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## SECURITIES CLASS ACTIONS IN STATE COURT

*Jennifer J. Johnson\**

### I. INTRODUCTION

Over the past two decades, Congress has gradually usurped the power of state regulators to enforce state securities laws, and the power of state courts to adjudicate securities disputes. In 1996, as part of National Securities Market Improvement Act (NSMIA),<sup>1</sup> Congress preempted state regulatory authority over nationally traded securities, and over Rule 506 private placements, which represent the bulk of private offerings.<sup>2</sup> In 1998, Congress enacted the Securities Litigation Uniform Standards Act (SLUSA)<sup>3</sup> in order to restrict most securities fraud class actions to federal court, where they would be subject to the jurisprudence of Rule 10b-5 and the strict procedural requirements of the 1995 Private Securities Litigation Reform Act (PSLRA).<sup>4</sup> SLUSA precludes both state and federal courts from adjudicating certain class actions that are based upon state statutory or common law and that allege a misrepresentation in connection with the purchase or sale of nationally traded securities.<sup>5</sup> In 2005, Congress enacted the Class Action Fairness Act (CAFA),<sup>6</sup> which, among its other provisions, further restricts state courts from adjudicating all but the smallest securities class actions.<sup>7</sup>

A major impetus behind these preclusion and preemption statutes was to curtail abuses by class action lawyers. The PSLRA in particular was motivated by concerns that plaintiffs' counsel were untrustworthy and filed frivolous lawsuits primarily for their own advantage.<sup>8</sup> The PSLRA

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1. National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 [hereinafter NSMIA] (codified in scattered sections of 15 and 29 U.S.C.).

2. See Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. 151 (2010) (examining legislative history of NSMIA).

3. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 [hereinafter SLUSA] (codified in scattered sections of 15 U.S.C.).

4. Private Securities Litigation Reform Act of 1995, Pub.L. No. 104-67, 109 Stat. 737 [hereinafter PSLRA] (codified in scattered sections of 15 U.S.C.).

5. 15 U.S.C. § 78bb(f)(1)(A) (2006).

6. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 [hereinafter CAFA] (codified in scattered sections of 28 U.S.C.).

7. 28 U.S.C. § 1332(d)(2) (2006).

8. For example, Senator Alfonse D'Amato speaking in favor of the enactment of the PSLRA stated: "It is time to reform the securities class action litigation from a moneymaking enterprise for lawyers into a better means of recovery for investors," and that it was time to "go after the greatest abuse that is taking place, which is lawyers who do not represent the general public but represent

therefore imposes strict procedural hurdles, and contains standards for the appointment of lead plaintiffs' counsel. SLUSA, in combination with CAFA, ensures that class counsel cannot avoid the PSLRA's procedural impediments by filing in state court. There is evidence, however, that the collective effect of these statutes has been to drive smaller plaintiffs' firms out of the traditional securities litigation market, and perhaps strengthen larger firms—the very firms Congress sought to police.<sup>9</sup> This Paper presents data that dispossessed plaintiffs' lawyers increasingly have turned to filing alternative class actions in state court.

This Paper evaluates the impact of congressional preemption and preclusion upon state court securities class actions. Utilizing a proprietary database, this Paper presents and analyzes a comprehensive dataset of over 1,500 class actions filed in state courts from 1996–2010.<sup>10</sup> In Part II, this Paper details the permissible space for state securities class actions in light of congressional restrictions embodied in SLUSA and CAFA. Part II explains that these statutes have relegated state court securities class actions primarily to: (1) claims involving corporate governance, or merger and acquisition (M & A) transactions based upon the law of the defendant's state of incorporation; (2) class actions involving securities that are not nationally traded when the controversy is “local”; (3) class actions with a relatively small number of plaintiffs; and (4) possibly class actions solely premised on 1933 Securities Act (1933 Act) claims.

Part III presents the state class action filing data detailing the numbers, classifications, and jurisdictions of state class action cases that now occupy state forums. First, as expected, the data indicates that there are few traditional stock-drop securities class actions litigated in state court today. The few cases that survive preemption tend to involve alleged fraud in private offerings against promoters and other fiduciaries. Second, in spite of the debate over the impact of SLUSA and CAFA on 1933 Act claims,<sup>11</sup> very few plaintiffs attempt to litigate these claims in state court. Finally, the number of state court class actions involving M&A transactions is skyrocketing and now surpasses similar claims filed in federal court.<sup>12</sup> Moreover, various class counsel file their M&A complaints in multiple state jurisdictions and, increasingly, outside of Delaware.

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themselves.” 141 CONG. REC. 35,238, 40 (1995) (statement of Sen. D'Amato).

9. See generally, Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1618–19 (2008) (detailing the impact of PSLRA and CAFA on the class action bar and suggesting that the plaintiffs' bar is now more concentrated).

10. See *infra* Part III.A.

11. See *infra* Part II.C.

12. State court class actions involving merger and acquisitions (M&A) are permissible under SLUSA pursuant to the Delaware Carve-Out. See *infra* notes 109–19 and accompanying text.

Part IV describes the growing problems generated by the large number of multi-forum M&A class action suits and the burdens they impose on plaintiffs' counsel, the defendants and their counsel, and the judiciary. Part V suggests potential outcomes resulting from the proliferation of the M&A suits in multiple state courts. Part VI concludes that absent effective state coordination, further congressional preemption is possible, if not likely.

## II. FEDERAL PREEMPTION OF SECURITIES CLASS ACTIONS IN STATE COURT

Most private securities litigation in the federal courts involves Section 10(b) of the 1934 Securities Exchange Act (the 1934 Act),<sup>13</sup> and Rule 10b-5,<sup>14</sup> both of which prohibit fraud in connection with the purchase or sale of securities.<sup>15</sup> From its inception, courts have consistently implied a private cause of action under Rule 10b-5.<sup>16</sup> While Congress occasionally legislates in the Rule 10b-5 arena, the judiciary has largely established the elements of the implied cause of action. As set forth by the Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo*,<sup>17</sup> to establish a prima facie case under Rule 10b-5, a private plaintiff must generally plead and prove: (1) a material misrepresentation or omission by the defendant,<sup>18</sup> (2) scienter,<sup>19</sup> (3) a connection between the

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13. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2006). The 1934 Act confers exclusive jurisdiction upon the federal courts to adjudicate disputes arising from the act. *Id.* § 27(a), 15 U.S.C. § 78aa.

14. 17 C.F.R. § 240.10b-5 (2010).

15. Rule 10b-5, drawn from section 17(a) of the 1933 Act, provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." *Id.* While there is robust judicial precedent interpreting Rule 10b-5(b), prohibiting material omissions and misstatements of fact, there are very few cases directly addressing clauses (a) and (c), sometimes cumulatively deemed "fraud by conduct." Ronald J. Colombo, *Cooperation with Securities Fraud*, 61 ALA. L. REV. 61 (2009); *cf.* *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.* 552 U.S. 148, 158–60 (2008) (discussing fraud by conduct in the context of secondary actors).

16. *See, e.g., Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 513–14 (E.D. Pa. 1946). An overwhelming majority of lower courts adopted the *Kardon* holding that Rule 10b-5 included a private right of action, a position ultimately endorsed by the U.S. Supreme Court in 1975. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975). *See also, Merrill Lynch v. Dabit*, 547 U.S. 71, 79 (citing *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971)); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976).

17. 544 U.S. 336, 341 (2005).

18. Under applicable Supreme Court precedent, "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

misrepresentation or omission and the purchase or sale of a security,<sup>20</sup> (4) reliance upon the misrepresentation or omission,<sup>21</sup> (5) economic loss,<sup>22</sup> and (6) loss causation.<sup>23</sup>

Critics of federal securities class actions argue that even meritorious Rule 10b-5 class actions do not provide sufficient deterrence or compensatory benefits to justify their costs.<sup>24</sup> Conceptually, many securities class actions involving secondary market transactions simply impose a wealth transfer upon public shareholders, resulting in a net loss to investors after accounting for transaction costs, including attorneys' fees.<sup>25</sup> Directors and Officers (D&O) liability insurance typically insulates malfeasant managers, leaving only the corporation and the insurer to pay the damages.<sup>26</sup> The offending corporation's value is decreased by the amount of the award returned to the plaintiff-shareholders, either directly or as a result of increased D&O insurance premiums.<sup>27</sup> Diversified investors are particularly disadvantaged

19. *Ernst & Ernst*, 425 U.S. at 193. To establish scienter, the plaintiff must prove the defendant intended to "deceive, manipulate, or defraud" the plaintiff. *Id.* Among the federal circuit courts, this intent requirement is satisfied by knowledge and varying degrees of recklessness. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007). In *Tellabs*, the Supreme Court also held that to successfully plead scienter, "the inference of scienter must be more than merely 'reasonable' or 'permissible'—it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* at 324.

20. *Blue Chip Stamps*, 421 U.S. at 730–55 (acknowledging a private cause of action under Rule 10b-5 and establishing standing requirements limited to "purchasers" or "sellers" of securities).

21. *Basic Inc. v. Levinson*, 485 U.S. 224, 241–50 (1988) (affirming that reliance is a necessary element of Rule 10b-5 private actions and establishing a rebuttable presumption of reliance based upon the "fraud-on-the-market" theory); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.* 552 U.S. 148, 159–66 (2008) (holding that the reliance element of Rule 10b-5 requires that investors be aware of the defendant's role in the challenged transaction).

22. In *Dura*, the Court cites 15 U.S.C. § 78u-4(b)(4) as authority for the necessity of proving economic loss, although the cited provision actually refers to loss causation. *Dura Pharm., Inc.*, 544 U.S. at 341.

23. *Id.*

24. *See, e.g.*, Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L. J. 181, 183–85 (2008) (summarizing critiques of class action securities litigation).

25. *Id.*; *see also* Richard A. Booth, *Class Conflict in Securities Fraud Litigation* (Villanova Univ. Sch. of Law Working Paper Series, 2011), available at <http://ssrn.com/abstract=1811768> (detailing wealth transfer issue in the context of class actions); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1549–56 (2006) (noting corporate entity rather than individual wrongdoers normally funds the settlement); INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 78–79 (2006), available at [http://www.capmksreg.org/pdfs/11.30Committee\\_Interim\\_ReportREV2.pdf](http://www.capmksreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf) (explaining that recovery in securities class actions is circular); Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 698–700 (arguing liability of corporate enterprise imposes costs of fraud upon innocent shareholders).

26. Coffee, *supra* note 25, at 1546–53.

27. Booth, *supra* note 25 (arguing that stock drop class action claims should instead proceed as

because they often purchase and sell shares in the same firm at different points in time, which can leave them sharing in the loss but ineligible to claim any portion of the damages.<sup>28</sup> Moreover, evidence that securities class actions produce a deterrent effect is inconclusive.<sup>29</sup>

In an effort to curb what it deemed vexatious legislation, Congress in 1995 enacted the PSLRA.<sup>30</sup> Among its many provisions,<sup>31</sup> the PSLRA imposes lead plaintiff criteria and severe procedural hurdles for Rule 10b-5 class action plaintiffs. For example, under the PSLRA, in order to defeat a motion to dismiss, plaintiffs must, before discovery, state with particularity facts detailing the fraud and “giving rise to a strong inference that the defendant acted with the required state of mind (scienter).”<sup>32</sup>

#### A. *The Securities Litigation Uniform Standards Act of 1998*

Congress soon confronted allegations that civil plaintiffs were attempting to avoid the pleading and other procedural hurdles imposed by the 1995 PSLRA by filing civil claims in state court.<sup>33</sup> Though the

derivative suits).

28. Coffee, *supra* note 25, at 1556–57; *see also* Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237, 281 (2009) (“The compensation justification for a cause of action against the issuer for a misstatement in a disclosure filing is very weak, particularly given the high transaction costs associated with securities litigation.”); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1314 (2008) (“[M]ost commentators now agree that the prototypical Rule 10b-5 class action (i.e., one brought against a nontrading corporation for its officer’s fraud-on-the-market) cannot be defended on compensatory grounds.”).

29. *See, e.g.*, Donald C. Langevoort, *On Leaving Corporate Executives “Naked, Homeless and Without Wheels”*: *Corporate Fraud, Equitable Remedies, and the Debate Over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627 (2007) (arguing that deterrence value of enterprise liability is slightly positive but hard to justify given its costs); Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1504 (1996) (proposing a shift from damages to civil penalties); Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theories and Evidence*, 1992 U. ILL. L. REV. 691; (presenting empirical evidence that enterprise liability does not sufficiently deter fraud). Not everyone agrees that securities class actions are in need of reform. *See, e.g.*, James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497 (1997) (defending compensatory and deterrent values of securities class actions); Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438 (1994) (arguing that the rationale of the PSLRA is unfounded).

