COMMENTS

Appellate Review of SLUSA Remands after CAFA

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As part of an effort to curb the abuse of private securities class actions, Congress passed the Private Securities Litigation Reform Act of 1995[1] (PSLRA). In response to PSLRA's heightened pleading requirements for federal courts, plaintiffs in securities class actions shifted gears, filing their claims in state court instead.[2] Reacting to these efforts to dodge the stricter federal standards, Congress passed the Securities Litigation Uniform Standards Act of 1998[3] (SLUSA). SLUSA provides that class actions involving "covered" securities are automatically removable to federal court. A "covered" security is "a security that satisfies the standards . . . specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 USC § 77r(b)]," meaning a security listed on the New York Stock Exchange or another stock exchange with equivalent listing standards.[4]

SLUSA allows a federal court to dismiss the removed claims if it finds the claims to be among those types preempted by the statute.[5] If the court finds that the securities at issue are not "covered," or that the claims are not preempted, the court remands the claims to the state court.[6] In practice, then, litigants fight decisive battles for the claims' survival in federal court, where the question is whether SLUSA preempts the claims. If the district court remands to the state court because it finds that the action's claims are not preempted by SLUSA, defendants seeking to keep the case in federal court by appealing the

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1 Pub L No 104-67, 109 Stat 737 (1995), codified at 15 USC § 77a et seq (2000).

2 See Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan L Rev 273, 273 (1998) (discussing the "significant forum shift in class action securities fraud litigation, from federal to state court," after PSLRA).

3 Pub L No 105-353, 112 Stat 3227 (1998), codified in various sections of title 15 (2000).

4 15 USC § 78bb(f)(5)(E). See, for example, *Green v Ameritrade, Inc*, 279 F3d 590, 596 n 4 (8th Cir 2002) (explaining the requirements for a covered security).

5 See 15 USC § 78bb(f)(1)–(2).

6 See id §§ 77p(b), 77p(d)(4), 78bb(f)(1), 78bb(f)(3)(D).

district court's remand order[7] face a statutory restriction on appellate review. The separate statute governing remands, 28 USC § 1447(d), provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[8]

This Term, the Supreme Court will resolve a circuit split that has emerged over the reviewability of a SLUSA remand order.[9] The stakes for litigants are high. Allowing review gives defendants further protection from discovery and another chance that a court will dismiss the claims as preempted. Denying review means the case will proceed in state court and that discovery will commence.

Of the circuits to consider the question, two have read the statute restricting appeal of most remands to prevent appellate review of SLUSA-removed remand orders.[10] However, relying on Supreme Court case law decided after those circuit decisions, the Seventh Circuit has held that, for a remand order that is issued after the district court determined that removal was appropriate, the district court has subject matter jurisdiction over whether the claim is preempted by SLUSA.[11] The Seventh Circuit reasoned that, because the district courts have jurisdiction over the preemption decision, the determination itself and a subsequent remand order are "unaffected by § 1447(d)" and so are reviewable by an appellate court.[12]

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7 District courts often grant this order as a remand for lack of subject matter jurisdiction, but whether this is the correct description of the order is subject to debate and is critical to resolving the order's appealability.

8 28 USC § 1447(d) (2000).

9 See *Kircher v Putnam Funds Trust*, 403 F3d 478 (7th Cir 2005), cert granted No 05-409 (Jan 6, 2006) (available at 2006 US LEXIS 6). For a recent summary of the circuit split, see generally Thomas F. Lamprecht, Note, *How Can It Be Wrong When It Feels So Right? Appellate Review of Remand Orders under the Securities Litigation Uniform Standards Act*, 50 Vill L Rev 305 (2005) (concluding, after a brief statutory analysis, that review is barred).

10 See *United Investors Life Insurance Co v Waddell & Reed, Inc*, 360 F3d 960, 967 (9th Cir 2004) ("Because subsection 1447(d) precludes appellate review of the district court's remand order, we lack jurisdiction to consider [appellant's] motion to dismiss on the merits."); *Spielman v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 332 F3d 116, 127 (2d Cir 2003) (holding that "reviewability of a remand order based on the perceived lack of subject matter jurisdiction in a case previously removed under SLUSA's preemption provision is governed by 28 USC §§ 1447(c) and (d)"); *Abada v Charles Schwab & Co*, 300 F3d 1112, 1119 (9th Cir 2002) (finding that § 1447(d)'s "bar on the review of remand orders applies regardless of whether the case was removed pursuant to the general removal statute or the removal provisions of SLUSA").

11 *Kircher v Putnam Funds Trust*, 373 F3d 847, 850–51 (7th Cir 2004). In its subsequent decision on the merits, the Seventh Circuit again rejected the argument that the SLUSA remand was unreviewable. See *Kircher*, 403 F3d at 480 ("Last year, we held that these remands are appeallable. . . . Plaintiffs have asked us to overrule our decision about appellate jurisdiction, but their arguments are unpersuasive."). See also *Green*, 279 F3d 590 (holding that, where the remand order is based on the district court's supplemental jurisdiction authority, § 1447(d) does not bar appeal). *Green* technically does not split with the Ninth or Second circuits, because the district court had first determined that the plaintiff's complaint was preempted by SLUSA. Id at 594.

12 *Kircher*, 373 F3d at 851.

This Comment attempts to resolve the circuit split over whether district court determinations of SLUSA preemption are reviewable at the appellate level. The Comment considers the impact of an analogous body of law—the Class Action Fairness Act of 2005[13] (CAFA)—on the split. The Comment argues that CAFA reflects clear congressional intent favoring review for statutory schemes that, like SLUSA, grant federal courts jurisdiction in class action cases. Moreover, CAFA's treatment of remands suggests that these kinds of remands are what the Supreme Court has termed "claim-processing" rules rather than "jurisdictional" rules, and so review is not barred. The Comment further argues that allowing review of SLUSA remands is consistent with Supreme Court precedent, the statutes governing federal jurisdiction, and the purpose of SLUSA itself.

Part I briefly reviews the history of SLUSA, as well as the relevant rules governing removal, remands, appeals, and federal question jurisdiction. Part II explores the circuit split that has emerged over the appealability of SLUSA remands, evaluates the arguments on each side of the split, and concludes that the Supreme Court's decisions in *Kontrick v Ryan*[14] and *Scarborough v Principi*[15] are not dispositive on the issue. Part III argues that CAFA provides additional support in favor of review. The Comment concludes that allowing federal appellate review will better serve SLUSA's goal of creating uniform standards in securities class actions and that review will not create a burdensome increase in federal courts' caseloads nor cause undue delays in state court litigation.

I. THE HISTORY, PURPOSE, AND LANGUAGE OF SLUSA

Congress passed SLUSA "in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of PSLRA, which had "sought to prevent abuses in private securities fraud lawsuits."[16] In an effort to cut down on "strike suits"[17] and coercive incentives to settle such suits, PSLRA heightened pleading requirements in class actions alleging fraud in the

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13 Pub L No 109-2, 119 Stat 4 (2005), codified at 28 USC §§ 1, 1332, 1453, 1711–15 (Supp 2005).

14 540 US 443, 455 (2004) (explaining that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority").

15 541 US 401, 413–14 (2004) (finding that the statute at issue did not describe what "classes of cases" the Court of Appeals for Veterans Claims is competent to adjudicate).

16 SLUSA § 2(1), (5), 112 Stat at 3227.

17 A strike suit is an action "often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement." *Black's Law Dictionary* 1475 (West 8th ed 2004).

sale of national securities.[18] PSLRA also instituted a mandatory stay of discovery, to be in effect until a district court could determine whether the action had legally sufficient claims.[19] This helps prevent plaintiffs from pursuing discovery as a tactic to increase the defendant's incentives to settle.

