuit saw fit to set aside this “congressional preference” even where the removal statute was silent as to the removal of otherwise non-removable claims.²⁸²

This contextual analysis of the general removal statutes was the sole factor tipping the balance in favor of Section 1452(a). Otherwise, each of the factors evaluated by the Second Circuit favored Section 22(a) at least as much as Section 1452(a). Just as “Congress did not manifest an intent to alter preexisting law when it amended the 1933 Act in 1998,” the same could have been said that Congress did not manifest an intent to alter preexisting law—namely, the non-removal

277. *Id.*

278. *Id.* at 106.

279. *Id.* at 106-07 (citing *Gonsalves v. Amoco Shipping Co.*, 733 F.2d 1020, 1022-23 (2d Cir. 1984)).

280. 28 U.S.C. § 1441(c) (2000).

281. *Gonsalves*, 733 F.2d at 1026.

282. See *Cal. Pub. Employees' Ret. Sys.*, 368 F.3d at 106-07 (remarking that Section 1441(c) permitted removal of non-removable claims in certain instances (citing *Gonsalves*, 733 F.2d at 1022-23)).

of 1933 Act claims under Section 22(a)—when it enacted Section 1452(a) in 1978.²⁸³ Whereas “Section 1452(a) contains no exception for federal claims that are expressly nonremovable under an Act of Congress,” Section 22(a)—both before and after 1998—contains no exception for claims “related to” a bankruptcy.²⁸⁴ And though the Court declined to “create a distinction between two classes of ‘related to’ claims that is wholly absent from the bankruptcy removal statute,” it saw fit to create such a distinction wholly absent from the 1933 Act between claims “related to” and “unrelated to” a bankruptcy.²⁸⁵

Of particular note, the Second Circuit answered this “close question” without even a mention of the well-established core principle developed in its own circuit and throughout the federal courts: that “federal courts construe the removal statute narrowly, resolving any doubts against removability.”²⁸⁶ To the contrary, the Second Circuit considered none of the numerous, expressly-acknowledged uncertainties in its comparative analysis to weigh against removal, and construed the removal statutes broadly—particularly those statutes which provide “*additional* removal jurisdiction.”²⁸⁷ In sum, the Second Circuit appears to have been fixated on reaching a certain end rather than applying certain fundamental means of statutory interpretation.

The Second Circuit has been the only appellate court to address this statutory conflict.²⁸⁸ At the district court level, however, some courts foreshadowed the Second Circuit’s decision in finding in favor

283. *Id.* at 105.

284. *Id.*

285. *Id.* at 108.

286. *Lupo v. Human Affairs Int’l, Inc.*, 28 F.3d 269, 274 (2d Cir. 1994) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941)); *see Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (noting the “traditional reluctance” of the Court to give jurisdictional statutes a broad reading); *Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001) (identifying the limited jurisdiction of the federal courts and noting that where uncertainty exists concerning removal jurisdiction, the favored resolution is remand); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir.1999) (affirming that remand is the proper course of action where doubt exists concerning the “propriety of removal”).

287. *Cal. Pub. Employees’ Ret. Sys.*, 368 F.3d at 107 (emphasis in original).

288. Other circuit courts have received appeals of remand orders on the same issues, but have denied them based on the limited scope of appellate review of remand orders. *See, e.g., Ill. Mun. Ret. Fund v. Citigroup, Inc.*, 391 F.3d 844, 850-52 (7th Cir. 2004) (stating that the circuit court may only “review the contested exercise of authority without considering the reasoning in the district court’s remand order,” and concluding that “the district court did not exceed its authority in issuing a remand order”); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, No. 02-15385, 2003 WL 23526878, at *1 (11th Cir. June 19, 2003) (finding lack of jurisdiction to consider whether district court abused its discretion in remanding action to state court based on constitutionality of statutory provisions barring appellate review).

of Section 1452 on at least one maxim of statutory interpretation.²⁸⁹ However, as is to be expected given the numerous infirmities of the Second Circuit's opinion, other district courts have resolved the statutory conflict in favor of the non-removal provision of the 1933 Act on a variety of grounds.²⁹⁰ Some courts have disagreed with the Second Circuit's application of both the rule of recency²⁹¹ and specificity.²⁹² Still other courts have found no conflict between the two statutes based on their affirmative answer to the question not addressed by the Second Circuit: that potential indemnification claims against the bankruptcy estate to be brought in a separate lawsuit are not "related to" the bankruptcy.²⁹³ Additional courts have

289. See, e.g., *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 328-29 (S.D.N.Y. 2003) (using "*inclusio unius est exclusio alterius*" to find that 1933 Act claims may be removed under Section 1452(a)); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 Civ. 5794, 2003 WL 23018802, at *4 (S.D.N.Y. Dec. 23, 2003); *In re Global Crossing Ltd. Sec. Litig.*, Nos. 20 Civ. 910, 02 Civ. 10199, 2003 WL 21659360, at *3 (S.D.N.Y. July 15, 2003) (giving preference to the bankruptcy removal statute over the 1933 Act's removal prohibition, based on the rule of recency); *Carpenters Pension Trust for S. Cal. v. Ebbers*, 299 B.R. 610, 615 (C.D. Cal. 2003) (applying the rule of recency in favor of Section 1452); *Pac. Life Ins. Co. v. J.P. Morgan Chase & Co.*, No. SA CV 03-813GLT, 2003 WL 22025158, at *2 (C.D. Cal. June 30, 2003) (stating that in this case removal was based on "related to" jurisdiction, not federal question jurisdiction, thus removal was not prevented by Section 22(a)).

290. See *Ill. Mun. Ret. Fund v. Citigroup, Inc.*, No. 03-465, 2003 U.S. Dist. LEXIS 16255, at *5-9 (S.D. Ill. Sept. 9, 2003); *City of Birmingham Ret. & Relief Fund v. Citigroup, Inc.*, No. CV-03-BE-0994-S, 2003 WL 22697225, at *5 (N.D. Ala. Aug. 12, 2003); *Steel Workers Pension Trust v. Citigroup, Inc.*, 295 B.R. 747, 753-54 (E.D. Pa. 2003); *Tenn. Consol. Ret. Sys. v. Citigroup, Inc.*, No. 3:03-0128, 2003 WL 22190841, at *4 (M.D. Tenn. May 9, 2003); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 285 B.R. 519, 530-31 (M.D. Ala. 2002); *Ret. Sys. of Ala. v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257, 1270 (M.D. Ala. 2002); *Ariail Drug Co., Inc. v. Lease Partners Corp.*, No. CIV. A. 96-G-0708-S, 1996 WL 1060890, at *4-5 (N.D. Ala. May 23, 1996); *In re VideOcart, Inc.*, 165 B.R. 740, 743-44 (Bankr. D. Mass. 1994).

291. See *Tenn. Consol. Ret. Sys.*, 2003 WL 22190841, at *3 n.2 (finding rule of recency favors Section 22(a) because "SLUSA, a 1998 statute amending the 1933 Act, is the relevant comparative statute, not the original 1933 Act").

292. See *City of Birmingham Ret. & Relief Fund*, 2003 WL 22697225, at *3 (finding that "Section 22 . . . takes priority over the general removal statutes" because it "specifically precludes removal"); *Tenn. Consol. Ret. Sys.*, 2003 WL 22190841, at *3 (holding that Section 22(a), as amended by SLUSA, is a "special statute"); *Ill. Mun. Ret. Fund*, 2003 U.S. Dist. LEXIS 16255, at *6 (determining that Section 22(a) should control over the more general provisions found in Section 1452).