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

31. The PSLRA provides for a stay of discovery pending a motion to dismiss, 15 U.S.C. § 78-u4(b)(3)(B) (2006), 15 U.S.C. § 77z-1(b)(2006); contains a statutory safe harbor, unavailable under most state blue sky laws, for forward-looking statements, § 78-u5(c), § 77z-2; establishes lead plaintiff criteria for class actions, § 78-u4(a)(3), § 77z-1(a)(3); and creates a system of proportionate liability, § 78u-4(f), § 77(k)(f)).

32. § 78-u4(b)(2)(A).

33. *See* Merrill Lynch v. Dabit, 547 U.S. 71, 82 (2006) (“To stem this ‘shif[t] from Federal to State courts’ and ‘prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Reform Act, SLUSA §§ 2(2), (5), 112 Stat. 3227, Congress

empirical evidence of a shift to state court was inconclusive,<sup>34</sup> in 1998, Congress enacted SLUSA,<sup>35</sup> which restricts most securities fraud class actions to federal court, where they are subject to the federal jurisprudence of Rule 10b-5, and the strict procedural requirements of the PSLRA.<sup>36</sup>

SLUSA is a preclusion statute that prevents both state and federal courts from adjudicating certain class actions that are based upon state statutory or common law and that allege a misrepresentation in connection with the purchase or sale of “covered securities.”<sup>37</sup> SLUSA defines a covered security as any security that is traded nationally and listed on a regulated national exchange.<sup>38</sup> The definition also includes most senior securities of the same issuer.<sup>39</sup> SLUSA does not apply to securities issued by non-public companies nor does it apply to privately placed debt securities such as mortgage bonds, even when issued by public companies.<sup>40</sup>

SLUSA contains exceptions; notably, the “Delaware Carve-Out” preserves state court jurisdiction over any otherwise “covered class action . . . that is based upon the statutory or common law of the state in which the issuer is incorporated” when the claims involve communications directed to shareholders in connection with their voting rights, such as in M & A transactions.<sup>41</sup>

SLUSA applies to class actions or groups of lawsuits pending in the same courts that raise common issues of law and fact, and when combined, seek damages on behalf of fifty or more persons.<sup>42</sup> SLUSA

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enacted SLUSA.”) (quoting H.R. REP. NO. 105-640, at 10 (1998); S. REP. NO. 105-182, at 3–4 (1998)).

34. Compare Joseph A. Grundfest and Michael A. Perino, *Securities Litigation Reform: The First Year's Experience a Statistical and Legal Analysis of Class Action Securities Fraud Litigation Under the Private Securities Litigation Reform Act of 1995* (John M. Olin Program in Law and Economics, Working Paper No. 140, 1997), available at <http://ssrn.com/abstract=10582> (documenting shift to state court), and Michael Perino, *Fraud And Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998) (same), with Lisa L. Casey, *Shutting the Doors to State Court: The Securities Litigation Uniform Standards Act of 1998*, 27 SEC. REG. L.J. 141 (1999) (providing an in-depth analysis of the competing empirical studies), and David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1, 1–9 (1998) (questioning whether any empirical data indicates a post PSLRA migration by plaintiffs to state court), and Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1 (1998) (questioning the justification for SLUSA).

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

36. *Dabit*, 547 U.S. at 82.

37. 15 U.S.C. §§ 78bb(f), 77p(b)–(f) (2006).

38. 15 U.S.C. §§ 78bb(f)(3), 77r(f)(3) (2006).

39. 15 U.S.C. §§ 77p(f)(3), 77r(b). A senior security has “priority over any other class as to the distribution of assets or payment of dividends.” § 77r(d)(4).

40. 15 U.S.C. §§ 78bb(f)(5)(B), 77p(f)(3).

41. 15 U.S.C. §§ 78bb(f)(3)(A), 77p(d).

42. 15 U.S.C. §§ 78bb(f)(5)(B)(ii), 77p(f)(2). Initially, SLUSA would have prohibited all private

does not impact individual securities claims<sup>43</sup> unless they are part of a series of lawsuits that “proceed as a single action.”<sup>44</sup> Courts can combine individual suits, even over the objection of the plaintiffs, if the plaintiffs have consolidated the actions for any purpose.<sup>45</sup> If the combined lawsuits involve more than fifty plaintiffs, SLUSA preclusion applies. SLUSA creates federal removal jurisdiction over covered class actions,<sup>46</sup> so SLUSA interpretations have primarily been the province of the federal courts as they consider remand petitions.<sup>47</sup>

SLUSA precludes state class action claims involving misrepresentations in connection with securities transactions even if the state cause of action does not mirror Rule 10b-5. For example, lower courts have held that SLUSA precludes state court class actions premised on state statutory or common law provisions that, contrary to Rule 10b-5, do not require scienter or reliance.<sup>48</sup> In *Merrill Lynch v. Dabit*, the U.S. Supreme Court held that SLUSA precluded a class action based upon a state law providing for liability for misrepresentations that caused investors to “hold” securities.<sup>49</sup> The Court found that the allegations were “in connection with the purchase

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actions in state court involving nationally traded securities. See Securities Litigation Improvement Act of 1997, H.R. 1653, 105th Cong. (1997); see also Perino, *supra* note 34, at 334 (arguing that Congress should preclude all state private actions to prevent class action plaintiffs from eluding the discovery stay of the PSLRA by filing an individual action in state court).

43. See S. REP. NO. 105-182, at 7 (1998) (The Senate Banking Committee stated that it “does not intend for the bill to prevent plaintiffs from bringing bona fide individual actions simply because more than fifty persons commence the actions in the same state court against a single defendant.”).

44. 15 U.S.C. §§ 78bb(f)(5)(B)(ii)(II), 77p(f)(2)(A)(ii)(II) (2006); see, e.g., *In re Enron Corp. Sec.*, 535 F.3d 325, 339–42 (5th Cir. 2008) (holding cases filed by a single law firm involving 196 plaintiffs were “proceed[ing] as a single action” under SLUSA, even though each case involved fewer than 50 plaintiffs). Individual suits brought by state entities cannot be grouped with concurrent class actions. §§ 78bb(F)(3)(B), 77p(d)(2).

45. 15 U.S.C. §§ 78bb(f)(5)(B)(ii)(II), 77p(f)(2)(A)(ii)(II); see, e.g., *Instituto De Prevision Militar v. Merrill Lynch*, 546 F.3d 1340 (11th Cir. 2008) (stating cases can be involuntarily combined if plaintiffs have agreed to consolidation for discovery or any other purpose); *In re WorldCom, Inc. Sec. Litig.*, 308 F. Supp. 2d 236, 246 (S.D.N.Y. 2004) (noting cases consolidated for pretrial purposes qualified as a “group of lawsuits” under § 78bb(f)(5)(B)(ii)); *Gordon Partners v. Blumenthal*, No. 02-Civ-7377, 2007 WL 431864, at \*18 (S.D.N.Y. Feb. 9, 2007) (same); *In re Fed. Nat'l Mortgage Ass'n Sec., Derivative, and “ERISA” Litig.*, 503 F. Supp. 2d 25, 30–33 (D.D.C. 2007) (concluding that two lawsuits brought by plaintiffs who opted out of a class action were “covered class actions” once consolidated with the original claim).

46. 15 U.S.C. § 78bb(f)(2); *Proctor v. Vishay Intertech, Inc.*, 584 F.3d 1208 (9th Cir. 2009) (citing § 78bb(f)(1)–(2)) (noting SLUSA creates a federal preclusion defense and it alone establishes federal removal jurisdiction if a claim is covered under the statute).

47. In addition, federal remand decisions are not appealable. *Kircher v. Putman Funds Trust*, 547 U.S. 633 (2006). State courts, however, may adjudicate the propriety of a federal court remand even if they are not often called upon to do so. *Id.* at 646.

48. See, e.g., *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.* 521 F.3d 1278 (10th Cir. 2008) (“Plaintiffs did not have to allege scienter or reliance for SLUSA to apply.”); *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122 (8th Cir. 2008).

49. 547 U.S. 71 (2006).

or sale of securities,<sup>50</sup> even though such claims could not have proceeded under Rule 10b-5 due to the purchaser-or-seller standing requirement imposed by *Blue Chip Stamps v. Manor Drug Stores*.<sup>51</sup> The *Dabit* Court stated that courts should broadly interpret SLUSA<sup>52</sup> in order to carry out the congressional intent to limit abusive class actions.<sup>53</sup> In the wake of *Dabit*, courts have liberally construed the “in connection with” element of SLUSA, and have closely examined the substance of state complaints to prevent claimants from trying to elude preemption by “artful pleading.”<sup>54</sup>

### B. The Class Action Fairness Act of 2005 (CAFA)

Even if SLUSA preclusion is not available, defendants may still remove many securities class actions to federal court under the 2005 Class Action Fairness Act (CAFA).<sup>55</sup> CAFA confers original federal jurisdiction over any class action<sup>56</sup> with at least 100 claimants, minimal diversity,<sup>57</sup> and an aggregate amount in controversy of at least \$5

50. *Id.* at 89.

51. 421 U.S. 723, 738–55 (1975).

52. *Dabit*, 547 U.S. at 85 (“[I]t is enough that the fraud alleged ‘coincide’ with a securities transaction—whether by the plaintiff or by someone else.”).

53. *Id.* at 82.

54. *See, e.g.*, *Brown v. Calamos*, 664 F.3d 123, 129 (7th Cir. 2011) (explaining that SLUSA preclusion applies to fiduciary claim because “allegation of fraud would be difficult and maybe impossible to disentangle from the charge of breach of the duty of loyalty”); *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310–11 (6th Cir. 2009) (“For the same reason a claimant does not have the broader authority to disclaim the applicability of SLUSA to a complaint, he cannot avoid its application through artful pleading that removes the covered words from the complaint but leaves in the covered concepts.”); *City of Chattanooga v. Hartford Life Ins. Co.*, No. 3:09CV516(WWE), 2009 WL 5184706 (D. Conn. Dec. 22, 2009) (holding SLUSA precludes state action for breach of fiduciary duty and unjust enrichment resulting from a misrepresentation); *Levinson v. PSCC Servs., Inc.*, No. 3:09-CV-00269(PCD), 2009 WL 5184363, at \*12 (D. Conn. Dec. 23, 2009) (“Plaintiffs’ claims of common law fraud, negligent misrepresentation, and aiding and abetting conversion and statutory theft are precluded by SLUSA because a misrepresentation or other fraudulent conduct is a necessary element of these causes of action.”). In *Barron v. Igolnikov*, No. 09 Civ. 4471(TPG), 2010 WL 882890 (S.D.N.Y. Mar. 10, 2010), the court found that SLUSA precluded a class action involving the Bernie Madoff ponzi scheme even though Madoff only purported to purchase and sell covered securities.

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

56. Under CAFA, the term “class action” includes mass actions, which are claims on behalf of more than 100 persons, even if not styled as class actions. 28 U.S.C. § 1332 (d)(11)(A)–(B) (2006) (defining mass actions). *Cf. Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952–57 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 187 (2009) (noting CAFA, 28 U.S.C. § 1332(d)(11)(B)(iii), specifically states that a mass action shall not include claims that are joined upon the motion of a defendant); *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285 (S.D.N.Y. 2009) (adopting holding of report and recommendation of Magistrate that derivative suit on behalf of fund with 700 shareholders was not a mass action subject to removal under CAFA).

57. Under CAFA, the diversity requirement is satisfied if “any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2). Therefore, plaintiffs cannot destroy diversity jurisdiction by simply choosing class representatives from the defendant’s state or

million.<sup>58</sup> CAFA provides original federal jurisdiction over designated class actions, including those based upon state law claims, and does not entirely eliminate the class action as a means to adjudicate the state claims.<sup>59</sup>

CAFA contains exceptions for class actions involving covered securities as defined by SLUSA,<sup>60</sup> for class actions that concern internal corporate governance,<sup>61</sup> and for claims relating to the terms or ownership of the security itself.<sup>62</sup> Otherwise, state antifraud claims involving privately placed and non-traded securities, such as limited partnership offerings or privately placed mortgage-backed securities, appear to fall squarely within CAFA. Such claims generally cannot proceed as class actions in state court if more than one hundred plaintiffs are involved.