Congress found that after PSLRA, many class actions "shifted" to state court,[20] allowing plaintiffs to avoid the heightened federal pleading requirements and to pursue discovery in state court, "prevent[ing] [PSLRA] from fully achieving its objectives."[21] To stop this abuse, Congress passed SLUSA, which "enacts national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits."[22]

Under SLUSA, defendants may remove "covered" class actions involving "covered" securities to federal court.[23] SLUSA explicitly bars specific class action suits by "preempting" these claims:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.[24]

This preemption provision requires that where a district court finds a covered class action to be based on preempted claims, the district court must dismiss the claims.[25] If the claims are not preempted, the court must remand to the state court.[26] Whether such a remand order of a claim removed under SLUSA is appealable is the subject of this Comment.

A. The Appealability of Remands Generally

At first blush, 28 USC § 1447(d), the federal statute that governs remands, appears to bar appellate review of SLUSA remands. Typically, when a federal court remands a case to the state court from which the case was removed—either for lack of subject matter juris-

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18 15 USC § 78u-4(b).

19 Id § 77z-1(b).

20 SLUSA § 2(2), 112 Stat at 3227.

21 Id.

22 Id.

23 15 USC § 78bb(f)(2). See note 4 and accompanying text.

24 Id § 78bb(f)(1)(A).

25 Id § 77p(b).

26 Id § 77p(d)(4) (providing that "if the Federal court determines that the action may be maintained in State court" the court "shall remand such action to such State court").

diction or because of a procedural error in removal—the remand order is "not reviewable on appeal or otherwise."[27] There are, however, exceptions to this rule.

The Supreme Court has held that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)."[28] Section 1447(c) remands are for lack of subject matter jurisdiction.[29] Section 1447(d) does not prevent an appellate court from reviewing a district court's discretionary, abstention-based remand order,[30] nor does it bar review of discretionary decisions declining to exercise jurisdiction more generally.[31] If an appellate court concludes that a district court's order was discretionary, the appellate court may review the order even if the district court characterized it as being based on a lack of subject matter jurisdiction.[32]

Thus, whether an appellate court may review a district court's SLUSA remand order does not depend on how the district court characterized its decision to remand. If the case was remanded because of a procedural defect or for lack of subject matter jurisdiction, the appellate court may not review the order, but if the appellate court concludes the remand order was in any way discretionary, the order is reviewable. The circuit split over the appealability of SLUSA remand orders has turned on the circuits' interpretations of whether a remand order based on a finding of nonpreemption is an order remanding for lack of subject matter jurisdiction, or is an order remanding a case over which the court once had adjudicatory authority but no longer does.

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27 28 USC § 1447(d). Parties may not seek a writ of mandamus to dodge this rule. See, for example, *In re Benjamin Moore & Co*, 318 F3d 626, 631 (5th Cir 2002).

28 *Things Remembered, Inc v Petrarca*, 516 US 124, 127 (1995). See also *Thermtron Products, Inc v Hermansdorfer*, 423 US 336, 346 (1976) ("[O]nly remand orders issued under § 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d).").

29 28 USC § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

30 See *Quackenbush v Allstate Insurance Co*, 517 US 706, 712 (1996).

31 See, for example, *First National Bank of Pulaski v Curry*, 301 F3d 456, 460 (6th Cir 2002) ("[A] remand order is reviewable on appeal when the district court concludes that the action was properly removed but that the court lost subject matter jurisdiction at some point post-removal."); *City of Tucson v US West Communications, Inc*, 284 F3d 1128, 1131 (9th Cir 2002) ("[I]t is clear that non-jurisdictional, discretionary remands are not barred from appellate review."). See also *Long v Bando Manufacturing of America, Inc*, 201 F3d 754 (6th Cir 2000) (holding that remand orders are reviewable where the district court had subject matter jurisdiction but remanded, at its discretion, following dismissal of the plaintiff's federal claims).

32 See *Abada v Charles Schwab & Co*, 300 F3d 1112, 1117 (9th Cir 2002) ("We are not bound by the district court's characterization of its authority for remand. . . . [I]f we concluded that the district court's order was the result of an exercise of discretion, we could review it."). See also *Ferrari, Alvarez, Olsen & Ottoboni v Home Insurance Co*, 940 F2d 550, 553 (9th Cir 1991) ("A court's characterization of its authority for remand is not binding.").

B. Federal Question Jurisdiction, Removal, and Preemption

Generally, defendants may remove to federal court any action filed in state court over which federal courts have original jurisdiction.[33] Federal courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"[34]—federal question jurisdiction—as well as diversity jurisdiction over cases involving citizens of different states.[35] A case "arises" under federal law if the plaintiff's original claim facially states a federal claim—that is, the *Mottley*[36] well-pleaded complaint rule.[37]

A defense that raises a federal question is not part of a plaintiff's original claim,[38] so "a case may not be removed to federal court on the basis of a federal defense."[39] Moreover, a defense that federal law preempts the plaintiff's state law claims is generally insufficient to establish federal question jurisdiction.[40] However, if a federal statute "completely" preempts state law claims, a claim may be removed to federal court under federal question jurisdiction.[41]

II. THE CIRCUIT SPLIT

The Seventh Circuit has split with the Ninth and Second circuits over whether remand orders in cases originally removed under SLUSA are reviewable. The Ninth and Second circuits hold that § 1447(d) bars

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33 28 USC § 1441(a).

34 28 USC § 1331 (2000).

35 Id § 1332.

36 *Louisville & Nashville Railroad Co v Mottley*, 211 US 149, 152 (1908) ("[A] suit arises under the Constitution and the laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.").

37 *Caterpillar Inc v Williams*, 482 US 386, 392–93 (1987) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.").

38 See *Rivet v Regions Bank of Louisiana*, 522 US 470 (1998) (holding that a defense of preclusion is a defense that does not recast a plaintiff's original complaint and so is not a proper basis for removal). See also *Mottley*, 211 US at 152 ("It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States.").

39 *Franchise Tax Board of California v Construction Laborers Vacation Trust for Southern California*, 463 US 1, 14 (1983).

40 See *Caterpillar*, 482 US at 392–93 ("[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption.").

41 See *Beneficial National Bank v Anderson*, 539 US 1, 8 (2003) ("[A] state claim may be removed to federal court in only two circumstances—when Congress expressly so provides . . . or when a federal statute wholly displaces the state-law cause of action through complete preemption."); *Avco Corp v Aero Lodge*, 390 US 557 (1968) (holding that where a federal cause of action completely preempts a state cause of action, any complaint within the scope of the federal cause of action arises under federal law, even where the plaintiff does not invoke federal law). See also *Franchise Tax Board*, 463 US at 24 (discussing *Avco*'s holding).

appellate review of SLUSA remands, whereas the Seventh Circuit holds that review is not barred.

A. The First Approach: Section 1447(d) Bars Review of SLUSA Remands

In *Abada v Charles Schwab & Co, Inc*,[42] the Ninth Circuit held that it lacked jurisdiction to review a district court's order remanding an action in which the defendant, an online securities brokerage firm, allegedly misrepresented its online trading service.[43] The *Abada* court acknowledged that if the district court's decision was discretionary, the order would be reviewable,[44] but found that the lower court's determination that SLUSA did not completely preempt the plaintiff's state law claims amounted to a determination that the district court lacked subject matter jurisdiction.[45] Relying on the Supreme Court's decision in *Things Remembered, Inc v Petrarca*,[46] the *Abada* court declined to review the order.[47]

Abada explicitly rejected the claim that the district court, in ordering the remand, was exercising its discretion; instead, the district court was "reaching a legal conclusion" that it lacked subject matter jurisdiction.[48] Moreover, the appellate court rejected the defendant's argument that the order was reviewable because the district court had to construe SLUSA to determine whether it had jurisdiction.[49] Finally, *Abada* rejected the claim that, because removal and remand were based on SLUSA's explicit provisions, and because SLUSA did not explicitly bar appellate review of remand orders, such remand orders are reviewable.[50] In rejecting this argument, the Ninth Circuit emphasized *Things Remembered*'s holding that § 1447(d)'s prohibition of review applies to remand orders made in suits under the general re-

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42 300 F3d 1112 (9th Cir 2002).