293. See, e.g., *City of Birmingham Ret. & Relief Fund*, 2003 WL 22697225, at *5 (holding that the "primary action" has no effect on the WorldCom estate as it only acts as a potential indemnification claim); *Steel Workers Pension Trust*, 295 B.R. at 750 (stating that an indemnification agreement alone does not provide the "nexus necessary" to establish "related to" jurisdiction); *Ill. Mun. Ret. Fund*, 2003 U.S. Dist. LEXIS 16255, at *7 (finding that the suit at issue will not affect the administration or size of the WorldCom bankruptcy estate); *Ariail Drug Co., Inc.*, 1996 WL 1060890, at *3 (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. at 744 (remanding without addressing the Section 22(a)/1452(a) 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). Indeed, the seminal decision

declined jurisdiction for another reason not addressed by the Second Circuit: abstention under the bankruptcy jurisdiction statute given the “attenuated connection” between claims against non-debtors and bankruptcy proceedings.²⁹⁴ Notably, these remand decisions are consistent with how courts have uniformly resolved an analogous conflict in favor of the non-removal provision of the Jones Act over Section 1452(a).²⁹⁵

As the discussion above reveals, courts have struggled not only with how to interpret the plain meaning of SLUSA’s amendment to the non-removal provision of the 1933 Act, but also how to deal with the practical implications of the loopholes left in its wake. The fact that courts have been far from unanimous on both issues reveals just how deep the ambiguities in the statute are. Moreover, the length to which courts have gone to try to defuse the impact of orchestrated exploitation of jurisdictional loopholes accentuates the need for immediate legislative action.

III. PROPOSED AMENDMENT TO THE NON-REMOVAL PROVISION OF THE 1933 ACT

There are numerous ambiguities and contradictions in the jurisdictional provisions of the federal securities laws, not just in theory, but as proven recently, in practice with real ramifications on the conduct of securities fraud litigation. Whereas Congress was silent in enacting the jurisdictional provisions over seventy years ago,²⁹⁶ it has expressed a current intent to expand federal jurisdiction

establishing the “conceivable effect” standard for “related to” jurisdiction held that indemnification claims to be brought in a later lawsuit were not “related to” a bankruptcy proceeding. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984) (finding a potential third-party action is not “related to” bankruptcy because the estate will not be affected unless the third-party action is actually commenced).

294. *Tenn. Consol. Ret. Sys.*, 2003 WL 22190841, at *4 (exercising discretion to abstain based on judicial efficiency and comity concerns); see *Ret. Sys. of Ala.*, 209 F. Supp. 2d at 1269; *Ill. Mun. Ret. Fund*, 2003 U.S. Dist. LEXIS 16255, at *9; *Ret. Sys. of Ala.*, 285 B.R. at 531 (exercising discretionary abstention because “action is relatively remote from the bankruptcy proceeding in that it will not have any effect on WorldCom’s bankruptcy estate”).

295. See, e.g., *Bennett v. United Kingdom Mut. Steam Ship Assurance Assoc. (Bermuda) Ltd.*, No. CIV. A. 98-3237, 1999 WL 13996, at *1-2 (E.D. La. Jan. 11, 1999); *McRae v. Lykes Bros. Steamship Co.*, No. Civ. A. 98-3240, 1998 WL 898467, at *1 (E.D. La. Dec. 22, 1998) (finding that preserving Jones Act plaintiff’s choice of forum outweighed the “possib[ility] that the tort actions against the insurer . . . could affect the bankruptcy”); *In re Durheim*, 215 B.R. 876, 879-80 (D. Alaska 1997) (finding that if a Jones Act action commences in state court, it should not be removed to federal court because of the existence of a “strong Congressional policy against removal of [Jones Act] claims” even where concurrent jurisdiction exists); *In re U.S. Lines, Inc.*, 128 B.R. 339, 342 (S.D.N.Y. 1991); *Kinder v. Wis. Barge Line, Inc.*, 69 B.R. 11, 13 (E.D. Mo. 1986).

296. See *supra* Part I.A.

in both the securities and class action contexts.²⁹⁷ Yet this intent remains largely stunted by the non-removal provision of the 1933 Act, the plain language of which (even as amended by SLUSA) still prevents the removal of all individual actions and most class actions brought under the 1933 Act.²⁹⁸ As a result, whereas Congress intended to “provide for the shifting of securities lawsuits [involving nationally-traded securities] filed in a state court into the more appropriate federal court” and spare defendants from having to “face liability under federal securities law in fifty state courts,”²⁹⁹ issuers, auditors, underwriters, directors, officers, and research analysts have in fact had to defend simultaneously against both massive consolidated actions in federal court and scores of individual actions in state courts across the country.³⁰⁰

This Article recommends an express amendment of the non-removal provision to allow for the removal of 1933 Act claims which “sound in fraud.” As explained below, if a 1933 Act claim appears in a complaint containing fraud allegations, that claim should be subject to removal. This would hold true even if such fraud allegations support an accompanying Section 10(b)/Rule 10b-5 claim and are expressly disavowed for purposes of the 1933 Act claim. On the other hand, if the complaint alleges only negligent or innocent conduct, the 1933 Act claims may remain in state court.

This demarcation recognizes both the unique role of fraud in 1933 Act claims and their interrelation with 1934 Act claims.³⁰¹ Indeed, plaintiffs can—and often do—bring both 1933 Act and 1934 Act claims for the same underlying wrong. However, whereas causes of action under Section 10(b) of the 1934 Act and Rule 10b-5 are for fraud, the 1933 Act allows plaintiffs to sue for misrepresentations or omissions on theories of fraud, negligence, or even strict liability.³⁰² In such instances, 1933 Act claims—although not necessarily for fraud—may be pled in large part based on allegations of fraud. Because of the jurisdictional framework of the federal securities laws and the overlapping substantive bases of various causes of action thereunder, the same fraud can generate litigation in both individual and class actions in both state and federal court. The proposed amendment would erase this jurisdictional disparity. All actions alleging securities fraud—whether under the 1933 Act or 1934 Act—

297. See *supra* Part I.C, E.

298. See *supra* Part II.A-B.

299. 144 CONG. REC. S4796 (daily ed. May 13, 1998) (statement of Sen. Feinstein).

300. See *supra* notes 218-222 and accompanying text.

301. See *supra* notes 35, 56-65, 70 and accompanying text.

302. *Id.*

would be heard in federal court. All actions alleging just negligence and strict liability, which are more akin to state common law actions, could be filed and remain in state court.