Unlike SLUSA preclusion, CAFA preemption is not absolute. For example, the act requires federal courts to decline jurisdiction under the “Home State Controversy Exception”—when more than two-thirds of the class members as well as the primary defendants are from the forum state.<sup>63</sup> The federal court must also decline jurisdiction under the “Local Controversy Exemption” when: (1) more than two-thirds of the putative class members are from the forum state, (2) at least one defendant is a citizen of the state if the class seeks significant relief from that defendant, (3) the defendant’s conduct constitutes a significant basis of the class claims, (4) the principal injuries occurred in the forum state, and (5) no similar class action have been filed against any of the same

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naming and in-state defendant. A corporation is a citizen of the state of incorporation and the state where it maintains its principal place of business. § 1332(c)(1). A corporation’s principal place of business is its “nerve center” where “a corporation’s officers direct, control, and coordinate the corporation’s activities.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

58. 28 U.S.C. § 1332(d)(2). CAFA allows aggregation of the amount in controversy to reach the \$5 million dollar prerequisite. § 1332(d)(6). Also, there “is no requirement in a class action brought originally or on removal under CAFA that any individual plaintiff’s claim exceed \$75,000.” *Cappuccitti v. DirectTV, Inc.*, 623 F.3d 1118 (11th Cir. 2010).

59. CAFA expands federal jurisdiction over pendant state law claims as long as the class action meets CAFA’s jurisdictional requirements, regardless of whether the court would otherwise exercise supplemental jurisdiction. *Erichson*, *supra* note 9, at 1618–19.

60. 28 U.S.C. § 1332(d)(9)(A).

61. 28 U.S.C. § 1332(d)(9)(B).

62. 28 U.S.C. § 1332(d)(9)(C). In *Estate of Pew v. Cardarelli*, 527 F.3d 25, 31 (2d Cir. 2008), the Second Circuit held that this third CAFA exception was limited to disputes over the meaning of the terms of the security itself, such as the interest rate. *See also* *Greenwich Fin. Serv. Distressed Mortgage Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23 (2d Cir. 2010) (dismissing appeal on grounds that CAFA does not permit appellate review of remand orders when issue involves terms of a security).

63. 28 U.S.C. § 1332(d)(4)(B); *see* *Lao v. Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1050 (C.D. Cal. 2006). In *Lao*, the court held that “Under the ‘home state controversy,’ district courts must decline jurisdiction where two-thirds or more of the class members and the ‘primary’ defendants are citizens of the state where the action was originally filed.” *Id.* (citing § 1332(d)(4)(B)). The definition of “primary” defendant has not been without controversy.

defendants within a three-year period.<sup>64</sup> CAFA gives discretion to the courts to decline jurisdiction in the interest of justice, looking at the “totality of the circumstances,” when between one-third and two-thirds of the plaintiffs reside in the same state as the defendant.<sup>65</sup>

### C. Class Actions Alleging 1933 Act Claims

State class action filings alleging violations of the 1933 Act<sup>66</sup> have presented problematic interpretations under both SLUSA and CAFA. The 1933 Act imposes liability for misrepresentations in connection with public offerings of securities.<sup>67</sup> Section 22 of the 1933 Act itself provides for concurrent jurisdiction between state courts and federal district courts.<sup>68</sup> Originally, Section 22(a) of the 1933 Act specifically provided that no case “brought in any state court of competent jurisdiction shall be removed to any court of the United States.”<sup>69</sup>

#### 1. The Impact of SLUSA on 1933 Act Claims

In 1998, Congress amended Section 22 of the 1933 Act to allow removal pursuant to SLUSA.<sup>70</sup> Ordinarily, a public offering of securities under the 1933 Act results in nationally listed and traded

64. 28 U.S.C. § 1332(d)(4)(a). The terms “significant basis” and “significant relief” have been the subject of litigation. *See, e.g.*, *Graphic Commc’ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 725 F. Supp. 2d 849, 854–55 (D. Minn. 2010). In *CVS Caremark*, the court wrote, “Significant relief” is “a significant portion of the entire relief sought by the class,” and the “significant basis” provision requires a comparison of “the local defendant’s alleged conduct to the alleged conduct of all the defendants.” *Id.* (quoting *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1167 (11th Cir.2006), *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 156 (3d Cir.2009)).

65. 28 U.S.C. § 1332(d)(3). In exercising this discretion, the court must consider: “whether the claims asserted involve matters of national or interstate interest; whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.” *Id.*

66. Securities Act of 1933 § 11, 15 U.S.C. § 77k (2006).

67. Securities Act of 1933 Act § 12(a)(2), 15 U.S.C. § 77l(a)(2) (2006); 1933 Act § 11, 15 U.S.C. § 77k (2006). Section 12(a)(1) of the 1933 Act also provides a rescission remedy to purchasers when the seller has violated section 5 of the 1933 Act, which requires securities to be either exempt or registered. Such claims, however, do not involve misrepresentations and therefore would not fall within SLUSA’s preclusion. 15 U.S.C. § 77l(a)(1).

68. Securities Act of 1933 Act § 22, 15 U.S.C. § 77v (2006).

69. *Id.* § 22(a).

70. Securities Act of 1933 Act § 16(b), 15 U.S.C. § 77p(c) (2006).

securities that would fall within SLUSA's definition of covered securities. Arguably, therefore, any resulting state court class action claims would be subject to removal under SLUSA. Some federal district courts, however, citing the statutory text of SLUSA, have held that state court class actions asserting only 1933 Act claims may not be removed under SLUSA. These courts reason that SLUSA defines a covered class action as one "based upon the statutory or common law of any State or subdivision thereof," and containing specified allegations in connection with the purchase or sale of a security.<sup>71</sup> Claims based upon the 1933 Act, however, are federal law claims not arising under the "statutory or common law of any State." Therefore, under a literal reading of SLUSA's terms, its removal provisions do not apply.<sup>72</sup>

Conversely, some courts have interpreted SLUSA to authorize or require removal of 1933 Act class actions to federal court. One proffered theory is that quite apart from its removal provisions, SLUSA stripped state courts of subject matter jurisdiction over covered class actions raising 1933 Act claims, leaving federal courts with sole subject matter jurisdiction over these class actions.<sup>73</sup> Another theory suggests that the SLUSA removal provisions, properly understood, trump the Section 22 anti-removal statute even when the class action complaint is solely grounded on federal 1933 Act claims.<sup>74</sup>

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71. *Id.*

72. Federal Courts adopting this view include: *Unschuld v. Tri-S Sec. Corp.*, No. 06 Civ. 2931-JEC, 2007 WL 2729011 (N.D. Ga. Sept. 14, 2007) (granting remand); *Irra v. Lazard Ltd.*, No. 05 CV 3388RJDRLM, 2006 WL 2375472 (E.D.N.Y. Aug. 15, 2006) (same); *Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Commc'ns Corp.*, No. CV 05-2730-RGK, 2005 U.S. Dist. LEXIS 14202 (C.D. Cal. June 28, 2005) (same); *In re Tyco Int'l, Ltd.*, 322 F. Supp. 2d 116 (D.N.H. 2004) (same); *Nauheim v. Interpublic Grp. of Co.*, No. 02-C9211, 2003 WL 1888843 (N.D. Ill. Apr. 16, 2003) (same); *Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03-cv-0714-BTM (JFS), 2003 WL 23509312 (S.D. Cal. Aug. 27, 2003) (same); *In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590 (S.D. Tex. 2002) (same). *Contra* *Rubin v. Pixelplus Co., Ltd.*, No. 06-CV-2964(ERK), 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007) (denying remand); *Pinto v. Vonage Holdings Corp.*, No. 07-0062 (FLW), 2007 WL 1381746 (D.N.J. May 7, 2007) (same); *Rovner v. Vonage Holdings Corp.*, No. 07-178 (FLW), 2007 WL 446658 (D.N.J. Feb. 7, 2007) (same); *Lowinger v. Johnston*, No. 3:05-CV-316-H, 2005 WL 2592229 (W.D.N.C. Oct. 13, 2005) (same); *In re King Pharms., Inc.*, 230 F.R.D. 503, 505 (E.D. Tenn. 2004) (same); *Kulinski v. Am. Elec. Power Co., Inc.*, No. Civ.A.C-2-03-412, 2003 WL 24032299 (S.D. Ohio Sept. 19, 2003) (same); *Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122 (C.D. Cal. 2003) (same); *Alkow v. TXU Corp.*, Nos. 3:02CV2738K, 3:02 CV 2739 K, 2003 WL 21056750 (N.D. Tex. May 8, 2003) (same).

73. *See, e.g.*, *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009). *Accord* Michael Serot, *(Mis)Interpreting SLUSA: Closing the Jurisdictional Loophole in Federal Securities Class Actions*, 7 BERKELEY BUS. L.J. 162 (2010).

74. Courts adopting this view include: *Rubin*, No. 06-CV-2964(ERK), 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007) (denying remand); *Pinto*, No. 07-0062 (FLW), 2007 WL 1381746 (D.N.J. May 7, 2007) (same); *Rovner*, No. 07-178 (FLW), 2007 WL 446658 (D.N.J. Feb. 7, 2007) (same); *Lowinger*, No. 3:05-CV-316-H, 2005 WL 2592229 (W.D.N.C. Oct. 13, 2005) (same); *In re King Pharmaceuticals, Inc.*, 230 F.R.D. 503, 505 (E.D. Tenn. 2004) (same); *Kulinski*, No. Civ.A.C-2-03-412, 2003 WL 24032299 (S.D. Ohio Sept. 19, 2003) (same); *Brody*, 240 F. Supp. 2d 1122 (C.D. Cal. 2003)

These various rulings by federal district courts are not as of yet constrained by federal appellate opinions because SLUSA did not amend the general prohibition on interlocutory appeals of remand decisions.<sup>75</sup> Therefore, different federal judges, sometimes even in the same court, have reached differing conclusions on the viability of 1933 Act class action suits in state courts in the aftermath of SLUSA.<sup>76</sup>

## 2. The Impact of CAFA on 1933 Act Claims

CAFA does not impact 1933 Act claims involving nationally-traded securities defined under SLUSA as covered securities.<sup>77</sup> For non-covered securities, courts face conflicting statutory provisions: CAFA, requiring removal under most circumstances, and Section 22 of the 1933 Act, forbidding removal. Currently, circuit courts disagree on the relationship between CAFA and Section 22 of the 1933 Act.<sup>78</sup> The Ninth Circuit, relying upon the canon of statutory construction that the more specific statute controls the general statute, held that 1933 Act claims are not removable under CAFA.<sup>79</sup> The Seventh Circuit rejected the Ninth Circuit's analysis of statutory canons, finding that Section 22(a) of the 1933 Act was not a subset of CAFA, and therefore was not the more specific statute.<sup>80</sup> On the merits, the Seventh Circuit reached the opposite conclusion, finding upon the basis of the statutory language

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(same); *Alkow*, Nos. 3:02CV2738K, 3:02 CV 2739 K, 2003 WL 21056750 (N.D. Tex. May 8, 2003) (same).

75. 28 U.S.C. § 1447(d); see *Kircher v. Putnam Trust Funds*, 547 U.S. 633, 640 (2006). In *Kircher*, the court held that “An ‘order remanding or declining to remand a case to the State court from which it was removed is not reviewable on appeal or otherwise.’” *Id.* (quoting § 1447(d) in a post-SLUSA Supreme Court opinion).

76. For example, in the Eastern District of New York, some judges take the broad approach to interpreting the SLUSA and refuse to remand 1933 Act class actions, while others take the narrow approach and remand the cases to state court. Compare *Irra*, No. 05 CV 3388 RJDRML, 2006 WL 2375472 (E.D.N.Y. Aug. 15, 2006) (granting remand), with *Rubin*, No. 06-CV-2964(ERK), 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007) (denying remand). In *Luther v. Countrywide Financial Corp.*, No. B222889, 2011 WL 1879242 (Cal. App. 2d Dist. May 18, 2011), a California Appellate Court held that 1933 Act class action claims can proceed in state court if they involve non-covered securities under SLUSA.

77. 28 U.S.C. § 1332(d)(9)(A) (2006).

78. Unlike SLUSA, CAFA specifically provides that remand decisions are appealable under the discretion of the appellate court. Compare SLUSA, 15 U.S.C. § 77p(d)(4), with CAFA, 28 U.S.C. § 1453(c)(1) (2006).

79. *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008) (noting § 11 action was not removable because § 22 of the 1933 Act is the more specific statute and trumps CAFA). Ironically, upon remand, the state court found that SLUSA deprived the state court of jurisdiction and dismissed the proceeding, a decision that itself was subsequently reversed. *Luther v. Countrywide Financial Corp.*, No. B222889, 2011 WL 1879242 (Cal. App. 2d Dist. May 18, 2011).

80. *Katz v. Gerardi*, 552 F.3d 558, 561–62 (7th Cir. 2009).

that CAFA permitted removal of 1933 Act claims.<sup>81</sup> This split obviously provides some opportunities for forum shopping if a plaintiff desires to keep a Section 11 case in state court.<sup>82</sup>

#### *D. The Remaining Space for State Securities Class Actions*

Together, SLUSA and CAFA relegate state securities class actions primarily to (1) claims involving corporate governance, or M & A transactions that are based upon the law of the defendant's state of incorporation; (2) class actions involving securities that are not nationally traded when the controversy is "local"; (3) smaller class actions where the plaintiff class does not exceed fifty in the case of SLUSA covered securities, or one hundred in the case of non-covered securities; and (4) perhaps class actions solely premised on claims under the 1933 Act.