43 Id at 1114–15.

44 Id at 1116–17.

45 Id at 1116.

46 516 US 124, 127–28 (1995) ("As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction—the grounds for remand recognized by § 1447(c)—a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).").

47 300 F3d at 1116 ("[W]e do not have appellate jurisdiction to review the remand order because it was founded on the absence of subject matter jurisdiction.").

48 Id at 1117.

49 Id at 1118 ("[W]e do not acquire appellate jurisdiction over a remand order simply because the district court was required to resolve a novel legal issue in order to determine whether to remand based on the absence of subject matter jurisdiction.").

50 Id at 1119 (finding that § 1147(d)'s "bar on the review of remand orders applies regardless of whether the case was removed pursuant to the general removal statute or the removal provisions of SLUSA").

moval statute and those made in cases removed under "*any other statutes* as well."[51]

The Ninth Circuit reaffirmed this basic position in *United Investors Life Insurance Co v Waddell & Reed, Inc*.[52] *United Investors* involved claims against an investment advisory firm that had allegedly procured replacement annuity contracts through deceptive and manipulative practices.[53] The defendant removed the case to federal court, pursuant to SLUSA, and filed a motion to dismiss.[54] The district court issued a remand order denying the defendant's motion to dismiss and remanding the case to state court.[55] The defendants appealed, and the Ninth Circuit held that the order was unreviewable.

Because the order did not specify on what grounds the case was remanded, the *United Investors* court looked to the "substance" of the remand order.[56] The court explained that "in order to establish jurisdiction over [the defendant's] motion to dismiss, the district court would have had to decide [the defendant's] SLUSA pre-emption claim" in the defendant's favor.[57] Because the district court denied the motion to dismiss, it must have believed that the claim was not removable and, therefore, that it lacked subject matter jurisdiction.[58]

Having determined that the district court remanded the case for lack of subject matter jurisdiction, the Ninth Circuit echoed its previous holding in *Abada* and the Second Circuit's holding in *Spielman v Merrill Lynch, Pierce, Fenner & Smith, Inc*[59] that § 1447(d) precludes review of such orders. The court acknowledged that if the district court had "remanded on non–subsection 1447(c) discretionary grounds, then subsection 1447(d) does not bar appellate review."[60]

In *Spielman*, the Second Circuit also held that § 1447(d) bars appellate review of SLUSA remands.[61] The *Spielman* court held that "a remand order based on a finding that the state law claim evades SLUSA preemp-

51 Id, quoting *Things Remembered*, 516 US at 128.

52 360 F3d 960, 967 (9th Cir 2004) ("Because subsection 1447(d) precludes appellate review of the district court's remand order, we lack jurisdiction to consider [appellant's] motion to dismiss on the merits. This would be true even if the district court clearly misapplied SLUSA's preemption provisions.").

53 Id at 962.

54 Id at 962–63.

55 Id.

56 Id at 964. See *Executive Software North America, Inc v United States District Court*, 24 F3d 1545, 1549 (9th Cir 1994) ("[I]n instances of ambiguity, this circuit looks to the substance of the order to determine whether it was issued pursuant to section 1447(c).") (internal quotation marks omitted).

57 *United Investors*, 360 F3d at 966.

58 Id at 965.

59 332 F3d 116, 127 (2d Cir 2003).

60 *United Investors*, 360 F3d at 964.

61 *Spielman*, 332 F3d at 127.

tion is merely an alternative, and not incorrect, way of stating that the subject matter jurisdiction under SLUSA is lacking."[62] Under this rule, in cases like *United Investors* and *Spielman*, even when a district court does not explicitly base its remand order on a finding of a lack of subject matter jurisdiction, an appellate court may not review the order if it was based on a finding that SLUSA does not preempt the state court claims.[63]

Spielman reasoned that "SLUSA's applicability is triggered if and only if a claim, on its face, falls within SLUSA's preemptive scope," so that a finding that one of SLUSA's substantive requirements does not apply actually means that "federal question jurisdiction to proceed under SLUSA is lacking."[64] The court also noted that, nonjurisdictional discretionary remands aside, it could find only three statutory exceptions to § 1447(d)'s bar of appellate review, and that "SLUSA does not constitute a fourth exception."[65] *Spielman*, echoing *Abada*, also rejected the argument that because SLUSA did not expressly prohibit appellate review of remand orders, Congress must have meant to preserve such review.[66]

The *Spielman* court also relied heavily on *Things Remembered*'s holding that § 1447(d) barred review of a remand order in a bankruptcy action.[67] *Things Remembered*, the Second Circuit reasoned, stood for the proposition that § 1447(d) barred review of such an order "irrespective of whether the initial removal had taken place under Section 1441(a), the general removal statute, or Section 1452(a), the bankruptcy removal statute."[68] *Spielman* concluded that "[t]he district court's finding that SLUSA did not preempt [a state law claim] was tantamount" to a finding that the court lacked subject matter jurisdiction to proceed under SLUSA, and that a remand order, based on that finding, was not reviewable.[69]

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62 Id. The court noted that such a remand order is not reviewable "even if the district court's determination regarding subject matter jurisdiction is ill-founded or poorly reasoned." Id.

63 Id at 128–29. See also *Pierpoint v Barnes*, 94 F3d 813, 816 (2d Cir 1996).

64 332 F3d at 126–27.

65 Id at 126. The statutory exceptions include civil rights cases removed pursuant to 28 USC § 1443; cases removed under the Financial Institution Reform, Recovery and Enforcement Act of 1989, Pub L No 101-73, 103 Stat 183 (1989), codified at 12 USC §§ 209(4)(b)(2), 501(1)(3), 1441(a)(1)(3) (2000); and remands that the FDIC wishes to appeal, 12 USC § 1819(b)(2)(C) (2000). See *Spielman*, 332 F3d at 126 n 8. See also Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 14 *Federal Practice and Procedure* § 3740 (West 3d ed 1998).

66 *Spielman*, 332 F3d at 127. See also note 131.

67 A bankruptcy court's decision to remand a case is not reviewable. 28 USC § 1452(b) (2000).

68 *Spielman*, 332 F3d at 128. See *Things Remembered*, 516 US at 128.

69 332 F3d at 130.

B. The Second Approach: If Properly Removed, SLUSA Remands Are Reviewable

In *Kircher v Putnam Funds Trust*,[70] the Seventh Circuit split with the Ninth and Second circuits, holding that a remand order of a case previously removed under SLUSA was reviewable, notwithstanding § 1447(d).[71] *Kircher* involved a class action against a mutual fund in which the plaintiffs alleged that the fund and its investment advisor had reduced the value of the plaintiffs' shares by engaging in misconduct.[72] The defendant removed the suit under SLUSA and requested that the case be dismissed under SLUSA's preemption provision. The district court found that, though the action was a "covered class action," the claims were not preempted by SLUSA § 77p(b) preemption provision.[73] The court therefore granted the plaintiffs' motion to remand.[74]

Acknowledging that in order to review the district court's remand order it had to "reckon" with § 1447(d), the Seventh Circuit found that SLUSA's provision requiring remand was "not within § 1447(c) or equivalent to it."[75] Thus a remand ordered pursuant to § 77p(d)(4) was not a remand for lack of subject matter jurisdiction or for a procedural defect in removal, and so § 1447(d) did not bar appellate review of such a remand order.