As discussed next, a “sound in fraud” distinction for jurisdictional purposes is supported by the recent use of that exact distinction in interpreting other features of private securities actions.³⁰³ As discussed thereafter, there are numerous advantages to adding this distinction to the non-removal provision of the 1933 Act. Most importantly, a “sound in fraud” distinction would harmonize the statute with various expressions of legislative intent throughout the history of the federal securities laws.³⁰⁴ This proposal would have the added procedural benefit of nullifying yet another byproduct of forum shopping of particular import in the federal securities context—piecemeal litigation under Section 1441(c) of the federal removal statutes.³⁰⁵ Finally, the proposal would streamline the securities fraud “race for the assets” in federal courts under uniform standards in the interests of both judicial economy and fairness to defrauded investors.³⁰⁶

A. *Legislative Use of the “Sound in Fraud” Demarcation*

Congress has already shown an affinity for demarcating the federal securities laws based on fraud. In 2002, Congress passed the Sarbanes-Oxley Act in quick response to a string of massive corporate frauds.³⁰⁷ This time, investors required protection from corporate wrongdoers committing securities fraud rather than plaintiffs’ lawyers raising such allegations.³⁰⁸ That protection extended to private litigants in just one respect: a prolonged limitations period. Interestingly, Congress did not extend the period to specific federal securities law provisions or just to fraud claims in name alone, but to “a private right of action that *involves* a claim of fraud, deceit, manipulation, or contrivance of a regulatory requirement concerning the securities laws”³⁰⁹

The applicability of this provision to 1933 Act claims is not obvious. Without identifying any particular statutory provision, this new

303. See *infra* Part III.A-B.

304. See *infra* Part III.C.

305. See *infra* Part III.D.

306. See *infra* Part III.E; see also *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 334 (S.D.N.Y. 2003) (holding that ensuing litigation would be wasteful to the extent it may deprive “many victims of . . . fraud of their fair share of any recovery”).

307. See *supra* note 126.

308. See *supra* notes 126-127.

309. Sarbanes-Oxley Act of 2002, 28 U.S.C.A. § 1658(b) (West 2002) (emphasis added).

limitations period apparently applies universally to the 1933 Act and 1934 Act despite the fact that it conflicts with various express limitations periods therein.³¹⁰ However, both the plain language and legislative history of Section 804 of the Sarbanes-Oxley Act suggest a differentiation of 1933 Act claims depending on whether they “involve” fraud. Congress generally intended to extend “the time that people have to go in and do something about fraud.”³¹¹ To that end, Congress did not limit the scope of the extended limitations period to fraud claims in name alone. Nor did Congress limit this period to claims under any particular statutory provision. In other words, Congress sought to assist victims of fraud—regardless of the federal securities law provision (i.e., the 1933 Act versus the 1934 Act) under which they might bring their claims—as opposed to those seeking recovery for only negligent or innocent misrepresentations. As a result, Congress appears to have treated 1933 Act claims disparately depending on whether they “involve” fraud.

B. Judicial Use of the “Sound in Fraud” Demarcation

Courts have similarly displayed a recent tendency to demarcate 1933 Act claims based on fraud in two areas of federal securities jurisprudence: (1) Rule 9(b) of the Federal Rules of Civil Procedure and (2) Section 804 of the Sarbanes-Oxley Act.

1. Rule 9(b): Pleading fraud with particularity

Rule 9(b) of the Federal Rules of Civil Procedure provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”³¹² Because Rule 9(b) applies to “all averments of fraud,” not just claims of fraud, it may apply to allegations regardless of whether they are “styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action.”³¹³ Even though fraud is not a required element of 1933 Act claims, most courts have applied Rule 9(b) “insofar as the claims are premised on allegations of fraud.”³¹⁴ In other words, courts determine whether the 1933 Act claim “sounds in fraud.”³¹⁵

310. See, e.g., 15 U.S.C. §§ 77m, 78r(c) (2000).

311. 148 CONG. REC. H4846 (daily ed. July 17, 2002) (statement of Rep. Markey); see 148 CONG. REC. S6535 (daily ed. July 10, 2002) (statement of Sen. Leahy) (saying that an extended limitations period should, “when there has been such enormous fraud[,] give [plaintiffs] at least some chance to recover something”).

312. FED. R. CIV. P. 9(b).

313. *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004).

314. *Id.*; see also, e.g., *In re Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005)

For purposes of Rule 9(b), a 1933 Act claim “sounds in fraud” if “an examination of the factual allegations that support Plaintiffs’ [1933 Act] claim establishes that the claims are indisputably immersed in unparticularized allegations of fraud.”³¹⁶ For example, Rule 9(b) would apply “if a plaintiff were to attempt to establish violations of [the 1933 Act] as well as the anti-fraud provisions of the [1934] Act through allegations in a single complaint or a unified course of fraudulent conduct.”³¹⁷ Although 1933 Act claims often disavow allegations of fraud made elsewhere in the complaint, that is “insufficient to divorce the claims from their fraudulent underpinnings” for purposes of Rule 9(b).³¹⁸ If the complaint uses

(stating that claims that “sound in fraud” must satisfy the heightened procedural requirements of Rule 9(b)); *Cal. Pub. Employees’ Ret. Sys. v. Chubb Corp.*, 394 F.3d 126 (3d Cir. 2004) (stating that allegations brought under the 1933 Act which “sound in fraud” are subject to the heightened pleading requirements of Rule 9(b)). *But see* *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 210 (5th Cir. 2004) (explaining that Section 11 claims only mandate notice pleading as opposed to the more detailed pleading required by Rule 9(b) or the PSLRA); *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 314 (8th Cir. 1997) (holding that “Rule 9(b) does not apply to claims under § 11 of the [1933] Act, because proof of fraud or mistake is not a prerequisite to establishing liability under § 11”).

315. *Rombach*, 355 F.3d at 167; *see also, e.g., In re Daou Sys., Inc.*, 411 F.3d at 1027 (“Although section 11 does not contain an element of fraud, a plaintiff may nonetheless be subject to Rule 9(b)’s particularity mandate if his complaint ‘sounds in fraud . . .’”); *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 273 n.5 (3d Cir. 2004) (noting that 1933 Act claims which do not “sound in fraud” need not comply with the heightened pleading requirements of Rule 9(b) (citing *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 288 (3d Cir. 1992)); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (recognizing that 1933 Act claims which “sound in fraud” must comply with Rule 9(b)’s particularity requirement); *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (refusing to apply Rule 9(b) requirement to a 1933 Act claim not “premised on fraud”); *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1404 (9th Cir. 1996) (noting that Rule 9(b) applies to 1933 Act claims “grounded in fraud”); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1223 (1st Cir. 1996) (determining that Rule 9(b) applies to 1933 Act claims which “sound in fraud”); *Shapiro*, 964 F.2d at 288 (“[T]he plain language of [Rule 9(b)] clearly encompasses § 11 and § 12(2) claims based on fraud . . .”); *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990) (finding that Rule 9(b) applies to 1933 Act claims “sounding in fraud”).

316. *Cal. Pub. Employees’ Ret. Sys.*, 394 F.3d at 160.

317. *Shaw*, 82 F.3d at 1223; *see also Vess*, 317 F.3d at 1103-04 (explaining that a claim may “sound in fraud” and must meet Rule 9(b)’s requirements even if fraud is not a necessary element of the claim so long as the plaintiff alleges that the defendant engaged in a unified course of fraudulent conduct and this course of conduct is the basis for the plaintiff’s claim).