### III. THE DATA SET—SECURITIES CLASS ACTION FILINGS IN STATE COURTS (1996–2010)

#### *A. Overview of the Data*

The data in this Paper is comprised primarily of state securities class action filings identified by Securities Class Action Services (SCAS) from 1996 through 2010.<sup>83</sup> SCAS maintains a proprietary database to serve its institutional investor clients who participate in class action filings or settlements. This database draws primarily from state courts that maintain electronic, searchable data on class action filings,<sup>84</sup> and

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81. *Id.* at 562–63 (expressly disagreeing with *Luther* and holding that securities class actions alleging 1933 Act claims are removable under CAFA unless they fall within a statutory exception); *see also* N.J. Carpenters Vacation Fund v. HarborView Mortg. Loan Trust 2006-4, 581 F. Supp. 2d 581 (S.D.N.Y. 2008) (noting Congressional intent and the rule of recency mandate that removal power under CAFA supersedes section 22(a)). For support of the *HarborView* position, *see* Laura L. Arp, New Jersey Carpenters Vacation Fund v. Harborview Mortgage Loan Trust 2006-4, *Resolving Irreconcilable Conflicts*, 88 NEB. L. REV. 853 (2010).

82. *But see* Pub. Emp. Ret. Sys. v. Stanley, 605 F. Supp. 2d 1073 (C.D. Cal. 2009), where the federal district court judge in California, before ruling on the remand motion (which under Ninth Circuit precedent the court would probably grant), transferred the case to the federal district court in New York, where the plaintiff had commenced another cause of action. Under *HarborView*, the applicable precedent in the New York district court, the remand motion would likely fail.

83. Risk Metric Group/Securities Class Action Services is a division of Institutional Shareholder Services (ISS) that provides a range of services relating to risk management, corporate governance, and financial research and analysis for their institutional investor clients. *Securities Class Action Services*, ISS, <http://www.issgovernance.com/scas> (last visited Apr. 28, 2012) ("SCAS offers complete research and analysis on all federal, state and SEC settlements, with the industry's most comprehensive database on securities class action litigation.").

84. SCAS reports that the following state jurisdictions maintain searchable class action filing

from SEC filings for public companies.<sup>85</sup> Given Delaware's dominance in corporate charters for public companies,<sup>86</sup> the use of SEC filings as a primary source of data may tend to over represent Delaware corporations in the sample.<sup>87</sup> SCAS augments its data with (1) available published judicial orders and opinions,<sup>88</sup> (2) published news reports and law firm web announcements, and (3) information it receives from attorneys and others interested in the database. I augmented the SCAS dataset using reported federal remand decisions. Also, I augmented the database by correlating federal securities class action filings with their state court counterparts.<sup>89</sup>

This database is necessarily incomplete and omits some cases filed in courts that do not maintain electric filing data systems. It also omits cases in jurisdictions where trial courts do not ordinarily produce judicial opinions or other public announcements concerning the cases. While the database is fairly comprehensive regarding complaints filed against public companies,<sup>90</sup> there is currently no feasible way to reliably

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data bases: California: Santa Clara County, Santa Barbara County, Contra Costa County; Oklahoma: Tulsa County; Texas, Dallas County; and Arizona, Maricopa County.

85. SEC disclosure rules require companies to “describe briefly any material pending legal proceeding” in their disclosure documents. See Item 103 Legal Proceedings, Regulation SK, 17 C.F.R. § 229.103 (2011). Class action filings would ordinarily be deemed “material” under the test of *TSC Indus., Inc. v. Northway*, 426 U.S. 438 (1976), in that “there is a substantial likelihood that a reasonable shareholder would consider it important” in making an investment decision. *Id.* at 449. Therefore, the SCAS review of SEC disclosure documents, including reports filed on Forms 10K, 10q, 8k, as well as filings specific to M & A transactions, should reveal almost all class action filings against public companies.

86. Delaware remains the chosen home of 63% of Fortune 500 companies and in 2010, 76% of all new U.S. Initial Public Offerings (IPOs). DELAWARE DIVISION OF CORPORATIONS, 2010 ANNUAL REPORT (2011), available at <http://corp.delaware.gov/10CorpAR.pdf>.

87. This will not necessarily impact the jurisdiction in which the class action complaint is filed. See *infra* notes 121 & 124 and accompanying text and Figure 11.

88. Given that the vast majority of securities class actions settle, the most useful judicial opinions and orders will necessarily consist of preliminary trial court orders. Unfortunately, from the perspective of researching state court proceedings, very few state trial courts outside of Delaware, New York, and California consistently publish orders or opinions. Indeed, only a very small percentage of federal trial courts issue published opinions. See David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (“Overall, of the 5,736 judicial actions we recorded, only 178—3%—came accompanied by opinions.”). Augmenting this class action filing data with other sources of class action filings reduces this selection bias. See David Hoffman & Christina Boyd, *Disputing Limited Liability*, 104 NW. U. L. REV. 853, 856 (2010) (noting analysis of these complaints and dockets advances a “new and robust form of legal realism”); Pauline T. Kim et al., *How Should We Study District Court Decision-Making?*, 29 WASH. U. J.L. & POL’Y 83, 103 (2009) (viewing case documents helps to avoid “the problems of selection bias introduced by relying only on opinions or published opinions”).

89. SCAS as well as other organizations such as the Stanford Securities Class Action Clearing House track federal securities class action filings. The federal courts maintain a searchable database for class action filings, making this data more reliable. Nonetheless, different researchers analyze the data quite differently. See *infra* note 95.

90. One study, however, suggests that the SCAS database underreports M & A objection suits

track state court class action filings against private company defendants that do not file SEC reports.<sup>91</sup> Still, there is reason to believe that, given the nature of securities class actions, most suits will target public companies,<sup>92</sup> and omitted data from private company cases will be largely insignificant.<sup>93</sup>

SCAS codes its data in several ways, including categories of allegations. Upon review, however, I found the coding to be incomplete and, in some cases, inaccurate.

Therefore, I reviewed the complaints, settlement documents and other available material to recode the data. In studying the nature of the allegations, the vast majority of state securities class actions fell into one of three general categories: (1) M & A objection suits; (2) 1933 Act claims (§ 11 and § 12); or (3) “other.” The nature of the allegations in the “other” category primarily includes fraud allegations with respect to non-nationally-traded securities, claims against broker or dealers or brokers and dealers, and breach of fiduciary duty claims apart from M&A transactions.

This Paper tracks class actions in state court relating to the purchase, sale, or ownership of securities, including fiduciary duty claims arising from M & A transactions.<sup>94</sup> The data counts all securities class action complaints filed in a particular state jurisdiction regardless of the ultimate disposition of the case.<sup>95</sup> Complaints consolidated in a single

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even within its own search criteria. See C.N.V. Krishnan et al., *Litigation in Mergers and Acquisitions* (Vanderbilt Law & Econ., Research Paper No. 10-37, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1722227](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722227) (finding 127 state M & A class actions filings in 1999, and 114 in 2000). The authors derived these 1999–2000 statistics from all filings in the Delaware Chancery court involving M & A transactions during 1999 and 2000. To access data from cases filed in non-Delaware state courts, the authors examined SEC filings for companies involved in announced M & A transactions. In comparison, the SCAS reports 59 M & A cases for 1999 and 88 for 2000. While the difference may be attributable in part to different methods of counting the complaints, it serves to highlight the difficulty in capturing accurate data for class actions filed in state court.

91. This difficulty has led most researchers to concentrate their studies upon federal courts, public companies, or a single jurisdiction. See, e.g., Neil Marchand, *Where’s the Party, Do Class Action Plaintiffs Really Prefer State Court?* (Jan. 6, 2009) (unpublished paper), available at <http://ssrn.com/abstract=1334923> (tracking state class actions in Michigan).

92. For example, in a study of M & A class action lawsuits brought in Delaware courts in 1999 and 2000, the authors found that 99% involved public companies, a number undoubtedly inflated by the ratio of public companies to private companies in Delaware and the focus on M & A activity. Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133 (2004). The findings are telling nonetheless.

93. See Marchand, *supra* note 91. Utilizing the Westlaw docket database, the author tracked class action filings in three Michigan counties from 2000–2007. The author found just two securities class actions that were not represented in the SCAS database. *Id.*

94. This Paper includes a dataset that is different from that used by other research groups. For example, the Stanford Securities Class Action Clearing House and NERA Economic Consulting track only (or at least primarily) federal securities class actions.

95. When reviewing reports involving class action filings, it is important to know what counting method the research firm employs. For example, Cornerstone Research issues quarterly and annual

jurisdiction are counted as one action. The rationale for tracking filings over this fifteen-year period is that the complaints demonstrate jurisdictional choices made by plaintiffs' counsel, and should measure the impact of congressional preclusion and preemption measures upon those choices.

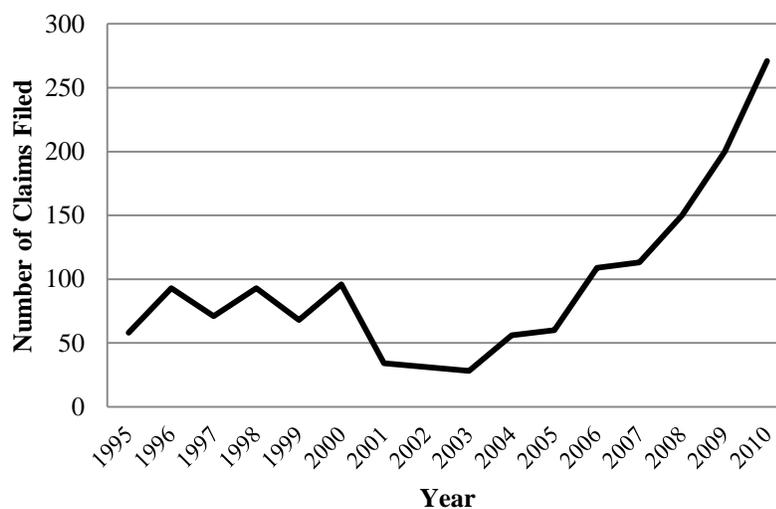
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reports analyzing federal securities class actions. Utilizing data on federal class actions provided by the Stanford Securities Class Action Clearing House, Cornerstone counts multiple filings against the same defendants as a single filing. *See, e.g.*, CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2010 YEAR IN REVIEW (2010), *available at* [http://securities.stanford.edu/clearinghouse\\_research/2010\\_YIR/Cornerstone\\_Research\\_Filings\\_2010\\_YIR.pdf](http://securities.stanford.edu/clearinghouse_research/2010_YIR/Cornerstone_Research_Filings_2010_YIR.pdf). In contrast, NERA Economic Consulting, utilizing SCAS federal class action data along with other unique sources of filing information, counts different complaints against the same company in different jurisdictions as separate lawsuits (at least until the complaints are consolidated). *See* DR. JORDAN MILEV, ROBERT PATTON & SVETLANA STARYKH, TRENDS 2010 YEAR-END UPDATE: SECURITIES CLASS ACTION FILINGS ACCELERATE IN SECOND HALF OF 2010; MEDIAN SETTLEMENT VALUE AT AN ALL-TIME HIGH (2010), *available at* [http://www.nera.com/nera-files/PUB\\_Year\\_End\\_Trends\\_1210.pdf](http://www.nera.com/nera-files/PUB_Year_End_Trends_1210.pdf). Advisen, an advisor to D & O Insurance companies, maintains its own proprietary database of class action filings. In its reports analyzing the data, Advisen counts each company for which securities violations are alleged in a single complaint as a separate suit and includes regulatory actions. *See, e.g.*, ADVISEN, 2010 A RECORD YEAR FOR SECURITIES LITIGATION (2010), *available at* [https://www.advisen.com/downloads/sec\\_lit\\_Q42010\\_report.pdf](https://www.advisen.com/downloads/sec_lit_Q42010_report.pdf).