The court found that review of the remand order was not barred by § 1447(d) even though the district court had explicitly indicated that it remanded the action "because the Court lack[ed] subject matter jurisdiction."[76] The Seventh Circuit explained that the district judge's "use of the word 'jurisdiction'" was not necessarily conclusive in preventing review, because of two recent Supreme Court decisions clarifying the proper use of the phrase "subject-matter jurisdiction."[77]

In *Kontrick*, the Supreme Court explained that courts should use the word "jurisdictional" only "for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[78] A few months

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70 373 F3d 847 (7th Cir 2004).

71 Id at 850 ("This suit was properly removed. . . . It follows that the remand is unaffected by § 1447(d).").

72 Id at 847.

73 *Kircher v Putnam Funds Trust*, 2004 US Dist LEXIS 10327, *7–9 (SD Ill).

74 Id at *9.

75 *Kircher*, 373 F3d at 848–49.

76 Id at 848. See *Kircher*, 2004 US Dist LEXIS 10327 at *9.

77 *Kircher*, 373 F3d at 849. *Kircher*'s analysis distinctly contrasts with *United Investors* and *Spielman*, where the district courts did *not* explicitly use the word "jurisdiction" but the appellate courts found that the remand was nonetheless jurisdictional in substance.

78 540 US at 455.

later, the Court reaffirmed this statement in *Scarborough*.[79] Under these holdings, "jurisdictional" refers only to classes of cases federal courts are "competent to adjudicate."[80]

Relying on this distinction, the *Kircher* court reasoned that if a case had properly been removed under SLUSA in the first place—that is, if the action was "a covered class action" involving a "covered security"—then the district court had subject matter jurisdiction to determine whether SLUSA actually preempted the state law claims. Then, "[a]fter making the decision required by [SLUSA § 77p(b) preemption provision], the district court had nothing else to do: dismissal and remand are the only options."[81] But taking either option meant only that the court had done "all that the statute [had] authorize[d]" it to do; neither dismissal nor remand meant "this court lacks adjudicatory competence."[82] Instead, dismissal or remand meant "the court has been authorized to do X and having done so should bow out."[83]

The Seventh Circuit acknowledged that "[t]echnically this opinion creates a conflict among the circuits about appellate review of decisions under SLUSA," but noted that *Abada* and *Spielman* had been decided before *Scarborough* and *Kontrick*.[84] At any rate, the Seventh Circuit reasoned: "Both the second and the ninth circuits were mesmerized by the word 'jurisdiction' and did not see the difference between a case that never should have been removed and a case properly removed and remanded only when the federal job is done."[85]

Finally, the *Kircher* court noted that appellate review of decisions under SLUSA "makes practical sense too" because:

> SLUSA means . . . that one specific substantive decision in securities litigation must be made by the federal rather than the state judiciary. Appellate review of decisions under § 77p(b) will pro-

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79 541 US at 413–14. See note 15.

80 Id.

81 *Kircher*, 373 F3d at 849–50. The court explained:

> Once a court does all that the statute authorizes, there is no adjudicatory competence to do more. That is not the "lack of subject-matter jurisdiction" that authorizes a remand. Otherwise every federal suit, having been decided on the merits, would be dismissed "for lack of jurisdiction" because the court's job was finished.

Id at 850. As support for this distinction, the court referred to *Bell v Hood*, 327 US 678, 682–83 (1946) (explaining that cases dismissed "for want of jurisdiction where the alleged . . . [federal claim] . . . clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous" are not accurately called jurisdictional dismissals).

82 *Kircher*, 373 F3d at 850.

83 Id.

84 Id at 850–51. The court also explained that "although *United Investors* came a month after *Kontrick* the court did not discuss it." Id at 851.

85 Id.

> mote accurate and consistent implementation of that statute, at little cost in delay beyond what the authorized removal itself creates. Yet if the remand is deemed non-appealable, then a major substantive issue in the case will escape review—for SLUSA ensures that only the federal judiciary makes the § 77p(b) decision. . . . [I]t is now or never for appellate review of the question whether an action under state law is preempted.[86]

To the Seventh Circuit, promoting uniformity would come at little cost and would be consistent with SLUSA's removal and remand provisions as well as the federal laws governing removal, jurisdiction, and remand.

At bottom, the circuits are split over whether a remand under SLUSA's remand provision is based on a lack of subject matter jurisdiction—and so subject to § 1447(d) via § 1447(c)—or whether such a remand is the last act of a federal court exercising its jurisdiction pursuant to SLUSA. The Ninth and Second circuits look to SLUSA's preemption provision to determine whether there was federal question jurisdiction when the case was originally removed. The Seventh Circuit differs, holding that the very purpose of SLUSA is to grant the district court jurisdiction to make the preemption decision—thus the district court had jurisdiction as soon as it determined that the case was properly removed. To the Ninth and Second circuits, if the district court determines that SLUSA does not preempt the state law claims, the court never had federal question jurisdiction to begin with and so a remand, couched in any language, is for a lack of subject matter jurisdiction. To the Seventh Circuit, if the district court determines that SLUSA does not preempt the state law claims, the district court has finished its adjudicatory task as mandated by federal law, and its remand is not based on a lack of subject matter jurisdiction.

C. Evaluating the Two Approaches

To the Ninth and Second circuits, a finding that SLUSA does not preempt a plaintiff's state law claims means the district court did not have federal question jurisdiction to begin with. For these circuits, a district court remand under SLUSA § 77p(d)(4) provision is based on a lack of subject matter jurisdiction.

Because § 1447(d) applies only to remands based on a timely raised defect in removal procedure or on lack of subject matter jurisdiction,[87] the Ninth and Second circuits assume that if the district court finds that SLUSA does not preempt the state law claims, then the

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86 Id at 850. The court also noted that "[i]n the unusual securities class action where expedition is vital, we can accelerate the appeal's disposition." Id.

87 *Things Remembered*, 516 US at 127–28.

court never had jurisdiction. But these assumptions are at odds with SLUSA's express removal provision and the statute's very purpose: to allow the federal judiciary to make the preemption determination.[88] In the normal situation where a defendant hopes to raise a preemption defense, that defense is affirmative, so a state court can itself evaluate the preemption claim provided that the claim is not completely preempted by federal law. In that situation, a federal court does not have jurisdiction to evaluate the preemption claim—the federal court has jurisdiction only if the plaintiff's original complaint itself raised a federal question.[89]

SLUSA allows defendants to remove the case so that a federal judge can evaluate the preemption defense, effectively overruling the well-pleaded complaint rule for securities class actions.[90] Section 77p(c) mandates that "[a]ny 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."[91] To the Ninth and Second circuits, the words "as set forth in subsection (b)" limit removal to cases that SLUSA preempts. If the action does not allege fraud in connection with the sale or purchase of a nationally traded security,[92] the case should not have been removed. Another reading of the statute, however, suggests that the propriety of removal does not rest upon preemption. Under this reading, the purpose of the statute is to grant the federal judiciary the authority to make the preemption decision, and removal is "proper" whenever this determination must be made.[93]

1. Proper removal need not rest on preemption.

One can just as easily read the limiting phrase "as set forth in subsection (b)" to apply to "covered securities" as to "covered class actions." If Congress had meant to make the removal provision clearly mandate the Ninth and Second circuits' conclusion that removal is improper unless the state law claims are not preempted, Congress could have written the statute to read: "Any covered class action, as set forth in subsection (b), brought in any State court involving a covered security shall be removable."

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88 See 15 USC §§ 77p(c), 78bb(f)(2).

89 See *Mottley*, 211 US at 152. See also *Caterpillar v Williams*, 482 US 386, 392–93 (1987).

90 15 USC § 77p(c).