318. *Cal. Pub. Employees’ Ret. Sys.*, 394 F.3d at 160; *see Rombach*, 355 F.3d at 172 (rejecting an effort by plaintiffs to avoid the requirements of Rule 9(b) through a characterization of their claims in their pleading); *In re Stac Elec. Sec. Litig.*, 89 F.3d at 1405 n.2 (holding that disavowal of fraud allegations is “unconvincing where the gravamen of the complaint is plainly fraud and no effort is made to show any other basis for the claims levied at the Prospectus.”); *In re Ultrafem, Inc. Sec. Litig.*, 91 F. Supp. 2d 678, 690-91 (S.D.N.Y. 2000) (applying Rule 9(b) where plaintiffs simply disavowed that Rule 9(b) was applicable and made no other effort to differentiate between their negligence and fraud claims).

words or imputations which are “classically associated with fraud”³¹⁹ without making any effort to show an additional basis for a 1933 Act claim, then the claim “sounds in fraud” and is subject to Rule 9(b).³²⁰

2. Section 804 of the Sarbanes-Oxley Act

As discussed above, Congress enacted a fraud demarcation of federal securities causes of action in Section 804 of the Sarbanes-Oxley Act. Thus far, courts have unanimously held that that provision does not apply to Section 11 and 12 claims under the 1933 Act.³²¹ However, these holdings pertain to a certain subset of 1933 Act claims: those which expressly disavow any and all fraud allegations or otherwise do not “sound in fraud.”³²² In other words, no court has directly addressed whether Section 804 applies to a 1933 Act claim “sounding in fraud.”

Courts are increasingly indicating that the “sound in fraud” distinction also applies to 1933 Act claims for purposes of Section 804 of the Sarbanes-Oxley Act. Some courts have expressly found Section 804 inapplicable on the distinguishing fact that “plaintiffs’ claim under § 11 of the Securities Act does not sound in fraud and [the Sarbanes-Oxley Act] applies only to fraud claims.”³²³ Reflecting the

319. *Rombach*, 355 F.3d at 172. Such words “classically associated with fraud” include “inaccurate and misleading,” “untrue statements of material facts,” and “materially false and misleading written statements.” *Id.*

320. *In re Stac Elec. Sec. Litig.*, 89 F.3d at 1405 n.2.
321. *See, e.g., Ballard v. Tyco Int’l*, No. 02-MD-1335-PB, 2005 WL 928537 (D.N.H. Apr. 22, 2005); *In re WorldCom, Inc. Sec. Litig.*, Nos. 02 Civ.3288, 03 Civ. 9499, 2004 WL 1435356 (S.D.N.Y. June 28, 2004); *ATO RAM II, Ltd. v. SMC Multimedia Corp.*, No. 03 Civ. 5569 HB, 2004 WL 744792 (S.D.N.Y. Apr. 7, 2004); *In re FirstEnergy Corp. Sec. Litig.*, 316 F. Supp. 2d 581 (N.D. Ohio 2004); *Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*, No. 02 C S893, 2004 WL 574665 (N.D. Ill. Mar. 22, 2004); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. MDL-1446, 2004 WL 405886 (S.D. Tex. Feb. 25, 2004); *In re Global Crossing, Ltd. Sec. Litig.*, No. 02 Civ. 910, 2003 WL 22999478 (S.D.N.Y. Dec. 22, 2003); *Friedman v. Rayovac Corp.*, 295 F. Supp. 2d 957, 975 (W.D. Wis. 2003); *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431 (S.D.N.Y. 2003); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 272 F. Supp. 2d 243 (S.D.N.Y. 2003) (all refusing to extend the Sarbanes-Oxley Act to claims under Section 11 or 12 of the 1933 Act).

322. *See, e.g., Ballard*, 2005 WL 928537, at *4 n.4 (noting that the plaintiffs specifically stated that their Section 11 claim did not “sound in fraud” and excluded all allegations of fraud from that claim); *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 1435356, at *4 n.6 (commenting that “the plaintiffs’ pleading expressly denies that its [1933] Act claims sound in fraud”); *In re FirstEnergy Corp. Sec. Litig.*, 316 F. Supp. 2d at 602 (finding that plaintiffs did not intentionally claim fraud allegations); *Lawrence E. Jaffe Pension Plan*, 2004 WL 574665, at *13 n.1 (noting that the plaintiff disavowed that its 1933 Act claims were anything other than strict liability or negligence claims); *In re Global Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d at 197 n.4 (noting that plaintiffs specifically disavowed and disclaimed any allegations of fraud).

323. *Ballard*, 2005 WL 928537, at *4; *see In re Alcatel Sec. Litig.*, 382 F. Supp. 2d 532, 536 (S.D.N.Y. 2005) (stating that Section 804 would apply if the claims “sound in fraud”); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 365 n.16 (D.

prevalence of the “sounding in fraud” concept, one court has even mistakenly averred that “Section 804 expressly states that it applies to ‘claims sounding in fraud’”³²⁴—when it actually states that it applies to claims “involv[ing]” fraud.

Judicial interpretation of the virtually identical phrase “claim involving fraud” in another federal statute suggests a “sound in fraud” distinction for purposes of Section 804 of the Sarbanes-Oxley Act. The Contract Disputes Act provides that the United States Claims Court has subject matter jurisdiction over claims thereunder, except for “any claim involving fraud.”³²⁵ In construing that exception, courts have noted that a claim can “involve” fraud even if fraud is not a required element.³²⁶ Rather, claims “involving fraud” encompass “claims which arise from the same actions that lead to the fraud claim and merely constitute alternative pleadings.”³²⁷ 1933 Act claims are often just that: alternative theories of recovery for the same alleged fraudulent scheme underlying Section 10(b)/Rule 10b-5 claims.

C. Consistency with Legislative Intent

A demarcation of 1933 Act claims based on fraud not only is already employed in federal securities legislation and jurisprudence, but also would harmonize the federal securities jurisdictional framework with the legislative history of both the 1933 Act itself and the recent enactments pertaining to private securities actions and, more generally, class actions.

Md. 2004) (stating that Section 804 applies to fraud-based claims but Section 804 does not apply to Section 11 or Section 12 claims which do not “sound in fraud”); *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d at 441 (recognizing that Section 804 applies to claims under the 1933 Act and 1934 Act which “sound in fraud”); *see also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 2004 WL 405886, at *11 (recognizing that the availability of Section 804’s longer statute of limitations under a 1933 Act claim depends upon whether the claim “involves ‘fraud, deceit, manipulation, or contrivance’”); *Lawrence E. Jaffe Pension Plan*, 2004 WL 574665, at *13 (concluding that the extended limitations period under Section 804 is inapplicable to non-fraud-based 1933 Act claims).

324. *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 381 F. Supp. 2d 192, 208 (S.D.N.Y. 2004).

325. 41 U.S.C. § 605(a) (2000).

326. *See infra* note 327.

327. *United States v. United Techs., Corp.*, No. C-3-99-03, 2000 WL 988238, at *4 (S.D. Ohio Mar. 20, 2000); *see also United States v. Baker & Taylor, Inc.*, No. C-95-1825, 1998 WL 230979, at *14 (N.D. Cal. Mar. 20, 1998) (determining that claims “involve fraud” where they “serve as alternative theories of recovery for the alleged fraudulent pricing scheme”); *United States v. Unified Indus., Inc.*, 929 F. Supp. 947, 951 (E.D. Va. 1996) (declaring that breach of contract claim “involved fraud” because it was “intimately bound up with and part of the same case or controversy as” fraud claim); *United States v. Rockwell Int’l Corp.*, 795 F. Supp. 1131, 1135 (N.D. Ga. 1992) (noting that a claim “involves fraud” where “the events, transactions, and contracts at issue in the lawsuit give rise to fraud allegations”).