*B. The Results*

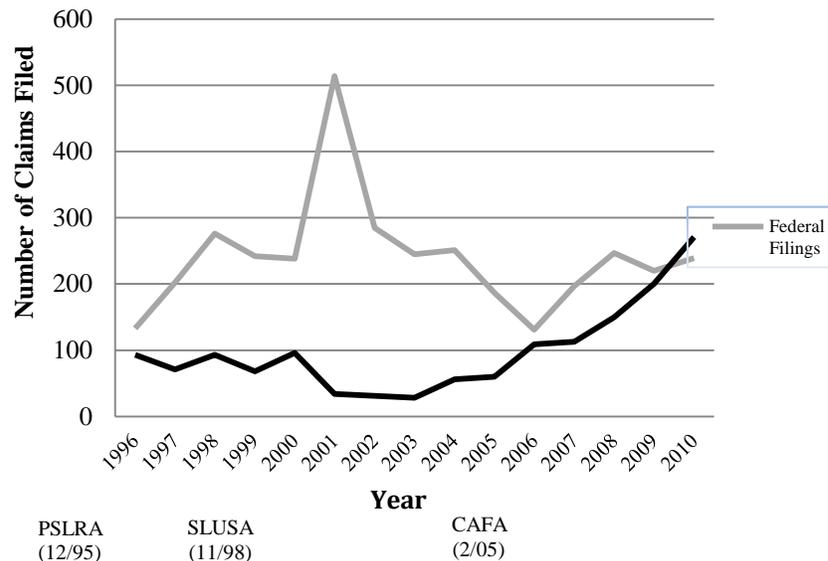
## 1. The Increasing Number of State Court Securities Class Actions

**Figure 1**  
**State Securities Class Actions: 1996-2010**



As Figure 1 shows, the level of class action securities lawsuits filed in state court remained relatively constant from 1996 until 2005, when there was a demonstrable increase in the number of filings from an annual average well under one hundred filings per year to the 2005 total of 272.

**Figure 2**  
**State Securities Class Actions 1996-2010**  
**Compared to Federal Class Action Filings\***



\* Federal filing data courtesy of NERA

Figure 2 compares state securities class action filings to federal filings during the same time periods. This comparison helps control for adverse economic events, such as the dot-com bust circa 2000 or the credit crisis circa 2008, which tend to increase securities class action filings generally. Conversely, the comparison also controls for general positive market conditions, such as the overall market rise from 2002–2008, which resulted in fewer securities class actions. Figure 2 shows that the relative percentage of state securities class action filings to federal filings began to rise dramatically in 2005, and by 2010 the number of securities class action filings in state court outnumbered federal filings.<sup>96</sup>

96. Given the relative accuracy of the data tracking the number of federal filings as compared to data tracking equivalent state filings, which undoubtedly omits some claims, it is likely that the actual number of state class actions exceeds federal filings by a greater number than depicted in Figure 2.

**Figure 3**  
**State Securities Class Actions by State**

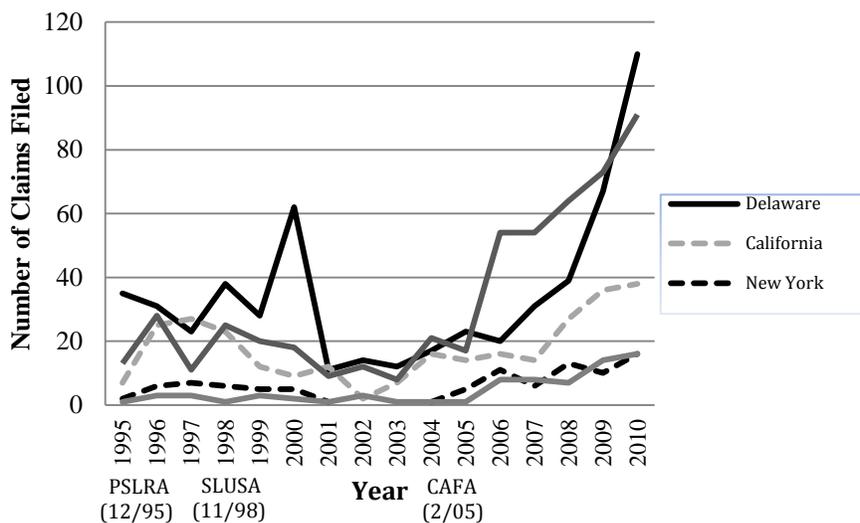


Figure 3 demonstrates that the largest number of state securities class action filings occur in Delaware, followed by California, New York, and Texas.<sup>97</sup> This finding is not particularly surprising given the number of companies incorporated, headquartered, or at least doing business in these four states.<sup>98</sup> Usually, defendants in securities class actions include the entity itself; selected members of the board of directors; and designated corporate officers. In general terms, a state court has personal jurisdiction over a corporation, and its directors and officers, if the entity is incorporated in the state or maintains its principle place of business in the state.<sup>99</sup> On the other hand, these states may be slightly

97. These findings are consistent with a 2010–2011 study of M & A litigation for transactions valued at over \$100 million. See CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITION 7 (2012), available at [http://www.cornerstone.com/files/News/d7e418ea-eb2c-4a17-8eae-de2510d9d1ba/Presentation/NewsAttachment/8b664075-ebfb-4cce-aa76-8a050befad03/Cornerstone\\_Research\\_Shareholder\\_MandA\\_Litigation.pdf](http://www.cornerstone.com/files/News/d7e418ea-eb2c-4a17-8eae-de2510d9d1ba/Presentation/NewsAttachment/8b664075-ebfb-4cce-aa76-8a050befad03/Cornerstone_Research_Shareholder_MandA_Litigation.pdf).

98. More than half of publicly traded companies and more than half of the Fortune 500 companies are incorporated in Delaware. Lucian Ayre Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 578 (2002). The top three states in terms of number of Fortune 500 companies headquartered in the state are California, Texas, and New York. *Annual Ranking of America's Largest Corporations*, FORTUNE (Oct. 10, 2011), <http://money.cnn.com/magazines/fortune/fortune500/2011/>.

99. See, e.g., DEL. CODE ANN. tit. 10, § 3114(b) (2011). Also under the Due Process Clause of the U.S. Constitution, state courts can assert jurisdiction only over defendants who have the requisite minimum contacts with the forum state. Although personal jurisdiction typically extends to any

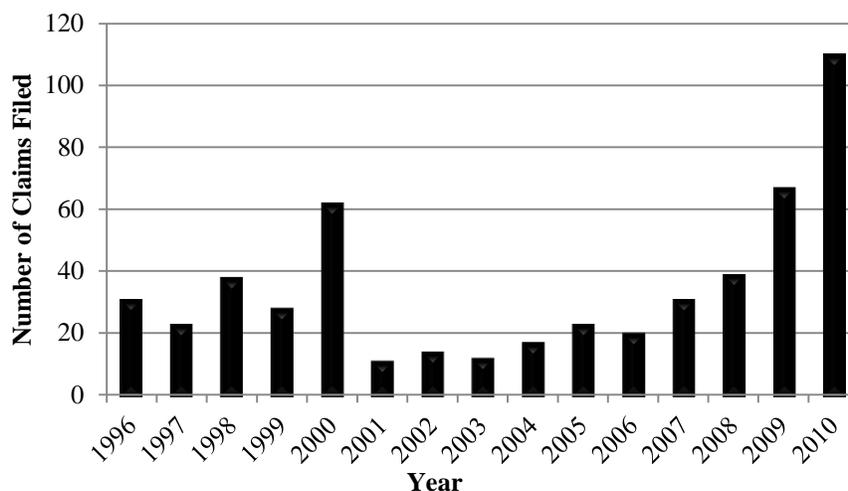
overrepresented in the data, given SCAS's relative ability to track filings in Texas and California, and the more readily available state trial court opinions in Delaware, California, and New York.<sup>100</sup>

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corporation incorporated within the state or maintaining its principal place of business within the state, "long-arm" statutes greatly expand personal jurisdiction to any corporation doing business with the state. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 17.042 (West 2011) ("[A] nonresident does business in [Texas] if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in [Texas], for employment inside or outside th[e] state.").

100. Other state courts that witnessed significant securities class action activity from 1996–2010 include Florida with 46 filings; New Jersey with 42 filings and Illinois with 41 filings.

**Figure 4**  
**Delaware Securities Class Action Filings: 1996–2010**

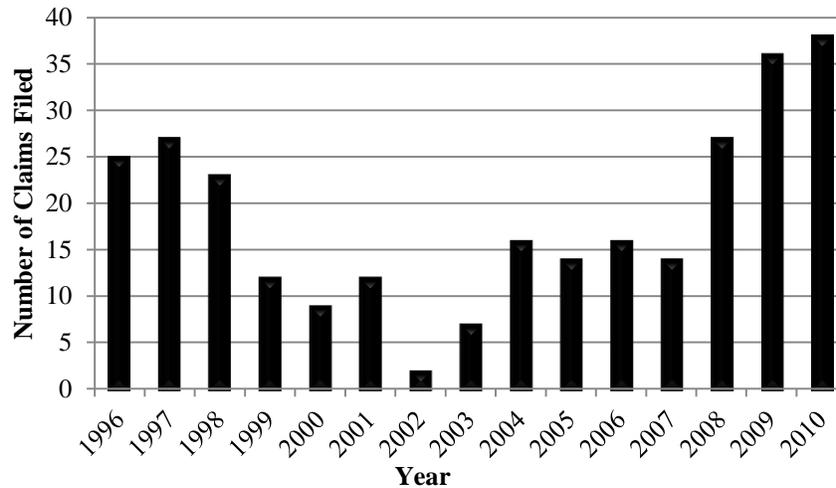


Figures 4 and 5 illustrate the securities class action complaints filed in state court in Delaware and California, the states with the largest number of filings.

Figure 4 details the securities class actions filed in the Delaware Chancery Court from 1996–2010. The number of securities class action filings in Delaware remained relatively constant until 2000, two years after the enactment of SLUSA, when filings more than doubled from the previous year. In 2001, the number of Delaware class action filings retreated to pre-1995 (PSLRA) levels before rising to a record number of filings in 2010. Interestingly, while the number of Delaware securities class actions has increased, the relative percentage of Delaware cases compared to those in other jurisdictions has fallen.<sup>101</sup>

101. See *infra* notes 127–130 and accompanying text.

**Figure 5**  
**California Securities Class Action Filings: 1996–2010**



In 1996 and 1997, in the immediate aftermath of the PSLRA, plaintiffs' counsel filed several securities class actions in California state courts. This activity provided ammunition for those arguing that plaintiffs' attorneys were bringing their securities cases in state court to avoid the procedural hurdles mandated by Congress in 1995.<sup>102</sup> At that time, the California courts appeared to recognize broad civil liability in connection with secondary market transactions that comprise the vast majority of stock drop class actions.<sup>103</sup> Moreover, in 1996 California voters were considering a ballot measure to further extend civil liability in securities cases.<sup>104</sup> Lobbying efforts by California-based issuers prompted Congress to enact SLUSA in 1998.<sup>105</sup>

102. The existence of the state court end run to avoid the mandates of the PSLRA is now enshrined in judicial opinions including those of the U.S. Supreme Court. See *Merrill Lynch v. Dabit*, 547 U.S. 71, 81–82 (2006); see also *supra* note 33. Among scholars, the empirical justification for SLUSA is debatable. See *supra* note 34.

103. See Levine & Pritchard, *supra* note 34 (detailing the securities litigation climate in California in 1996 and 1997).

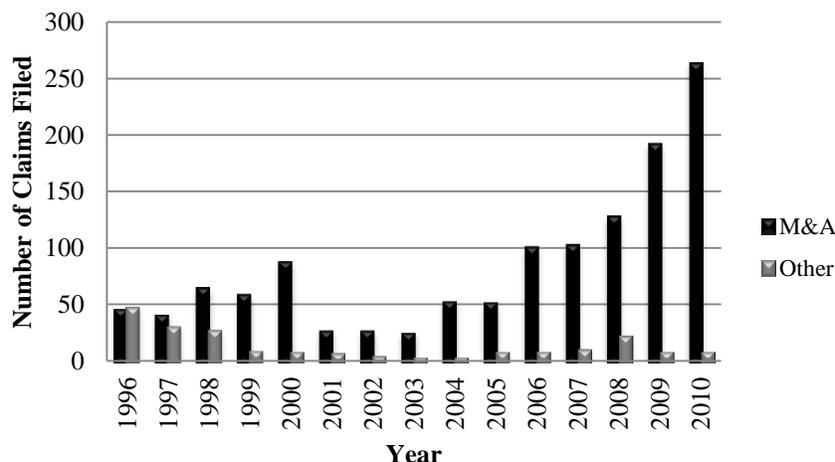
104. *Id.* (explaining California Prop. 211). Ultimately, the California voters defeated the ballot measure. See Bob Davis & G. Paschal Zachary, *Election '96: Affirmative Action, Shareholder Lawsuits and Tax Increases Are Rejected By Voters*, WALL ST. J., Nov. 7, 1996, at A17. Also, the California Court of Appeals limited liability in stock drop cases to defendants who were purchasers or sellers (or offerors) of the securities. *Murphy v. BDO Seidman, LLP*, 6 Cal. Rptr. 3d 770, 784 (Cal. Ct. App. 2003).