91 Id.

92 See id § 77p(b).

93 That is, whenever a class action is "covered" and involves a "covered security," the preemption decision must be made and removal is proper. These two questions are relatively straightforward, whereas the preemption decision itself is the most difficult, and critical, determination.

Because the statute is ambiguous as to whether the "as set forth" phrase should be applied to "covered class action" or to "covered security" (or to both), the statute's purpose and congressional intent must be considered.[94] SLUSA's purpose is to return to federal court the "number of securities class action lawsuits [that] have shifted from Federal to State courts" after PSLRA.[95] Given this goal, and the goal of preventing plaintiffs from frustrating the mandatory stay of discovery by filing in state court, reading SLUSA's removal provision to allow removal of covered class actions (followed by a decision as to whether the state law claims are preempted) makes more sense and is still very much in keeping with the language of the statute.[96]

The Ninth and Second circuits' approach does not view SLUSA as a mechanism by which federal courts are given jurisdiction over the substantive decision regarding preemption. Instead, these courts view SLUSA as a simultaneous removal and preemption inquiry process. These courts are really examining whether removal was proper based on federal question jurisdiction: if the original claim is completely preempted by federal law, then the court has subject matter jurisdiction, but, if the claims were not preempted, the court never had subject matter jurisdiction. The Ninth and Second circuits' approach, then, does not put much stock in SLUSA's express purpose of granting the federal courts the adjudicatory authority to evaluate the preemption claim outside of the normal restrictions of the well-pleaded complaint rule and federal question jurisdiction.

2. The implications of *Kontrick* and *Scarborough*.

The Seventh Circuit acknowledged that its holding finding a SLUSA-based remand reviewable conflicted with the Second and Ninth circuits'

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94 See *United States v Hohri*, 482 US 64, 71 (1987) ("Because the statute is ambiguous, congressional intent is particularly relevant to our decision."); *Silvers v Sony Pictures Entertainment, Inc*, 402 F3d 881, 896 (9th Cir 2005) ("[W]here a statute is ambiguous, courts should consult a statute's legislative history to discern Congressional intent.").

95 Securities Litigation Uniform Standards Act of 1998, Conference Committee, HR Rep No 105-803, 105th Cong, 2d Sess 1, 1 (1998).

96 Against this position, it might be argued that congressional intent in passing § 1447(d) reflects a desire to expedite a trial on the merits and avoid frivolous appeals and delay tactics. This argument is sound for remands involving areas of law, such as diversity jurisdiction, where extensive appellate review existed *before* § 1447(d) was passed, creating a consistent set of guidelines for district courts in making remand decisions. However, as discussed at length in Part III, Congress has recently suggested that for statutory schemes that are new and have no such body of law, Congress would "particularly encourage appellate courts to review cases that raise jurisdictional issues likely to arise in future cases." Class Action Fairness Act of 2005, S 5, 109th Cong, 1st Sess, in 151 Cong Rec H 723, 729 (Feb 17, 2005) (Statement of Rep. Sensenbrenner). See text accompanying note 116.

decisions.[97] The *Kircher* court reasoned that the Ninth and Second circuits "did not see the difference between a case that never should have been removed and a case properly removed and remanded only when the federal job is done."[98] Relying on two relatively recent Supreme Court decisions (*Kontrick* and *Scarborough*), the court concluded that "normal remands" aside, "[t]hat's not how SLUSA works"; "SLUSA means . . . that one specific substantive decision in securities litigation must be made by the federal rather than the state judiciary."[99]

Kontrick and *Scarborough* aid the Seventh Circuit's conclusion that properly removed SLUSA remands are not for lack of subject matter "jurisdiction," but an examination of the cases suggests that *Kontrick* and *Scarborough* do not resolve the question of whether such remands are reviewable. *Kontrick* held that filing deadlines prescribed in certain Bankruptcy Code rules were "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate."[100] To get to this holding, the Supreme Court explained that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[101] *Scarborough* explicitly echoed this distinction, reiterating the intention to clarify that jurisdiction defines a court's adjudicatory authority, not a court's claim-processing rules.[102]

But neither *Scarborough* nor *Kontrick* explicitly enumerates other kinds of claim-processing rules as being distinct from prescriptions delineating adjudicatory authority. Both cases deal with filing deadlines, which are much more clearly placed in the "claim-processing" category than in a jurisdictional category. Neither case suggests that remands are closer to claim-processing rules than to the alternative, "jurisdictional rules." A remand provision can plausibly be viewed in one context as a rule that gives a court a mechanism to proceed once it has made a substantive decision; in other words, as a claim-processing rule. But in another context, a remand provision might also plausibly be viewed as a rule requiring a court to do something or as telling a court when it

97 *Kircher*, 373 F3d at 850.
98 Id at 851.
99 Id at 850.
100 540 US at 454.
101 Id at 455.
102 *Scarborough*, 541 US at 401, 413–14.

must give up authority to hear a case; that is, as a rule delineating the court's adjudicatory authority.[103]

In *Kircher*, the Seventh Circuit implicitly took SLUSA's removal and remand provisions to be closer to claim-processing rules than to rules delineating the classes of cases that fall within the federal courts' adjudicatory authority. At the same time, the court interpreted SLUSA as a whole to grant federal courts the power and authority to adjudicate the preemption determination.[104] This analogy is plausible because SLUSA, like all federal laws, operates in the context of clear rules (the well-pleaded complaint rule and general precedents governing federal question jurisdiction) that themselves delineate the classes of cases that fall within the federal judiciary's adjudicatory authority. SLUSA grants federal courts exclusive jurisdiction over the preemption determination, and also provides claim-processing rules to guide courts making these decisions.

But because the SLUSA remand provision *requires* the federal court to remand if state claims remain, a plausible case can be made that this rule limits the court's authority to decide the case, making the remand provision a jurisdictional rule. The Seventh Circuit assumes this is not the case, but *Kontrick* and *Scarborough* do not resolve the issue beyond clarifying that jurisdiction means adjudicatory authority.

Thus, the Seventh Circuit's analysis assumes that (1) cases in which the district court determined that state law claims were not preempted were nonetheless properly removed, and (2) SLUSA's removal and remand provisions were necessarily more like claim-processing rules than like jurisdictional guidelines. Each of the assumptions is plausible, but neither is inescapable or necessarily compelled by the language of the statute. Thus, the Seventh Circuit's analysis, like the Ninth and Second circuits', does not convincingly put the issue to rest. More is needed to understand what Congress meant SLUSA's remand provision to serve as—a claim-processing rule or a rule delineating the federal courts' adjudicatory authority. Ideally, SLUSA's legislative history would serve as a guide, but that history is silent on the issue of remands.

As argued in Part III, SLUSA remands might be better understood when viewed in light of another, analogous body of law that

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103 This subtle but important distinction might simply depend on whether the remand provision is discretionary or mandatory. If the court *may* order a remand for discretionary purposes, the remand provision is closer to a mechanism by which the court can achieve this. If the remand provision mandates that "if the court finds X, the court *must* remand," the provision clearly draws at least one line at which the court's adjudicatory authority ends. Neither *Kontrick* nor *Scarborough* discusses or explains how courts should navigate these distinctions.

104 See *Kircher*, 373 F3d at 850 ("SLUSA means . . . that one specific substantive decision in securities litigation must be made by the federal rather than the state judiciary.").

more explicitly deals with remands. The Class Action Fairness Act of 2005[105] (CAFA), enacted with language similar to SLUSA's and for a purpose very similar to SLUSA's, reflects a congressional preference for appellate review of remand orders in new statutory schemes in order to create a clear body of law that will guide district courts.