As discussed above, there is no indication of exactly why Congress enacted the non-removal provision in 1933.³²⁸ However, given the overriding theme of investor protection in the 1933 Act and the express intent of the few other federal non-removal statutes, it is likely that the protection of the plaintiff's choice of forum was paramount.³²⁹ This proposed amendment to the non-removal provision preserves that implicit legislative intent, as plaintiffs may still remain in state court on 1933 Act claims if they plead their claims on a certain factual predicate. In other words, plaintiffs would only face removal if the gravamen of their claim is fraudulent conduct—that is, if the misrepresentations or omissions underlying the 1933 Act claim are part of overarching fraudulent conduct.

Moreover, given that the legislative history of the federal securities laws itself sounds in fraud, there is an apparent intent to have all securities fraud litigation heard in federal court. The 1933 Act and 1934 Act served to deter the commission of fraud.³³⁰ In 1995, the PSLRA was enacted to put an end to the abuses of securities fraud class actions.³³¹ As a result, a significant portion of the PSLRA—most notably, the heightened pleading requirements—applies only to fraud claims under Section 10(b) of the 1934 Act and Rule 10b-5.³³² Moreover, most of the PSLRA's measures apply only to actions filed in federal court.³³³

In 1998, SLUSA was enacted to prevent plaintiffs from avoiding the PSLRA's mandates by filing claims in state court. As a result, SLUSA perpetuated the particular concerns over securities fraud litigation. Congress made this clear in its express legislative findings: “[I]n order to prevent certain State private securities class action lawsuits *alleging fraud* from being used to frustrate the objectives of the

328. See *supra* note 83 and accompanying text.

329. See *supra* notes 89-95 and accompanying text.

330. See *supra* notes 44, 66 and accompanying text.

331. See, e.g., H.R. REP. NO. 104-369, at 39 (1995), as reprinted in 1995 U.S.C.C.A.N. 730, 738 (“The Conference Committee recognizes the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of fraud to pursue legitimate claims.”); 141 CONG. REC. 35300 (1995) (statement of Sen. Grams) (explaining that the PSLRA would “make some modest and reasonable changes which will help weed out the most abusive lawsuits in the field of securities litigation while at the same time, preserving the right of action for shareholders who are truly victimized by securities fraud”); 141 CONG. REC. 17546 (1995) (statement of Sen. Rockefeller) (“[The PSLRA] would go a long way toward curtailing what I believe is an epidemic of frivolous securities fraud lawsuits that are brought by a small cadre of lawyers”). Indeed, three years later, Congress expressly highlighted the fact that the PSLRA was passed in an effort to prevent abuses in the filing of private securities fraud lawsuits. H.R. REP. NO. 105-803, § 2, ¶ 1 (1998) (Conf. Rep.).

332. See *supra* notes 109-112 and accompanying text.

333. See *supra* note 113.

[PSLRA], it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities”³³⁴ In other words, “[t]he solution to this problem is to make Federal court the exclusive venue for most securities *fraud* class action litigation involving nationally traded securities.”³³⁵ This theme recurred throughout the SLUSA debates.³³⁶

Fraud claims have therefore been targeted as the main conduit through which plaintiffs’ lawyers seek maximum settlements based on minimum allegations of wrongdoing. The PSLRA heightened the requirements for such claims, and SLUSA sought to have such requirements more uniformly applied under federal law in federal courts.³³⁷ Yet, Congress’ work is unfinished. Sophisticated plaintiffs’ lawyers have foregone fraud claims under the 1934 Act in order to bring quasi-fraud claims under the 1933 Act for the same wrongdoing under different standards in different fora—namely, state courts across the country.

334. Securities Litigation Uniform Standards Act of 1998 § 2, ¶ 5, Pub. L. No. 105-353, 112 Stat. 3227 (codified at scattered sections of 15 U.S.C.) (emphasis added); *see also supra* note 124.

335. H.R. REP. NO. 105-803, at 15 (emphasis added). Indeed, courts have defined the scope of state law claims falling within the purview of SLUSA based on fraud being a “necessary component” thereof. *See, e.g.*, *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 266 (S.D.N.Y. 2004) (holding that a state law claim falls under SLUSA if it “asserts (1) an explicit claim of fraud (*e.g.*, common law fraud or fraudulent inducement), or (2) other garden-variety state law claims that ‘sound in fraud’”).

336. *See, e.g.*, 144 CONG. REC. H10771 (daily ed. Oct. 13, 1998) (statement of Rep. Bliley) (“If there is intentional fraud, there is nothing in [SLUSA] or in the [PSLRA] to prevent those cases from proceeding. We do not need to exacerbate market downturns by allowing companies to be dragged into court every time their stock price falls. The [PSLRA] remedied that problem for Federal courts, and this legislation will remedy it for State courts.”); 144 CONG. REC. S12447 (daily ed. Oct. 13, 1998) (statement of Sen. Domenici) (recognizing SLUSA was designed to “provide one set of rules to govern securities fraud class actions”); *id.* at S12448 (statement of Sen. Dodd) (“[SLUSA] is intended to create a uniform national standard for securities fraud class actions involving nationally-traded securities.”); *id.* at S12445 (Letter from Arthur Levitt to Senators D’Amato and Sarbanes (Oct. 9, 1998)) (“The purpose of the bill is to help ensure that securities fraud class actions involving certain securities traded on national markets are governed by a single set of uniform standards.”); 144 CONG. REC. H10781 (daily ed. Oct. 13, 1998) (statement of Rep. Cox) (“[SLUSA] will make federal courts the exclusive venue for large-scale securities fraud lawsuits involving securities subject to federal regulation”); 144 CONG. REC. H6058 (daily ed. July 21, 1998) (statement of Rep. Tauzin) (“Lawsuits brought on fraud charges both in State and Federal courts can go forward. They simply go forward under the reforms we passed both on the Federal law and now conforming that Federal law to the 50 States.”).

337. Congress again focused on fraud in enacting the Sarbanes-Oxley Act in 2002. *See supra* notes 126-127 and accompanying text. The one amendment to private rights of action is yet another example of the legislative trend of demarcating securities claims based on fraud. *See supra* Part III.A.

Congress had its chance to address this latest loophole in part (that is, in terms of class actions) in CAFA, which targeted forum shopping by expanding federal jurisdiction over class actions of national interest.³³⁸ However, Congress expressly exempted the securities laws from CAFA.³³⁹ Congress created this exemption despite the fact that CAFA echoes the dual intent underlying—but far from fully effectuated by—SLUSA: (1) for federal courts to adjudicate suits of national interest, such as those involving nationally traded securities;³⁴⁰ and (2) to combat forum shopping via artful pleading.³⁴¹ Whereas SLUSA addressed forum shopping by establishing removal and preemption of state law causes of action, CAFA allows federal courts “in the interests of justice” in certain circumstances to evaluate complaints as to (1) the intent for their filing in state rather than federal court, and (2) their potential effect on parallel litigation in other courts.³⁴²

As to the former discretionary tool, the federal court may now exercise diversity jurisdiction where the complaint has been drafted in a manner that seeks to avoid federal jurisdiction.³⁴³ Specifically, the court may assess “whether the plaintiffs have proposed a natural class that encompasses all of the people and claims that one would expect to include in a class action, as opposed to proposing a class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims.”³⁴⁴

As to the latter, CAFA allows courts to consider whether other similar class actions have been recently filed to allow for coordination of parallel actions.³⁴⁵ “The purpose of this factor is efficiency and fairness: To determine whether a matter should be subject to Federal jurisdiction so that it can be coordinated with other overlapping or

338. See *supra* notes 150-153 and accompanying text.

339. See *supra* notes 167-172 and accompanying text.

340. Compare *supra* note 116 (SLUSA) (noting that SLUSA aimed to create uniform federal standards for securities traded nationally), with *supra* notes 150-152, 157 (CAFA) (explaining how Congress intended CAFA to send class actions of a “truly national” nature to federal courts).