105. High-tech companies located in Silicon Valley led the lobbying effort. Leslie Eaton, *The Silicon Valley Gang; An Influential Industry With Lots of Money Is Getting Its Way on Capitol Hill*, N.Y. TIMES, June 11, 1998, at D1; see, e.g., Michael Perino, *Fraud and Federalism: Preempting Private State Securities Causes of Action*, 50 STAN L. REV. 273 (1998) (providing empirical evidence of a shift of securities class actions to state court as plaintiffs seek to avoid the procedural hurdles of the PLSA).

## 2. Allegations in State Securities Class Action Complaints

*a. Merger and Acquisition (M & A) Transactions*

**Figure 6**  
**Composition of State Court Class Action Filings:**  
**M & A vs All Other**  
**1996-2010**



With the exception of 1996, the vast majority of state securities class action filings from 1996–2010 involved M&A cases in which shareholders challenged some facet of a corporate acquisition.<sup>106</sup> These class action complaints usually allege that the transaction price offered to shareholders is too low or, in the case of hostile acquisitions, that the target board is unfairly preventing the shareholders from selling their shares at a premium.<sup>107</sup> In state court, the allegations are usually styled as a breach of fiduciary duty, or claims that the defendant company provided inaccurate or misleading information to the shareholders. Almost all of these M&A cases involve public companies with

106. These figures do not include state court derivative suits, which are expressly exempted from SLUSA. 15 U.S.C. § 77p(f)(2)(B) (2006). Thompson and Thomas found that of the cases filed in Delaware courts in 1999 and 2000 alleging a fiduciary duty breach in connection with an acquisition transaction, 94% were styled as class actions rather than derivative suits. Thompson & Thomas, *supra* note 92, at 167–69. However, a more recent study of derivative suits filed in 2005 and 2006 found that many derivative suits were in fact filed in federal, where they perhaps escaped notice by other authors. Jessica M. Erickson, *Corporate Governance in the Courtroom: an Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1762 (2010).

107. Thompson and Thomas found that the vast majority (88%) of M & A class actions were shareholder lawsuits alleging a fiduciary duty breach resulting from an agreement to sell the company for too low of a price. Thompson & Thomas, *supra* note 92. The remaining 12% of the lawsuits involved complaints by bidders or targets. *Id.*; see also Krishnan et al., *supra* note 90.

nationally traded securities defined as covered securities under SLUSA.<sup>108</sup> SLUSA, however, exempts M&A class actions from its preclusive provisions. In a provision known as the “Delaware Carve-Out,” SLUSA exempts from its coverage any otherwise “covered class action . . . that is based upon the statutory or common law of the State in which the issuer is incorporated” under specified circumstances including M&A transactions.<sup>109</sup>

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108. While these M & A transactions involve “covered securities,” there may be a question whether some of these controversies involve misrepresentations in connection with the purchase or sale of a security as contemplated by SLUSA. The existence of the Delaware Carve-Out makes it unnecessary to address this issue.

109. 15 U.S.C. §§ 78bb(f)(3)(A)(i)–(ii), 77p(d)(1)(A)–(B) (2006) (providing that SLUSA preclusion does not apply to a class action “that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party . . . if it involves . . . the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer, or any recommendation, position, or other communication with respect to the sale of securities of the issuer that—is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters’ or appraisal rights.”). CAFA also excepts from its preemptive scope these M&A cases involving covered securities, as defined in SLUSA. CAFA, 28 U.S.C. § 1453(d)(1) (2006).

**Figure 7**  
**Federal Court vs State Court M&A Filings**  
**2000-2010**

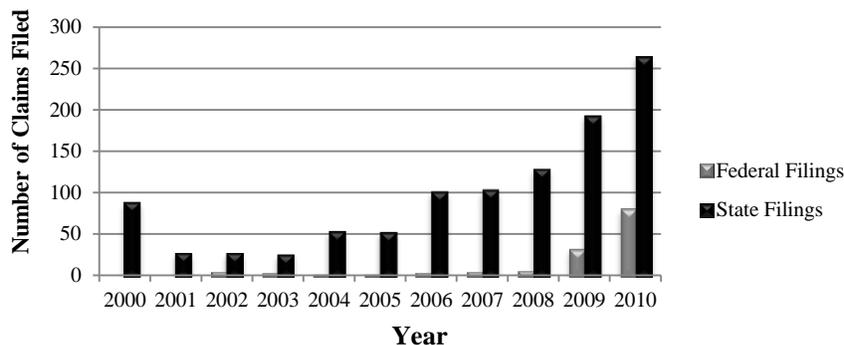


Figure 7 compares the number of M&A class actions filed in state court with those filed in federal court.<sup>110</sup> Allegations of misrepresentations in connection with M&A transactions are actionable under Section 14 of the 1934 Act,<sup>111</sup> where jurisdiction remains exclusively within the federal courts.<sup>112</sup> In the last decade, however, state courts have been the forums of choice to redress these grievances, and even the majority of M&A cases filed in federal courts are diversity cases alleging state law fiduciary duty breaches.

110. The federal filing data is provided courtesy of Luke Green at SCAS.

111. 15 U.S.C. § 78n(a), (e) (2006).

112. *Id.* § 78aa(a).

**Figure 8**  
**Filings by State of Incorporation (2010)**

	State of Incorporation of all defendants	State of Incorporation subset: M & A defendants	Home State Court Filing	Federal Court Filing	Other State filing
Delaware	196	193	103	47	115
Nevada	12	11	6	6	6
New York	6	5	4	3	2
California	5	5	4	3	1
Maryland	5	5	3	1	2
Other	38	3	26		12

Figure 8 demonstrates that increasingly, plaintiffs' attorneys are choosing to file cases in multiple jurisdictions and often outside of the defendant's state of incorporation. For example, of the 2010 M & A class action state court filings against Delaware corporations, approximately 18% were single, out-of-state filings; 23% were Delaware-only filings; and 58% were multiple filings where plaintiffs sued both in Delaware and out of state.<sup>113</sup> Larger M & A transactions generate a correspondingly larger number of filings. Cornerstone Research reports that in 2010 and 2011, litigation occurred in 91% of M & A deals valued at over \$100 million with an average of 5.1 lawsuits per deal.<sup>114</sup>

This data is consistent with a 2011 study of Leverage Buyouts (LBOs), a subset of merger and acquisition transactions, which found a drop in filings in the Delaware courts, even for entities incorporated in Delaware.<sup>115</sup> Armour, Black, and Cheffins's report that in 2000, 76% of LBO cases involving Delaware companies were filed in Delaware courts. Between 2003 and 2005, the number of Delaware filings dropped to 60%, and from 2006 forward, plaintiffs brought a majority of LBO cases involving Delaware corporations in other—almost

113. Similarly, for M& A transactions involving Delaware targets with value of at least \$100 million, only a small number of claims were filed solely in the Delaware Chancery Court. CORNERSTONE RESEARCH, RECENT DEVELOPMENTS, *supra* note 97, at 6.

114. The very largest transactions during 2010 and 2011 generated 15–29 lawsuits each. *Id.* Unlike the SCAS data, the Cornerstone Research Report includes derivative suits. In another study of derivative suits filed in federal court during a 12-month period in 2005–2006, the author found 39 suits alleging violation of section 14(a) of the 1934 Act, thus indicating an M & A objection suit. Erickson, *supra* note 106, at 1762. Over half of federal derivative suits in the study were accompanied by at least one parallel state court derivative suit. *Id.* at 1827.

115. John Armour, Bernard S. Black & Brian R. Cheffins, *Is Delaware Losing its Cases?* (University of Cambridge Faculty Law, Research Paper No. 11/08, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1578404](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578404).

exclusively state—courts.<sup>116</sup> Legislative history suggests that at least some in Congress intended that SLUSA exempt only M & A class action complaints filed in the court of the defendant’s state of incorporation.<sup>117</sup> The text of SLUSA, however, is not so limited. On its face the carve-out requires only that allegations are based upon the *law* of the state of incorporation.<sup>118</sup> Consistent with SLUSA’s statutory text, courts have unanimously concluded that cases alleging violations under the laws of the state of incorporation can be brought in any state court having jurisdiction over the defendants.<sup>119</sup>

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116. *Id.* at 18–22. In a follow up article, Armour, Black, and Cheffins reported similar results for mega M & A transactions. John Armour, Bernard Black & Brian Cheffins, *Delaware’s Balancing Act* (Univ. of Cambridge Faculty of Law, Research Paper No. 37, 2011), available at [http://ssrn.com/abstract\\_id=1677400](http://ssrn.com/abstract_id=1677400); see also Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* (Apr. 1, 2012) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1984758](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758) (finding in a study of M & A deals completed between 2005 and 2010 and valued at over \$100 million “that Delaware is relatively unresponsive to attorneys who leave the jurisdiction in pursuit of more favorable fee awards” and that Delaware may indeed be losing cases to other jurisdictions).

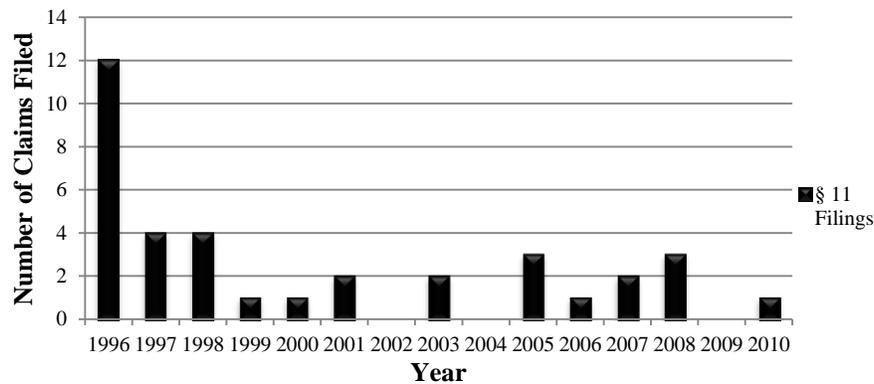
117. See, e.g., H.R. REP. NO. 105-803, at 13–14 & n.2 (1998) (Conf. Rep.) (“It is the intention of the managers that the suits under this exception be limited to the state in which the issuer of the security is incorporated.”). Similar statements appeared in an earlier Senate Banking Committee Report: “[T]he Committee expressly does not intend for suits excepted under this provision to be brought in venues other than the issuer’s state or incorporation.” S. REP. NO. 105-182, at 6 (1998).

118. 15 U.S.C. § 77p(d)(1) (2006).

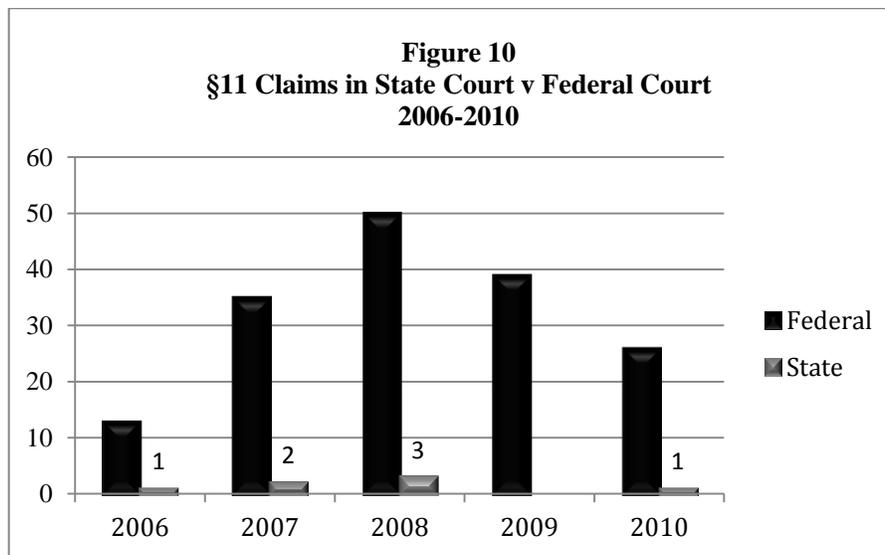
119. See, e.g., *Huang v. Reyes*, No. C 07-5950 CRB, 2008 WL 648519 (N.D. Cal. 2008) (noting under plain text of SLUSA plaintiff need not bring suit only in state court of defendant’s state of incorporation to fall within “Delaware Carve-Out”); *Gibson v. PS Grp. Holdings, Inc.*, Fed. Sec. L. Rep. 90,921 (S.D. Cal. 2000) (“Nothing in [SLUSA’s] language suggests that Congress intended to restrict the venue of preserved class actions to the issuer’s state of incorporation.”); see also *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 808 n.3 (1989) (“Legislative history is irrelevant to the interpretation of an unambiguous statute.”).