III. SLUSA IN LIGHT OF CAFA

Given SLUSA's failure to explicitly discuss appellate review of remands, the circuit split that has developed over such review, and a lack of legislative history to illuminate the congressional intent behind the passage of SLUSA, this Part argues that SLUSA's sister legislation, CAFA, helps resolve the issue in favor of review. In passing CAFA, Congress emphasized that the § 1447(d) bar is best applied where a settled and coherent body of appellate law exists to guide district courts in implementing a statutory scheme that deals with important jurisdictional questions.[106] The SLUSA remand controversy is better understood with this in mind. Moreover, CAFA's use of review of remand orders indicates that Congress intended rules governing remands in such statutory schemes to be claim-processing, rather than jurisdictional, rules.

A. CAFA and Congressional Preference for Review

Congress passed CAFA to deal with what it found were "[a]buses in class actions [that] undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction."[107] CAFA grants original federal jurisdiction over most multistate, consumer class actions with $5 million or more in aggregate damages, thus providing for removal of those cases to federal court. CAFA creates both mandatory[108] and discretionary[109] jurisdiction for the federal courts, and also grants diversity jurisdiction when diversity is minimal.[110]

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105 119 Stat 4.

106 See 151 Cong Rec H at 729 (cited in note 96) (Statement of Rep. Sensenbrenner). See also text accompanying note 116.

107 CAFA § 2(a)(2), 119 Stat at 5.

108 28 USC § 1332(d)(2). Mandatory jurisdiction exists where one-third or fewer of the proposed class members are citizens of the state in which the action was filed. Id § 1332(d)(3). If more than two-thirds of the proposed class members are citizens of the state in which the actions were filed, the court must decline to exercise jurisdiction. Id § 1332(d)(4).

109 Id § 1332(d)(3). Courts have discretion to decline to exercise their jurisdiction if greater than one-third but fewer than two-thirds of proposed class members and "the primary defendants" are citizens of the state in which the action was originally filed." Id.

110 Id § 1332(d)(2)(A)–(B).

This statutory scheme is the area of existing law most analogous to SLUSA. In fact, most SLUSA actions—provided that the parties have met its minimal diversity requirements—would fall under CAFA, were it not for the fact that CAFA explicitly exempts securities actions from its scope.[111] Beyond having parallel purposes, CAFA and SLUSA work in nearly identical procedural ways. First, each identifies a type of class action that Congress believes must be considered in federal court in order to prevent abuse. Each statute provides a mechanism for removal to federal court and allows that court to decide whether the action should proceed in the federal forum. (Of course, for SLUSA actions, a finding that the case "belongs" in federal court means the case will be dismissed.) Finally, each statute provides a remand mechanism.

Importantly, there is no evidence in the statute or in CAFA's legislative history that securities class actions were exempted in order to avoid review of remand orders. Rather, CAFA did to multistate consumer class actions what SLUSA had already done to securities class actions: removed them for federal court consideration.[112]

The similarity in purpose, structure, procedure, and statutory language that SLUSA and CAFA share are evidence that, where one statute is ambiguous and the other is explicit, the explicit statute is a good guide to congressional intent in resolving the ambiguities.[113]

CAFA expressly provides for appellate review of remand orders. It allows expedited, discretionary reviews of district court orders remanding (or denying remand of) the removed actions to state court.[114] The expedited review provision means that courts of appeals reviewing remands must "complete all action on such appeal[s]" within sixty days of the date the appeal was filed.[115] Unlike SLUSA, there is an explicit legislative record dealing with remands and CAFA. Propo-

111 CAFA § 5, 119 Stat at 13. See also 151 Cong Rec H at 729 (cited in note 96) (Statement of Rep. Sensenbrenner) ("[CAFA] excludes . . . class actions that solely involve claims that relate to matters of corporate governance arising out of State law. The purpose of this provision is to avoid disturbing in any way the . . . jurisdictional lines already drawn in the securities litigation class action context by the enactment of [SLUSA]."). Thus, Congress exempted securities actions from CAFA because SLUSA had already addressed the problem of class action abuse involving securities, not because securities actions were seen as outside the general purpose of CAFA to remove multistate actions to federal court. See id.

112 See 151 Cong Rec H at 729 (cited in note 96) (Statement of Rep. Sensenbrenner).

113 See, for example, *United States v American Trucking Associations, Inc*, 310 US 534, 543–44 (1940) (interpreting the Motor Carrier Act of 1935 in light of other legislation including: the Hours of Service Act, the Motor Vehicle Act, the statutes governing the Civil Aeronautics Authority, and the subsequently enacted Fair Labor Standards Act). See also, for example, *Bob Jones University v United States*, 461 US 574, 601 (1982) (interpreting a statute governing the tax-exempt status of schools in light of a provision denying tax-exempt status to social clubs whose charters or policies discriminate).

114 28 USC § 1453(c)(1).

115 Id § 1453(c)(2).

nents of the bill explained why review was explicitly granted, creating an exception to § 1447(d):

> [T]he current prohibition on remand order review was added to section 1447 *after* the Federal diversity jurisdictional statutes and the related removal statutes had been subject to appellate review for many years and were the subject of considerable appellate level interpretive law. The Sponsors believe *it is important to create a similar body of clear and consistent guidance for district courts* that will be interpreting this legislation and would *particularly encourage appellate courts to review cases that raise jurisdictional issues likely to arise in future cases*.[116]

The idea that new bodies of law should be exempted from the § 1447(d) bar of appellate review so that appellate courts can create "clear and consistent guidelines for district courts" applies with equal force to SLUSA.[117] Courts have recognized the problem created by the absence of guidelines for district courts to use in implementing SLUSA: "[D]istrict court cases appear to be all over the map on the issue of what state law claims are preempted by SLUSA."[118] Given the unsettled nature of the law as applied to SLUSA reviews as manifested in the circuit split, this new evidence from Congress suggesting that the § 1447(d) bar is best applied after there is a settled body of law to guide district courts should influence appellate courts' SLUSA remand decisions in favor of review.

Moreover, when Congress passed CAFA, this concept of the need for appellate guidance was not controversial once it became clear, via the expediting clauses, that defendants could not use appellate review as a dilatory tactic. Key supporters came on board only after forging a compromise that required appellate courts to rule on remand appeals within sixty days.[119] Review itself was not the problem; dilatory review

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116 151 Cong Rec H at 729 (cited in note 96) (Statement of Rep. Sensenbrenner) (emphasis added).

117 The Seventh Circuit foreshadowed this argument in favor of appellate review in *Kircher*, 373 F3d at 850.

118 See, for example, *Magyery v Transamerica Financial Advisors, Inc*, 315 F Supp 2d 954, 959 (ND Ind 2004) ("A careful reading of the cases reveals that many of the differences [in the preemption decisions] are based on variations in the facts, but there is a clear split among the courts on the issue of whether the Plaintiffs' claims must allege 'scienter' for SLUSA preemption to apply.").