341. Compare *supra* notes 116-117 (SLUSA) (describing Congress’s desire to limit forum shopping through the passage of SLUSA), with *supra* notes 153-155, 158-159 (CAFA) (stating that the primary goal of CAFA was to limit forum shopping in state courts in class action litigation).

342. Specifically, this additional evaluation of complaints is warranted where between one-and two-thirds of the plaintiff class and named defendants are citizens of the state in which the action was filed. See Class Action Fairness Act of 2005 § 4(a)(2), 28 U.S.C.A. § 1332(d)(3) (West 2005).

343. *Id.*

344. 151 CONG. REC. H730 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

345. 28 U.S.C.A. § 1332(d)(3)(F).

parallel class actions.”³⁴⁶ This last factor is to be broadly interpreted so that “plaintiffs [cannot] plead around it with creative legal theories.”³⁴⁷

These tactics addressed in CAFA are exactly those left in the wake of SLUSA by means of the non-removal provision of the 1933 Act. As made clear in the WorldCom litigation, securities plaintiffs’ lawyers have purposefully raised only 1933 Act claims and foregone 1934 Act claims simply to remain in state court.³⁴⁸ Furthermore, these state filings on virtually identical factual allegations have frustrated the management of consolidated actions proceeding on parallel tracks in federal court.³⁴⁹ Nonetheless, Congress left these tactics unhindered by expressly exempting the federal securities laws from CAFA.³⁵⁰

These CAFA provisions would serve to curtail this forum shopping and its real implications in the securities law context. Yet the fact that CAFA expressly exempts the federal securities laws suggests that an extension of CAFA’s measures thereto would directly contradict express legislative intent. However, as described above, it is unclear whether Congress understands what that “intent” is. In other words, Congress exempted the federal securities laws from CAFA on the assumption that SLUSA resulted in a “carefully crafted framework” for federal versus state jurisdiction of federal securities claims. Indeed, the disparity between SLUSA’s legislative intent and effect—and the judicial discord over both the meaning and consequences of SLUSA’s amendment—strongly suggest that this framework was not so “carefully crafted.”

At first glance, a simple solution appears to be the repeal of CAFA’s exemption of the federal securities laws. If that were the case, courts could discretionarily evaluate complaints for removal purposes only in class actions. As the WorldCom litigation illustrates, however, plaintiffs’ lawyers are more than willing to forego class actions to take advantage of jurisdictional loopholes.³⁵¹ Therefore, there must be an amendment of the non-removal provision itself to apply to both individual and class actions. Nonetheless, the “sound in fraud” demarcation captures the intent of CAFA, as the evaluation of complaints for claims “sounding in fraud” would mirror the new judicial discretionary tools targeting the forum shopping so palpably

346. 151 CONG. REC. H728 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

347. *Id.*

348. *See supra* notes 220-223 and accompanying text.

349. *See supra* notes 226-239 and accompanying text.

350. *See supra* notes 167-172 and accompanying text.

351. *See supra* notes 220-223 and accompanying text.

addressed generally in Congress's latest endeavor, but bizarrely untouched in terms of the federal securities laws.

D. Avoiding Piecemeal Litigation under 28 U.S.C. § 1441(c)

Demarcating 1933 Act claims for removal purposes based on whether they “sound in fraud” would also resolve another jurisdictional glitch caused by the non-removal provision: piecemeal litigation under Section 1441(c) of the general removal statutes. That statute provides:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.³⁵²

Like SLUSA and CAFA, Section 1441(c) was intended to protect defendants from forum shopping and artful pleading. First, if defendants can remove a claim invoking federal jurisdiction if sued upon alone, “they should not be deprived of that right merely because the plaintiff or plaintiffs joined in the state court action additional claims that might not support federal subject matter jurisdiction.”³⁵³ Second, Section 1441(c) serves to promote judicial economy by “avoid[ing] piecemeal litigation” of claims which should be heard together.³⁵⁴

Most courts have held that Section 1441(c) trumps federal non-removal provisions—in other words, that an otherwise non-removable claim may be removed if the conditions set forth in Section 1441(c) are satisfied.³⁵⁵ One such condition is that the claim raising a federal

352. 28 U.S.C. § 1441(c) (2000).

353. David D. Siegel, *Commentary on 1988 and 1990 Revisions of Section 1441*, in 28 U.S.C.A. § 1441 (West 1994).

354. *Id.*; see also *U.S. Indus., Inc. v. Gregg*, 348 F. Supp. 1004, 1015 (D. Del. 1972) (noting that Section 1441(c)'s purpose is two-fold: first, to assure that defendants will not be prevented from enjoying a federal forum by plaintiffs' joinder of non-removable claims that are separate and independent; and second, to promote judicial economy by assuring that claims that should be litigated together are litigated in the same forum).

355. See, e.g., *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1197 (9th Cir. 1988); *Gonsalves v. Amoco Shipping Co.*, 733 F.2d 1020, 1023-26 (2d Cir. 1984); *Newton v. Coca-Cola Bottling Co. Consol.*, 958 F. Supp. 248 (W.D.N.C. 1997); *Farmers & Merchs. Bank v. Hamilton Hotel Partners of Jacksonville L.P.*, 702 F. Supp. 1417 (W.D. Ark. 1988); *Palser v. Burlington N. R.R. Co.*, 698 F. Supp. 793 (E.D. Mo. 1988); *Cacioppe v. Superior Holsteins III, Ltd.*, 650 F. Supp. 607 (S.D. Tex. 1986); *Titus v. Reynolds Metals Co.*, 637 F. Supp. 369 (D. Md. 1986); *Kinsey v. Nestor Exploration Ltd.*—1981A, 604 F. Supp. 1365 (E.D. Wash. 1985); *Abing v. Paine, Webber, Jackson & Curtis*, 538 F. Supp. 1193, 1197 (D. Minn. 1982); *Hages v. Aliquippa & S. R.R. Co.*, 427 F. Supp. 889 (W.D. Pa. 1977); *Armstrong v. Monex Int'l, Ltd.*, 413 F. Supp. 567

question must be “separate and independent” from the non-removable claim.³⁵⁶ The Supreme Court established that “a separate and independent” action does not exist for purposes of Section 1441(c) if there is “a single wrong to plaintiff . . . arising from an interlocked series of transactions.”³⁵⁷ This is true even if a party seeks redress for that single wrong under “multiple theories of liability against multiple defendants.”³⁵⁸

This standard is rarely satisfied in the federal securities context, given the conflicting jurisdictional provisions of claims under the 1933 Act and 1934 Act for the same wrongdoing. Specifically, a Section 10(b)/Rule 10b-5 claim is rarely “separate and independent” from an accompanying 1933 Act claim, as both claims are often premised on the same underlying fraud.³⁵⁹ This is so even if the 1933 Act claim, with its lower and fewer pleading requirements, is based only on some of the factual allegations underlying the 1934 Act claim.³⁶⁰

(N.D. Okla. 1976); *Milton R. Barrie Co. v. Levine*, 390 F. Supp. 475 (S.D.N.Y. 1975); *U.S. Indus., Inc.*, 348 F. Supp. at 1015-16; *Meinerz v. Harding Bros. Oil & Gas Co.*, 343 F. Supp. 681 (E.D. Wis. 1972); *Korber v. Lehman*, 221 F. Supp. 358 (S.D.N.Y. 1963). *But see Gamble v. Cent. of Ga. Ry. Co.*, 486 F.2d 781, 784 (5th Cir. 1973) (commenting that non-removal provision for FELA claims made removing state court instituted FELA suits to federal court on any grounds (i.e., Section 1441(c) impossible); *Green v. Hajoca Corp.*, 573 F. Supp. 1120, 1123 (E.D. Va. 1983) (holding that “§ 1441(c) is simply inapplicable to” statutorily non-removable claims).