*b. IPO Claims: Sections 11 & 12 of the 1933 Act*

**Figure 9**  
**IPO-related State Court § 11 Filings: 1996–2010**



**Figure 10**  
**§11 Claims in State Court v Federal Court 2006-2010**



Earlier, this Paper reviewed the controversy surrounding the appropriate relationship between Section 11 IPO claims under the 1933 Act, the preclusive provisions of SLUSA, and the preemptive provisions of CAFA. Figures 9 and 10 indicate that despite the alarm bells sounding in some quarters, and the many scholarly articles addressing this issue, plaintiffs rarely pursue IPO claims in state court. Since the enactment of CAFA in 2005, plaintiffs have filed very few Section 11 claims in state court, preferring the federal forum by a wide margin.

*c. The "Other" Category*

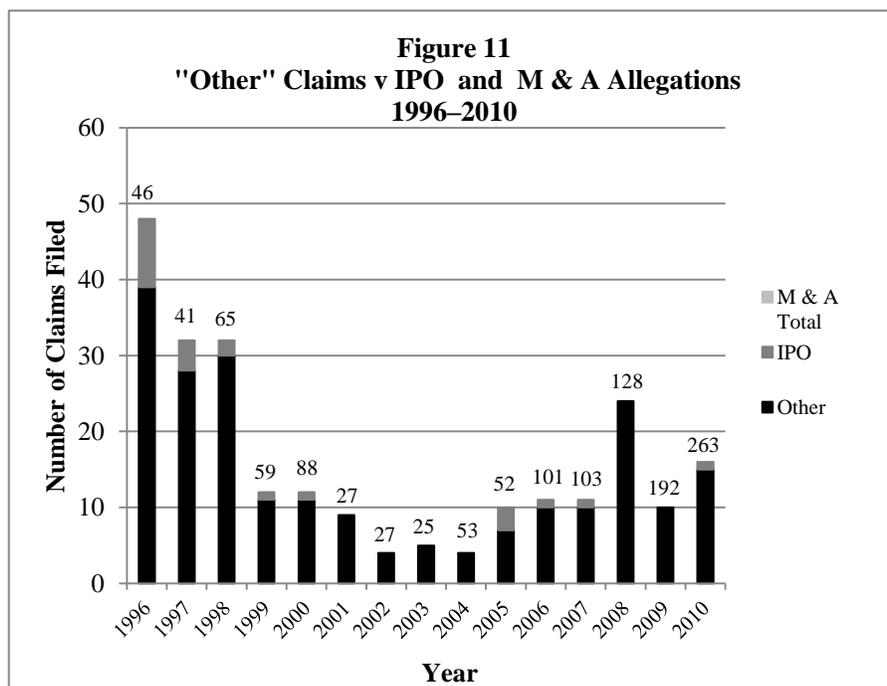


Figure 11 indicates that plaintiffs pursue relatively few class actions in state court outside of the M & A arena. Allegations in state class actions not involving

M & A or IPO cases arise from a wide array of misrepresentations with respect to non-traded securities, including Ponzi schemes, private placement offering fraud, suits against brokers, and breach of fiduciary duty claims apart from M & A transactions. There is little doubt that cases in this category are undercounted in the data due to tracing difficulties.<sup>120</sup>

120. For example, in Oregon, an alleged Ponzi scheme involving the SunWest corporation resulted in two class actions in Oregon courts against the promoter and various secondary defendants yet the SCAS database features neither claim. While the plaintiff classes far exceeded one hundred investors, these state actions involved non-covered securities, and did not fall under CAFA due to the local controversy exemption.

## IV. ANALYSIS OF STATE CLASS ACTION DATA

There are few securities class actions filed in state court today outside of the M&A arena. The low number of securities class actions in the “other” category is not particularly surprising quite apart from SLUSA preclusion or CAFA preemption. Unlike Section 10(b) of the 1934 Act and Rule 10b-5, most state blue sky laws do not provide for secondary market liability.<sup>121</sup> In secondary market cases, plaintiffs allege losses due to misrepresentations and omissions of the issuer (corporations) even though the plaintiffs purchased (or sold) the securities from others in the secondary market. While these claims are recognized under current Rule 10b-5 jurisprudence,<sup>122</sup> the vast majority of state blue sky laws limit liability for securities fraud to privity-based transactions.<sup>123</sup> Also, state courts have uniformly rejected the fraud-on-the-market theory necessary to establish a presumption of reliance,<sup>124</sup> which is integral to showing “common issues of fact” at class certification.<sup>125</sup> These dictates of state blue sky laws largely relegate state class actions in the other category to privity-based seller/buyer fraud claims. In combination with SLUSA and CAFA, the space for such actions is very narrow, limited to claims arising from non-SLUSA covered securities that involve either very small class actions or local controversies. While several of these cases are missing from the database, this category by its nature is unlikely to spawn class action complaints in large numbers.

Similarly, the data shows that Section 11 cases are rarely prosecuted in state court even after the enactment of the PSLRA. In many respects, it might have seemed logical for plaintiffs’ lawyers to file these claims

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121. Jennifer J. Johnson, *Secondary Liability for Securities Fraud: Gatekeepers in State Court*, 36 DEL. J. CORP. L. 463 (2011) (detailing liability under state blue sky statutes).

122. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005) (setting forth the elements of a cause of action under Rule 10b-5).

123. Only a very few states statutes provide a private cause of action against issuers in connection with secondary market transactions. *See, e.g.*, OR. REV. STAT. § 59.137 (2010); Johnson, *supra* note 121 (detailing primary and secondary liability for securities fraud under state blue sky laws).

124. For an explanation of the “fraud on the market” presumption of reliance for class certification, see *Basic Inc. v. Levinson*, 485 U.S. 224, 241–50 (1988).

125. Both state and federal courts have reached near consensus regarding the unavailability of the fraud-on-the-market doctrine under state blue sky laws. *See, e.g.*, *State v. Marsh & McClellan*, 250 P.3d 371 (Or. Ct. App. 2011) (holding that the fraud on the market presumption not available to establish required reliance under Oregon law); *Lee v. Carter-Reed Co., L.L.C.*, No. A-4598-07T1, 2009 WL 2475314, at \*6 (N.J. Super. Ct. App. Div. Aug. 14, 2009), *rev’d*, 4 A.3d 561 (N.J. 2009) (“[A]pplication of [the fraud-on-the-market] theory is confined to federal securities fraud litigation.”); *Garcia v. Medved Chevrolet, Inc.*, No. 09CA1465, 2009 WL 3765481, at \*10 (Colo. App. Nov. 12, 2009) (“We are also persuaded by a variety of state cases that have similarly rejected the invitation to apply a fraud on the market theory to presume reliance and causation in common law fraud or statutory deceit lawsuits.”); *Malone v. Brincat*, 722 A.2d 5, 13 (Del. Super. Ct. 1998) (noting Delaware does not recognize a state cause of action for fraud-on-the-market).

in state court to avoid the PSLRA's procedural requirements.<sup>126</sup> On the other hand, crowded state dockets and the general unfamiliarity of state court judges with federal securities law may have encouraged plaintiffs' attorneys to file in federal court. Also, the increased flexibility for defendants to remove Section 11 cases to federal court under SLUSA or CAFA may keep the numbers down as plaintiffs' attorneys may not find the benefits of state court to be worth the expense of litigating remand motions against increasing odds of failure.

The M&A data, on the other hand, raises several interesting issues. First, the sheer volume of M&A litigation is surprising. As is typical following a recession,

M&A activity increased in 2010.<sup>127</sup> However, while the number of M&A deals increased by 20%, the number of merger-objection state and federal filings increased by a much greater percentage.<sup>128</sup> Some of the increase is due to the multiplicity of filings for each deal, which, according to one informed observer, have "grown substantially in the past five years."<sup>129</sup> The SCAS data indicates that M&A suits involving the same deal increasingly take place in multiple state jurisdictions as well as federal courts.<sup>130</sup> This suggests that at least for M&A transactions, CAFA is not reducing forum shopping in the manner

126. 15 U.S.C. § 77z-1 (2006).

127. Thomson Reuters data indicate that announced M&A deals increased nearly 20% in 2010. Quentin Webb & Denny Thomas, *M&A Tops \$2.2 Trillion in First Yearly Rise Since 2007*, REUTERS (Dec. 17, 2010), <http://www.reuters.com/article/2010/12/17/us-deals-idUSTRE6BG00D20101217>.

128. All researchers following M & A class action litigation report a substantial increase in 2010, regardless of the precise method utilized to count the lawsuits. See, e.g., CORNERSTONE RESEARCH, RECENT DEVELOPMENTS, *supra* note 97 (finding substantial increase in M & A litigation in recent years) ADVISEN, MERGER OBJECTION LAWSUITS: A THREAT TO PRIMARY D&O INSURERS? (2011), available at [https://www.advisen.com/downloads/Merger\\_Objection\\_Suits.pdf](https://www.advisen.com/downloads/Merger_Objection_Suits.pdf) (noting skyrocketing number of M & A lawsuits in 2010); MILEV ET AL., *supra* note 95, at 12 (noting filings alleging breach of fiduciary duty, two-thirds of which were M & A transactions, have nearly doubled); CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS, *supra* note 95, at 33 ("In 2010 there were 40 federal filings with allegations relating to M&A transactions, which was a 471 percent increase from the seven such filings in 2009."). Press reports also document this increase in M & A filings. See, e.g., Dionne Searcey & Ashby Jones, *First the Merger, Then the Lawsuit*, WALL ST. J., Jan. 10, 2011 at C1.

129. Elizabeth Bennett, *A Great Migration of M & A Cases Out of Delaware*, DEL. BUS. CT. INSIDER (Mar. 16, 2011), [http://www.delbizcourt.com/story.php?story\\_id=3623&A-Great-Migration-of-MA-Cases-Out-of-Delaware-](http://www.delbizcourt.com/story.php?story_id=3623&A-Great-Migration-of-MA-Cases-Out-of-Delaware-) (quoting Theodore N. Mirvis, Partner, Wachtell Lipton Rosen and Katz, New York, a major M & A defense firm); see also, CORNERSTONE RESEARCH, RECENT DEVELOPMENTS, *supra* note 97, at 2-3 (finding that virtually every large M & A transaction in 2010 and 2011 attracted multiple lawsuits).

130. See also Committee on Securities Litigation, *Coordinating Related Securities Litigation: A Position, Paper*, ASS'N OF THE BAR OF THE CITY OF NEW YORK 3 (Apr. 17, 2008), available at [http://www.nycbar.org/pdf/report/Securities\\_Litigation\\_%20A.pdf](http://www.nycbar.org/pdf/report/Securities_Litigation_%20A.pdf) (noting that in takeover transactions it was becoming common for similar fiduciary duty claims to be filed in multiple jurisdictions); Cain & Davidoff, *supra* note 116 (finding that in 71% of large merger transactions completed from 2005-2010, the target is incorporated in a state other than its headquarters state allowing plaintiff attorneys discretion over where to file suits).

predicted by its proponents.

The multi-jurisdictional filing phenomena makes it difficult for the courts to manage cases, as there is no prescribed procedure for consolidation as would exist in the federal courts,<sup>131</sup> or if multiple suits were filed in the same state jurisdiction.<sup>132</sup> At present, there is no formal mechanism to coordinate suits among state courts.<sup>133</sup> While state judges can consider forum non conveniens motions, and motions to stay in favor of parallel proceedings in other courts, these motions are not always successful.<sup>134</sup> Similarly, there is no formal coordination between federal and state courts.<sup>135</sup> Only under extraordinary circumstances can a federal court interfere with parallel state proceedings. The Anti-Injunction Act prohibits federal courts from enjoining parallel state court proceedings unless expressly authorized by an act of Congress, where necessary in aid of their jurisdiction, or to protect federal court judgments.<sup>136</sup> If one of these statutory exceptions applies, the All Writs Act affirmatively authorizes federal courts to enjoin a state proceeding.<sup>137</sup> Plaintiffs in federal securities class actions have

131. The multidistrict litigation (MDL) statute, 28 U.S.C. § 1407, provides that related class actions pending in multiple federal district courts can be transferred to a single federal district court for coordinated pretrial proceedings, including class certification and appointment of class counsel. Also, under 28 U. S. C. § 1404, federal courts can transfer any civil action to any other district that would have jurisdiction “for the convenience of the parties and witnesses and in the interest of justice.” Federal courts can also obtain efficiencies through coordination. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20 (2004).

132. Multiple suits filed in the same state court can be consolidated under state court procedures. *See, e.g.*, CAL. CT. R. 3.767 (2011) (“In the conduct of a class action, the court may make orders that . . . [f]acilitate the management of class actions through consolidation, severance, coordination, bifurcation, intervention, or joinder . . .”).

133. Past efforts to institute a formal process for coordination among states have failed. *See* UNIF. TRANSFER OF LITIG. ACT § 201, 14 U.L.A. 677 (1991) (proposing a uniform state statute to allow consolidation of multiple actions pending in multiple state courts).