119 Class Action Fairness Act of 2005, S 5, 109th Cong, 1st Sess, in 151 Cong Rec S 1157, 1184 (Feb 9, 2005) (Statement of Sen. Feingold). Senator Feingold's speech arguing for a limit on the amount of time district courts could consider a remand motion included an emphasis on the efforts of Senators Schumer, Dodd, and Landrieu to limit the time for appellate review. Senator Feingold explained, "This 60-day time limit recognizes that there is a potential for delay that these newly permitted appeals could cause and that there is a need for courts to resolve quickly *at the appellate level* the issue of where a case will be heard." Id (emphasis added).

was. True, those key CAFA supporters wanted the window for defendants to appeal a remand order to be limited, so that defendants could not use the appellate system as a way of delaying the litigation and unnecessarily increasing costs to plaintiffs. But appeals of SLUSA remands would not face this problem to the degree that CAFA remand appeals would without the limited filing window, mainly because CAFA remand decisions are generally more procedurally complex—as they are based on different removal defect arguments relating to questions of mandatory versus discretionary jurisdiction.[120] Defendants seeking to delay by appealing CAFA remands would have more issues (not necessarily briefed beforehand) to raise on appeal without the restriction on timely appeals than would SLUSA defendants, who, because removal was proper, would be challenging only the preemption question. At any rate, Congress still favored and passed appellate review of CAFA remands, despite the burdens they might create.[121]

More important, delays due to appellate review were less objectionable to Congress than delays that might be caused by federal district courts slow to rule on the remand issue.[122] Significantly, the Judicial Conference of the United States, the policymaking body of the federal judiciary, directly opposed the idea that delays could be adequately dealt with by limiting the amount of time district courts had in making their remand decisions.[123] Congress and the Judicial Confer-

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120 For an discussion of the complexities that CAFA will bring to bear on appellate review, see generally Linda S. Mullenix and Paul D. Rheingold, *Impact of Class Action Fairness Law*, NY L J 5 (Mar 3, 2005).

121 One response to this argument is that Congress may have believed CAFA remands would be more complex than SLUSA remands, and so appellate review was more necessary for CAFA. There are two reasons, however, to doubt this. First, there is no evidence in CAFA's (or SLUSA's) legislative history suggesting that this was the case. Second, and perhaps more to the point, SLUSA remands are likely to deal with complex, substantive preemption issues that CAFA cases generally do not implicate. That is, CAFA's complexity will often be procedural, whereas SLUSA's complexity stems from the substantive legal issues that the claims raise. Though substantively complex, the preemption issue can quickly be reviewed because it will have already been briefed.

122 See, for example, 151 Cong Rec S at 1184–85 (cited in note 119) (Statement of Sen. Feingold) ("I strongly support this idea of a time limit for decisions on appeals. But it also highlights another great potential for delay that is caused by this bill. . . . Unfortunately, some courts take a great deal of time to decide motions to remand."). Feingold's amendment, which was defeated, would have required district courts to complete all action on a remand motion within sixty days or to explain why it has not yet ruled. Id. The amendment would have capped the time a district court could consider a remand motion at 180 days unless the parties agreed to an extension. Id.

123 See Judicial Conference of the United States, Letter to the Chairman of the Senate Judiciary Committee (Feb 7, 2005), explaining that "the Judicial Conference opposes the imposition of mandatory time frames for judicial actions." 151 Cong Rec S at 1186 (cited in note 119). Note that Senator Feingold's proposed amendment, imposing time limits on the resolution of remand motions, troubled the Judicial Conference and the Senate more than the question of appellate review of such remand orders. In fact, as noted above, any controversy over appellate

ence, then, have expressed approval of review of remand orders in this most recent and most analogous area of law. Moreover, Congress did so despite the burden review would place on federal appellate courts.

CAFA and its legislative history show that Congress favored appeal with new bodies of law concerning jurisdictional versus claim-processing rules, and this suggests that review of SLUSA remands is appropriate, especially given the fact that there appears to be no clear answer within the statute's text (as the circuit split demonstrates). Analogies to CAFA, of course, are not dispositive. There is the obvious argument that Congress's explicit consideration and approval of appellate review for CAFA remands suggests that congressional silence on SLUSA remands means Congress intended § 1447(d) to apply to SLUSA. However, there are several responses to this argument, beginning with the textual, statutory, and case law arguments dealt with earlier in this Part, which suggest that congressional silence on the issue cuts both ways.

Next, Congress dealt with CAFA legislation only shortly after passing SLUSA, and made it clear that it wanted to deal with one issue of class action abuse at a time. Review of remands was not seen as a major issue with SLUSA (indeed, the issue is not precisely discussed in its legislative history), but after courts began implementing SLUSA, Congress found that it needed to be explicit about the need for appellate review of remand orders.[124]

Finally, the fact that Congress did not revisit SLUSA-remand reviews as it enacted CAFA is not necessarily surprising. Adding another measure to an already significant tort reform might well have been seen as unnecessary, given the priority of passing some form of legislation (and given that SLUSA had already been seen as a major step in stopping frivolous litigation, whatever SLUSA's confusions).

Ultimately, support for appellate review of SLUSA remands cannot rest on analogies to CAFA alone, but, as demonstrated by the circuit split and the analysis of case law concerning what "subject matter jurisdiction" means, there are strong arguments in favor of review.

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review was resolved simply by requiring expedited review, suggesting that once the opportunity for dilatory tactics was minimized, appellate review itself was generally favored. This idea applies well to SLUSA remands, because parties already will have briefed the substantive issues.

124 There is no explicit indication that Congress believed the need for review of CAFA remand orders was based on the confusion over SLUSA, and Congress could have slipped a SLUSA review fix into CAFA if action had been considered urgent. But the fact that CAFA came only a few years after SLUSA, and that the idea of appellate review of such orders—in such a similar statutory scheme aimed at dealing with a similar problem of class action abuse—was relatively uncontroversial, suggests all the more that congressional silence on SLUSA remands should not be viewed as disapproval of review.

CAFA adds another, especially because SLUSA itself does not provide much evidence of congressional intent.

Where there are strong statutory bases for allowing review as described earlier in this Part, where Supreme Court decisions suggesting that the term "jurisdiction" does not cover what district courts do when they remand properly removed SLUSA cases, and where Congress has recognized the difficulties of this sort of statutory scheme in favor of review, courts, too, should resolve the appealability controversy over SLUSA remands in favor of review.

B. CAFA Suggests SLUSA Remands Are Not for Lack of Subject Matter Jurisdiction

In light of CAFA, the Seventh Circuit's holding that remand orders of cases previously removed under SLUSA are reviewable is more consistent with the laws governing appellate review, remands, and federal jurisdiction. This section highlights the legal justifications for this conclusion, answers counterarguments, and briefly examines background policy principles that support the analysis that review of SLUSA remand orders is favorable.

1. CAFA and *Kontrick* and *Scarborough*.

CAFA indicates that Congress sees remands in this kind of statutory scheme as a mechanism by which appellate courts can develop a body of law that guides district courts in determining jurisdiction. *Kontrick* and *Scarborough* suggest that this sort of rule is best deemed a "claim-processing"—not a jurisdictional—rule. Subject matter jurisdiction is lacking only where a court lacks adjudicatory authority to make a substantive decision under authority granted to it by a federal statute. With CAFA in mind, when SLUSA's remand, removal, and preemption provisions are considered more similar to rules delineating whether a court has adjudicatory authority than to claim-processing rules, it is evident that a district court's decision to remand a SLUSA action because state law claims are not preempted is actually a decision that the federal court should step aside because its work is finished, not because the federal court lacks the authority to make such a decision.

2. SLUSA's remand and removal provisions are claim-processing rules.

SLUSA's removal provision is a rule that creates a mechanism for federal courts to do the job Congress authorized them to do. Congress authorized the federal courts to determine whether a securities class action is preempted by SLUSA. A defendant's claim that the action is preempted by SLUSA must arrive at the federal court's doorstep

somehow, and SLUSA's removal provision, § 77p(c), is a rule that allows that claim to be processed. Likewise, when a court, as authorized (and indeed instructed) by Congress, has determined that an action's state law claims are not preempted by SLUSA, the court must remand the action. Congress has given the court an explicit rule by which to process this responsibility: SLUSA's remand provision. CAFA's explicit indication that remands are a tool for courts to use in processing claims and announcing guiding principles supports this idea.

Thus SLUSA's remand and removal provisions fall under what the Supreme Court would call claim-processing (not jurisdictional) rules. As such, these rules help a court carry out its statutorily defined adjudicatory authority, though the rules themselves do not define that authority. Like CAFA's remand provision, SLUSA's remand provision itself merely tells the court what to do if it makes a certain decision; in no way does it limit the court's authority to make that decision. CAFA therefore supports the notion that SLUSA's remand provision is a claim-processing rule.