356. 28 U.S.C. § 1441(c).

357. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951).

358. *Texas v. Walker*, 142 F.3d 813, 817 (5th Cir. 1998).

359. *See, e.g., Crowe v. Deutsch Bank*, 330 F. Supp. 2d 813, 817 (S.D. Miss. 2004) (remanding case containing 1933 Act, 1934 Act, and state law claims because “the 1934 Act claim cannot fairly be said to be ‘separate and independent’ from the 1933 Act claim” within the contemplation of Section 1441(c)); *Shorty v. Top Rank of La., Inc.*, 876 F. Supp. 838, 840 (E.D. La. 1995) (“The 1934 Act claim is not separate and independent from the 1933 Act claim because both involve a single wrong to the plaintiffs.”). 1933 Act claims have also been kept out of federal court when not “separate and independent” from other federal law claims or, prior to the amendment of Section 1441(c) in 1990, state law claims giving rise to diversity jurisdiction. *See Emrich*, 846 F.2d at 1197 (remanding 1933 Act claim because the asserted RICO claim was not “separate and independent” from the 1933 Act claim); *Peoples Nat’l Bank v. Darling*, No. 91-1052-K, 1991 WL 45716, at *6 (D. Kan. Apr. 1, 1991) (remanding multi-count case to state court where 1933 Act claims were simply interlocked and closely related “alternative theories of liability” seeking single relief for one wrong); *Abing*, 538 F. Supp. at 1197 (remanding entire action where 1933 Act claim not separate and independent from Investment Advisers Act and state law claims asserting same “right to be dealt with in an open, fair, and professional manner in their business transactions”); *Milton R. Barrie Co., Inc.*, 390 F. Supp. at 477 (remanding both state law and 1933 Act claims as “alternative theories of recovery for the single wrong . . . as a result of defendants’ alleged misrepresentations”); *Pinto v. Maremont Corp.*, 326 F. Supp. 165, 169 (S.D.N.Y. 1971); *Korber*, 221 F. Supp. at 359-60.

360. *See Crowe*, 330 F. Supp. 2d at 818 (reasoning that, though plaintiff’s 1934 Act claim appeared to encompass a broader range of conduct than did his 1933 Act claim, the alleged misrepresentations that form the basis of the 1933 Act claim fall

Courts have already confronted the forum shopping inherent in the pleading of dependent non-removable (e.g., 1933 Act) claims to prevent removal under Section 1441(c). One prominent means established for that purpose has been the “fraudulent joinder” concept, under which the merits of the “otherwise non-removable claims” are preliminarily assessed under a “summary judgment-like procedure . . . that as a matter of law there was no reasonable basis for predicting that the plaintiff might establish liability.”³⁶¹ However, that burden is a “heavy one.”³⁶² Moreover, that burden is often insurmountable in terms of 1933 Act claims given the fact that a plaintiff is more likely to satisfy the lower substantive and pleading requirements of a 1933 Act claim as compared to the accompanying Section 10(b)/Rule 10b-5 claim.³⁶³

Because the fraudulent joinder rule has little effect with respect to 1933 Act claims, an additional tool to combat the loopholes of Section 1441(c) is necessary. The proposed amendment would serve that purpose. 1933 Act claims which “sound in fraud” are those which are not “separate and independent” from nominal fraud claims, such as those under Section 10(b)/Rule 10b-5, because they are based most likely on the same allegations of wrongdoing. Whereas 1933 Act claims “sounding in fraud” rarely—if ever—are “separate and independent” from Section 10(b)/Rule 10b-5 claims, the proposed amendment would eliminate the other precondition to Section 1441(c): their non-removability. In other words, Section 1441(c) is not even implicated if the claims are removable in the first

within the range of conduct underlying the 1934 Act claim as not to be a “separate and independent” claim).

361. *Burchett v. Cargill, Inc.*, 48 F.3d 173, 176 (5th Cir. 1995) (quoting *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 551 (5th Cir. 1981)); *see also* *Feichko v. Denver & Rio Grande W. R.R. Co.*, 213 F.3d 586, 589 (10th Cir. 2000) (noting in dicta “that a fraudulent attempt to evade removal may provide an exception to the operation of [a non-removal provision]”); *Lackey v. Atl. Richfield Co.*, 990 F.2d 202, 207 (5th Cir. 1993) (allowing removing party to show that “the [non-removable] Jones Act claim has been fraudulently pleaded to prevent removal”); *Hutton v. Consol. Grain & Barge Co.*, 170 F. Supp. 2d 844, 846 (C.D. Ill. 2001) (“When a plaintiff has alleged a claim that is not removable . . . , the Court can look beyond the pleadings to determine whether plaintiff has any chance of prevailing on the nonremovable claim.”).

362. *Burchett*, 48 F.3d at 176.

363. *See, e.g., Milton R. Barrie Co.*, 390 F. Supp. at 477 (reasoning that 1933 Act claim was not so baseless even if complaint was amended to add such claim as “part of plaintiff’s ‘unworthy scheme’ to ‘oust’ the federal court of jurisdiction”); *Korber*, 221 F. Supp. at 360 (determining that a 1933 Act claim not “so farfetched that its inclusion in the complaint is a fraud on the jurisdiction of [the] Court”). However, 1933 Act claims have been found to be “fraudulently joined” based on fundamental legal—as opposed to mere pleading—deficiencies. *See, e.g., Bennett v. Bally Mfg. Corp.*, 785 F. Supp. 559, 562 (D.S.C. 1992) (finding 1933 Act claim “fraudulently joined” because “§ 12(2) does not apply to secondary market transactions”).

place. Therefore, rather than being partitioned under that removal statute, the entire case could be efficiently heard in federal court if 1933 Act claims “sounding in fraud” were removable.