3. SLUSA grants the federal judiciary the adjudicatory authority to make the preemption determination.

SLUSA authorizes the federal judiciary to determine whether a plaintiff's state law claims in a securities class action are preempted by the statute: "[I]f the Federal court determines that the action may be maintained in State court pursuant" to SLUSA § 77p(d), then the court must remand.[125] SLUSA has thus given the federal court the adjudicatory authority to make this substantive decision, and SLUSA's provisions are the means by which the court can exercise that authority. Removal is entirely proper—indeed necessary—for the federal court to carry out its appointed task. In cases where removal was proper, the Supreme Court allows review.[126]

Measuring the authority that SLUSA grants the district courts against the authority that the general removal statute grants the district courts drives home this point. As discussed in Part I, the general removal statute allows removal of any case of which "the district courts of the United States have original jurisdiction."[127] That is, the statute is a

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125 15 USC § 77p(d)(4).

126 See, for example, *Quackenbush v Allstate Insurance Co*, 517 US 706, 712 (1996) (concluding that a district court's abstention-based remand order was reviewable, "as it [was] not based on lack of subject matter jurisdiction or defects in removal procedure"); *Carnegie-Mellon University v Cohill*, 484 US 343, 357 (1988) (reviewing a district court's order remanding a removed case involving pendent claims upon a determination that retaining jurisdiction would be inappropriate). See also *In re Amoco Petroleum Additives Co*, 964 F2d 706 (7th Cir 1992) (holding that cases remanded on non–§ 1447(c) grounds are subject to review).

127 28 USC § 1441(a). See text accompanying note 33.

claim-processing rule that provides courts with a mechanism by which to hear a case over which they have jurisdiction (adjudicatory authority).

Under the general removal statute, a court can exercise jurisdiction over any case that would have fallen under its adjudicatory authority had that case been filed with the court in the first place. But the general removal statute certainly does not require use of the federal forum. In contrast, SLUSA's removal provisions work to make sure the SLUSA preemption decision is determined by the federal courts. The court is specifically granted authority to make the substantive preemption decision. The court's adjudicatory authority expires (but is not retroactively destroyed) when it has made this decision: if the claims are preempted, the court must dismiss;[128] if the claims are not preempted, the court must remand.[129]

The SLUSA preemption decision is a final decision on the merits of the preemption question that the federal judiciary is supposed to answer: if preemption is not found, the case absolutely will proceed (in state court) and preemption is no longer an issue in a federal forum. If preemption is accepted, the case is dismissed. Either way, the federal court was instructed and authorized by the statute to make the call, in stark contrast to general removals and remands. The one certain thing in the SLUSA preemption inquiry is that the federal judiciary alone has the adjudicatory authority (and responsibility) to make that decision. As the *Kircher* court explained, this decision "implies the presence of jurisdiction."[130] The district court's answer to a question that the law requires the court to address cannot destroy the court's obligation or its authority to answer.

Finally, unlike normal remands that generally leave all substantive issues open to litigation in state court, SLUSA preemption decisions—themselves major substantive issues reserved for resolution by federal courts—will be unreviewable unless federal appellate courts have jurisdiction over the district court's remand order. SLUSA's primary aim of promoting uniform national standards for securities class actions will go unserved if remand orders are immune from appeal.

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128 15 USC § 77p(b). The *Kircher* court noted: "Perhaps one could say that jurisdiction evaporated at that juncture, but that would be tautological. Once a court does all that the statute authorizes, there is no adjudicatory competence to do more." 373 F3d at 850. See note 81.

129 15 USC § 77p(d)(4). For an example of a situation in which the court may still retain adjudicatory authority over certain issues relating to removal *even after* dismissing the action for lack of subject matter jurisdiction, consider a district court's discretionary authority under § 1447(c) over whether to award attorney's fees to the party opposing removal. See, for example, *Martin v Franklin Capital Corp*, 126 S Ct 704, 708 (2005) (holding that "absent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal").

130 373 F3d at 850.

The absence of an express provision in SLUSA granting appellate jurisdiction[131] is hardly dispositive: Congress may well have sidestepped that issue by creating a specific remand provision outside the scope of § 1447(c). After all, if Congress intended a determination that state claims were preserved to be tantamount to a determination that subject matter jurisdiction was lacking, it need not have created a specific remand provision under SLUSA. If Congress intended that such remands be "for lack of subject matter jurisdiction," then SLUSA's remand provision *requiring* remand is superfluous, given that § 1447(c) mandates remand if a district court lacks subject matter jurisdiction. Congressional silence on the appealability of issues related to SLUSA suggests that courts should apply the general rules that apply to appeals and remands. These general rules include the specific ones allowing review of remands beyond § 1447(c)'s grasp.

C. Review Will Promote Consistent Application of SLUSA across Circuit and District Courts

Congress enacted SLUSA with an eye toward "enact[ing] national standards for securities class action lawsuits involving nationally traded securities."[132] As noted earlier, "district court cases appear to be all over the map on the issue of what state law claims are preempted by SLUSA."[133] Splits among district courts and different circuits over which claims are preempted undermine the consistent application of uniform standards.

Appellate review of remands in cases properly removed under SLUSA will create uniformity in SLUSA's implementation by providing district courts with clear guiding principles and precedents in this otherwise barren area of the law. This, in turn, will limit forum shopping and other typical forms of opportunistic behavior that SLUSA was designed to prevent. Allowing appeals will not create an unnecessary or burdensome increase in appellate court caseloads: the parties already will have briefed the preemption issue, which will be the primary (and often only) issue before the appellate court.[134] Although this

131 The Second and Ninth circuits make much of this absence, largely pinning their holdings that SLUSA remands are unreviewable on it. See *Spielman*, 332 F3d at 127; *Abada*, 300 F3d at 1119.

132 HR Rep No 105-803 at 2 (cited in note 95).

133 *Magyery*, 315 F Supp 2d at 959. See note 118 and accompanying text.

134 Notably, there is evidence that, even before SLUSA was enacted, the total number of securities class actions filed in state courts was relatively low in the context of appellate caseloads. For example, opponents of SLUSA cited the fact that in the year before Congress passed the legislation, only forty-four securities class actions were filed in state courts nationwide. See Securities Litigation Uniform Standards Act of 1998, Committee on Commerce Report, Additional Dissenting Views of Congressman Ron Klink, HR Rep 105-640, 105th Cong, 2d Sess 52 (1998).

reason by itself is not enough to justify appellate review, SLUSA's purpose to create uniformity, along with the legal justifications explored above, militate in favor of allowing appellate courts to review SLUSA remands.

CONCLUSION

Congress enacted SLUSA to give the federal judiciary the exclusive authority to decide whether securities class actions filed in state court alleging fraud in the purchase or sale of nationally traded securities are preempted by federal law. When federal district courts decide that certain covered class actions, though properly removed, are not preempted and therefore remand the cases, those courts are exercising the authority Congress granted them under SLUSA and are not dismissing or remanding for lack of subject matter jurisdiction.

Courts should look to the recently passed Class Action Fairness Act and its treatment of review of remands to inform their analysis of congressional intent regarding the nature of remand orders in this statutory scheme addressing class action abuse. CAFA, passed in light of recent Supreme Court decisions further delineating the meaning of the word "jurisdictional," bolsters the position that SLUSA remands are reviewable because CAFA indicates that remands of this sort are claim-processing rules rather than rules delineating adjudicatory authority. Appellate review of such orders is consistent with federal law and would promote SLUSA's goal of uniform standards in securities class actions without creating costly or unnecessary increases in the caseloads of federal appellate courts.