E. Fairness to Defrauded Investors

In its current state, the non-removal provision of the 1933 Act has led to a “race for the assets” as plaintiffs seek recovery for securities fraud in both individual and class actions in both state and federal courts. While offering a wider choice of forum, these permutations actually disserve plaintiffs in many respects. As an initial matter, the costs incurred by defendants in duplicative litigation deplete the funds from which plaintiffs are eventually paid. “As deep as some of the pockets in this action may be, they are in all likelihood not limitless.”³⁶⁴ In effect, the pendency of parallel actions in an array of state courts undermines the efficiencies otherwise achievable by the consolidation of related actions in federal court.³⁶⁵

This disparate playing field promises not only fewer assets for defrauded investors, but unfair distribution among them. Plaintiffs face various procedural and substantive requirements in the range of litigation spurned by the jurisdictional provisions of the federal securities laws, depending on whether they proceed in state court versus federal court, and in individual actions versus class actions. As a result, plaintiffs could be subject to inconsistent rulings in these different venues with potentially preclusive effect on other actions.³⁶⁶ Moreover, plaintiffs in individual actions and/or state court would not enjoy the PSLRA’s procedural safeguards for plaintiff class members against their lawyers.³⁶⁷

The proposal herein would alleviate these equitable concerns. First, if all securities actions “sounding in fraud” were in federal court, judicial efficiency would be achieved by the consolidation of all

364. *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 334 (S.D.N.Y. 2003).

365. *See* 28 U.S.C. § 1407 (2000) (permitting the transfer of multidistrict litigation into a consolidated proceeding in the interest of efficiency).

366. *See In re King Pharms., Inc.*, Case No. 2:03-CV-77, slip op. at 4 (E.D. Tenn. Feb. 6, 2004) (warning that parallel litigation of 1933 Act claims in state court and 1934 Act claims in federal court “asserting substantially similar claims . . . could lead to considerable confusion if not outright inconsistent results”); *In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d 527, 545 (S.D.N.Y. 2004).

367. *See supra* notes 104-105, 107-108 and accompanying text. Investors may not be made aware of these differences, as it is not necessarily in plaintiffs’ lawyers’ personal interests to disclose them. In fact, Judge Cote found the differences substantial enough—and the disclosures by plaintiffs’ lawyers deficient enough—to require curative notices be sent to plaintiffs both before her and in individual actions in state courts around the country. *In re WorldCom, Inc. Sec. Litig.*, No. Civ.02-3288, 2003 WL 22701241, at *8 (S.D.N.Y. Nov. 17, 2003).

related individual and class actions at least for pretrial purposes. Second, without the jurisdictional loophole, plaintiffs' lawyers may see less advantage in filing 1933 Act claims "sounding fraud" than Section 10(b)/Rule 10b-5 claims. With more plaintiffs proceeding on the same allegations of wrongdoing under the same procedural and substantive standards and in the same forum, their recovery could be both more widely and equitably distributed.

CONCLUSION

A "sound in fraud" demarcation of 1933 Act claims for jurisdictional purposes would both remedy the many problems and procure the many benefits identified in this Article. This demarcation would harmonize the jurisdictional framework of the federal securities laws with various expressions of legislative intent. First, the original intent of the non-removal provision of the 1933 Act would be preserved, as plaintiffs could still choose to have their 1933 Act claims heard in state court if pled in a certain fashion—that is, not premised on underlying fraudulent conduct. Second, the demarcation would strengthen the historic interrelation of the 1933 Act and 1934 Act, which are meant to offer "distinct causes of action and are intended to address different types of wrongdoing."³⁶⁸ Third, the removal of 1933 Act claims "sounding in fraud" would fulfill SLUSA's endeavor to have all claims "alleging fraud" regarding nationally traded securities administered in federal court under uniform standards, and would be consistent with the measures recently espoused by Congress in CAFA.

One likely criticism of this proposal is that it would still leave a loophole for the filing of 1933 Act claims in state court—plaintiffs could simply proceed in state court under theories of negligence and strict liability. However, this "loophole" would largely remain in theory given the real consequences accompanying its use. To remain in state court under this scenario, plaintiffs would have to forego any allegations of fraud that might otherwise support their claims. It is unlikely that plaintiffs' lawyers equipped with such allegations would eviscerate federal securities claims just for jurisdictional purposes. If there were in fact no allegations of fraud supporting the claims, then plaintiffs would still have the choice of forum intended by the non-removal provision. Indeed, Congress has never expressed an intent to disrupt that choice of forum, as it has only sought to have all

368. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983).

claims “alleging fraud” heard in federal court.³⁶⁹ Moreover, whereas securities fraud actions have become increasingly federalized through a series of unique substantive and procedural requirements under federal law (and applicable only in federal court), 1933 Act claims premised merely on negligence and strict liability remain largely analogous to state common law actions. Therefore, such claims are particularly suitable for adjudication by state courts.

Another likely criticism of a “sound in fraud” approach is the introduction of even more ambiguity and consequential uncertainty in judicial interpretations of the non-removal provision of the 1933 Act.³⁷⁰ As an initial matter, this demarcation is not a foreign concept in federal securities legislation and jurisprudence. In fact, Congress’s only change to private causes of action under the Sarbanes-Oxley Act took this exact form, and courts have been rather uniform in deciding what 1933 Act claims “sound in fraud.”³⁷¹ Moreover, forum shopping by its very nature thrives on exceptions to rules, and therefore may be best addressed by more flexible standards. Indeed, Congress saw fit in CAFA to give federal courts the discretion to evaluate complaints to ensure that federal courts adjudicate suits of national interest and to provide equity and efficiency in parallel litigation that would otherwise be waged in various fora. A similar evaluation of both individual and class action complaints for claims “sounding in fraud” would serve these dual intents underlying but far from effectuated by SLUSA.

Investor protection from fraud has been the overriding goal of Congress with respect to the private causes of action under the federal securities laws—either from those committing fraud or those raising allegations of fraud purportedly on their behalf. The non-removal provision of the 1933 Act was a rare step in one direction, and has failed to reach equipoise amidst the rising conflict of those

369. See Securities Litigation Uniform Standards Act of 1998 § 2, Pub. L. No. 105-353, 112 Stat. 3227 (codified at scattered sections of 15 U.S.C.).

370. Indeed, the Sarbanes-Oxley Act was widely criticized for its ambiguous language in establishing an express limitations period for any federal securities claim “involv[ing]” fraud. See *supra* note 142.

371. See *supra* Part III.B. However, one apparent discrepancy is whether 1933 Act claims for which all fraud allegations are expressly disavowed may still “sound in fraud.” Compare *Cal. Pub. Employees’ Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 160 (3d Cir. 2004) (holding that for purposes of Rule 9(b), disavowal of fraud allegations is “insufficient to divorce the claims from their fraudulent underpinnings”), with *Ballard v. Tyco Int’l*, No. 02-MD-1335-PB, 2005 WL 928537, *4 n.4 (D.N.H. Apr. 22, 2005) (“Plaintiffs expressly state in their complaint that their § 11 claim . . . ‘does not sound in fraud’ and that ‘[a]ll of the preceding allegations of fraud or fraudulent conduct and/or motive are specifically excluded from this Court.’”). Such 1933 Act claims should be deemed to “sound in fraud” so that the problems identified herein are not perpetuated by the simple disavowal of allegations.

2006] RECRAFTING THE JURISDICTIONAL FRAMEWORK 681

forces over time. In effect, Congress has transformed the choice of forum inherent in that provision from an asset to plaintiffs against corporate wrongdoers, to a liability in the hands of plaintiffs' lawyers who have used it to file duplicative litigation to the detriment of their clients. A "sound in fraud" demarcation, however, would recognize the unique role of fraud in 1933 Act claims and would harmonize both forms of investor protection which, despite their conflicts, themselves "sound in fraud." By coming to terms with its own oversights and heeding its recent enactments in the manner proposed here, Congress could finally achieve its goal of closing the jurisdictional loopholes in federal securities litigation.