134. *See, e.g.*, *Rosen v. Wind River Sys.*, No. 4674-VCP, 2009 WL 1856460, at \*5 (Del. Ch. June 26, 2009) (refusing to dismiss Delaware suit in deference to earlier litigation filed in California); *see also In re Topps Co. S’holder Litig.*, 924 A.2d 951 (Del. Ch. 2007); *In re Topps Co., Inc. S’holders Litig.*, No. 600715/07, 2007 WL 5018882 (N.Y. Sup. Ct. June 8, 2007) (explaining a situation where Vice Chancellor Strine of the Delaware Chancery Court and New York Superior Court Justice Cahn both refused to grant a stay in favor of the action in the other jurisdiction); *see also Tonnemacher v. Touche Ross & Co.*, 920 P.2d 5, 8 (Ariz. Ct. App. 1996). In *Tonnemacher*, the court held, “When actions are filed in different states, invoking the authority of independent sovereigns, neither sovereign is required to yield to the other.” *Id.* (citations omitted).

135. *See* COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994) (proposing a Complex Litigation Panel that would have authority to remove related cases from state to federal court); *see also* Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897, 905–06 (1994) (comparing potential approaches to interstate consolidation).

136. 28 U.S.C. § 2283 (2006).

137. The All Writs Act, 28 U.S.C. § 1651(a), provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The All Writs Act is limited by the

occasionally tried to obtain injunctions against parallel state proceedings under the exceptions to the Anti-Injunction Act with varying degrees of success.<sup>138</sup>

The problems associated with multi-forum litigation have engendered much recent commentary among academics and practicing attorneys.<sup>139</sup> Moreover, Delaware chancery judges are openly discussing these issues in court proceedings.<sup>140</sup> Litigation in multiple forums wastes judicial resources as judges in two or more jurisdictions must review the same pleadings and documents, and are sometimes asked to decide the exact same motions. When a case invariably settles, the settling judges must arbitrate fee disputes among any non-cooperating plaintiffs' counsel. Judges in non-settling forums may spend additional resources assuring the out of state settlement is not collusive.<sup>141</sup> As recently noted by Chancellor Chandler:

In the worse case, if a case does not settle or consolidate in one forum, there is the possibility that two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all involved.<sup>142</sup>

Second, defense counsel must litigate the same case in multiple courts, leading to obvious inefficiencies and increased costs. Defense

Anti-Injunction Act and in effect runs parallel to the second exception of that Act.

138. Compare *Newby v. Enron Corp.*, 302 F.3d 295, 303 (5th Cir. 2002) (noting All Writs Act permitted federal district court to “issue narrowly tailored orders enjoining repeatedly vexatious litigants from filing future state court actions without permission from the court”), with *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.* 386 F.3d 419 (2d Cir. 2004) (noting principles of federalism dictate that federal court should not enjoin parallel state class action).

139. See, e.g., Ted Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, 7 M&A J. 17 (May 2007); Armour, Black & Cheffins, *Delaware’s Balancing Act*, *supra* note 115; David Marcus, *Multiforum Mayhem*, DEAL MAG. (Jan. 11, 2011), <http://www.thedeal.com/magazine/ID/038069/2011/multiforum-mayhem.php>; Mark Lebovitch, Jerry Silk & Jeremy Friedman, *Making Order Out of Chaos: A Proposal to Improve Organization and Coordination in Multi-Jurisdictional Merger-Related Litigation* (Dec. 31, 2010) (unpublished manuscript), available at [http://www.blbglaw.com/misc\\_files/MakingOrderoutofChaos.;](http://www.blbglaw.com/misc_files/MakingOrderoutofChaos.;) Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, DEL. J. CORP. L., Jan.–Feb. 2012, at 1.

140. See, e.g., *In re Allion Healthcare Inc. S’holders Litig.*, No. 5022-CC, slip op. at 9–10 (Del. Ch. Mar. 29, 2011) (noting the increasingly problematic fallout created by the rise of multi-forum deal litigation for which there is not yet a workable solution); *In re Compellent Techs., Inc. S’holders Litig.*, No. 6084-VCL, slip op. at 26 (Del. Ch. Jan. 13, 2011) (stating that multi-forum issues are “a problem in virtually every deal”); *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 945–46 (Del. Ch. 2010) (describing the predictable and abusive multi-forum filing strategy as a “Kabuki dance”); Transcript of Status Conference, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL (Del. Ch. Dec. 17, 2010) (suggesting possibility of collusive forum shopping).

141. For example, in *Scully*, No. 5890-VCL, Vice Chancellor Landis retained special counsel to review the out-of-state settlement and instructed the parties to provide briefing on this issue.

142. *In re Allion Healthcare Inc. S’holders Litig.*, No. 5022-CC, slip op. at 10 (Del. Ch. Mar. 29, 2011).

counsel may have to appear at various hearings in multiple forums, respond to duplicative requests for discovery, and brief and argue duplicative motions.<sup>143</sup> For defendants, multi-forum litigation can be disruptive and pose transaction risks, including the potential for inconsistent rulings. Multi-forum litigation also creates an incentive for defense counsel (who are focused on completing the M&A transaction) to attempt a forceful consolidation of plaintiffs' cases, or to attempt to "divide and conquer" by settling with one plaintiff group. Critics contend that defense counsel often try to cut a quick settlement deal with the "weakest link" among plaintiffs' counsel,<sup>144</sup> perhaps leading to a collusive settlement.<sup>145</sup> Others argue, however, that defense motivations to settle in a particular jurisdiction are driven more by perceptions of which judge will respond most favorably to the defendant.<sup>146</sup>

The lack of formal coordination among state and federal jurisdictions can also lead to problems among plaintiffs' counsel as they jockey for position and ultimately for fees. Several theories explain plaintiffs' counsel propensity to file these cases in state as opposed to federal court, and to file in multiple jurisdictions.<sup>147</sup> One theory is that plaintiffs' counsel believe that state courts will be more sympathetic to the interests of local claimants, especially in claims against out-of-state defendants. This motivation has always driven forum shopping, and in part led to the adoption of CAFA.<sup>148</sup> Plaintiffs' lawyers may also

143. Silk & Friedman, *supra* note 139, at 2.

144. See, e.g., *In re Revlon, Inc. S'holders Litig.*, 990 A.2d at 945, n.4 ("Firms who are early filers are frequently early settlers, leading some wags in the defense bar to label them 'Pilgrims.'" (citing Thompson & Thomas *supra* note 92); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (describing "[T]he practice whereby the defendant . . . picks the most ineffectual class lawyers to negotiate a settlement."); *In re Mobile Commc'ns Corp. of Am. Consol. Litig.*, Fed. Sec. L. Rep. P 96, 558, 1991 WL 1392, at \*11 (Del. Ch. Jan. 7, 1991) ("[V]alid or strong claims may be settled too cheaply as part of an implied bargain with defendants that assures plaintiffs' counsel that there will be no opposition to payment of a generous fee."); *De Angelis v. Salton/Maxim Housewares, Inc.*, 641 A.2d 834, 838 (Del. Ch. 1993), *rev'd*, *Prezant v. De Angelis*, 636 A.2d 915, 922 (Del. 1994) ("When competition among different sets of plaintiffs' counsel exists, as it does here, there is the ever present danger that unscrupulous counsel may 'sell out' the class in order to receive a fee.").

145. See Brief of Special Counsel, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL (Del. Ch. Mar. 11, 2011) (reviewing propriety of forum shopping and providing extensive discussion of "reverse auctions" and the potential for collusion in multi-forum litigation). For an earlier explanation of the dangers inherent in the settlement of multi-jurisdictional class actions, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370-72 (1995) (coining the term "reverse auction" to describe collusive settlements).

146. Brief of Special Counsel, *Scully*, No. 5890-VCL, at 4 (noting defense counsel rarely forum shop to settle with weakest plaintiff, rather perceptions of judicial attitudes towards settlement or defendants' positions drive choice of settlement venue).

147. See, e.g., Cain & Davidoff, *supra* note 116 (finding in a study of large M & A deals completed between 2005 and 2010 that plaintiffs' attorneys bring suits in jurisdictions that award more favorable judgments and higher attorney's fees).

148. 28 U.S.C. § 1711(2)(a)(1)-(4) (2006) (highlighting "bias against out-of-State defendants" among Congressional findings that motivated the Act).

believe that their own chances to maintain control of the case increase in uncoordinated state court filings.<sup>149</sup> Also, the uncertainty of class certification and other issues in untested state trial courts could spur defense settlements.

While the first class action settlement will ordinarily bind class members in other actions based upon the same claims,<sup>150</sup> defendants often seek a global settlement as a precondition to settling with any plaintiff class.<sup>151</sup> The desirability of this global settlement precondition provides leverage to plaintiffs' counsel who have filed in alternate jurisdictions to demand a significant portion of legal fees. Even plaintiffs' counsel who filed and consented to a stay can free ride on the efforts of counsel in the settling jurisdiction.

Finally, the data underscores the increasing trend of plaintiffs' attorneys to file class action cases against Delaware corporations outside of Delaware; a phenomena one commentator called the "Anywhere But Chancery" effect.<sup>152</sup> Commentators suggest that a major factor influencing this migration is that Delaware courts are becoming increasingly diligent in policing the conduct of lead counsel<sup>153</sup> and the

149. See, e.g., *In re Compellent Techs., Inc. S'holder Litig.*, No. 6084-VCL, slip op. at 20 (Del. Ch. Jan. 13, 2011) ("[W]hen everybody is filing in the same forum, you're not guaranteed to get control of a case. But if you then go and file in another forum, you do have control of that case and then the defendants have to deal with you. You may get control of the entire action but, at a minimum, you get control of a piece of the litigation for purposes of the fee negotiations."); *In re Allion Healthcare Inc. S'holders Litig.*, No. 5022-CC, slip op. at 10 (Del. Ch. Mar. 29, 2011) (noting that plaintiff's counsel, unsatisfied with non-lead role it was offered in Delaware, refiled its case in New York); Armour, Black & Cheffins, *supra* note 116, at 33–36 (noting that first filers are more likely to keep control of litigation in states outside of Delaware). In federal courts, the PSLRA governs the appointment of lead counsel under guidelines that eliminate many plaintiffs' lawyers from serious consideration. 15 U.S.C. § 78-u4(a)(3)(B)(i) (2006).

150. U.S. CONST. art. IV, § 1 provides that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Together with its implementing statute, 28 U.S.C. § 1738 (2006) ("The records and judicial proceedings of any court of any [] State . . . shall have the same full faith and credit in every court within the United States."), the Full Faith and Credit Clause requires both state and federal courts to honor state court class action settlements. *Matsushita Elec. Indus. v. Epstein*, 516 U.S. 367, 375, 380 (1996) (directing that a federal court must honor a state court class action settlement even when the state court settlement released federal claims within the exclusive jurisdiction of the federal courts). For a recent summary of the preclusive impact of class action settlements, see Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 330 (2011) ("[I]n the substantial majority of certified class actions that settle, the judgment approving the settlement will have limited, if any, issue preclusive effect, but it will provide robust protection against the prosecution of individual follow-up suits arising out of the same factual predicate as the claims raised in the class action.").

151. Defense motivations driving global settlements include greater protection against future litigation and the elimination of non-settling plaintiffs' counsel as objectors at the class settlement hearing.

152. Mirvis, *supra* note 139; see also CORNERSTONE RESEARCH, RECENT DEVELOPMENTS, *supra* note 97, at 5 (finding that 2/3 of lawsuits involving large M & A transactions involving Delaware targets were filed outside of Delaware).

153. See, e.g., *In re Revlon S'holders Litig.*, 990 A.2d 940, 956–64 (Del. Ch. 2010) (removing

award of attorneys' fees.<sup>154</sup> For example, the Delaware courts no longer award lead plaintiff status to the first to file.<sup>155</sup> Other explanations include Delaware's image as a manager-friendly state, and the perception of plaintiffs' attorneys that settlement values may be higher outside of the Delaware state courts, where results may be less predictable.<sup>156</sup>

## V. POTENTIAL OUTCOMES

M&A objection class actions have replaced traditional stock drop cases as the lawsuit of choice for plaintiffs' securities lawyers.<sup>157</sup> In many respects, from the perspective of plaintiffs' counsel, the M&A state class action suits are even better than the stock drop cases. Like the traditional pre-PSLRA securities cases, they are filed quickly, usually within days of the announcement of an acquisition deal.<sup>158</sup> Unlike the prior cases, they also settle quite quickly, often within two or

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lead counsel for ineffective advocacy); *King v. VeriFone Holdings, Inc.*, 994 A.2d 354, 357 (Del. Ch. 2010) (criticizing the "lead counsel Olympics race").

154. See, e.g., *In re Cox Comm'n S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005) (reducing the award of attorneys' fees from \$5 million to approximately \$1.3 Million).

155. *TCW Tech. Ltd. P'ship v. Intermedia Comm'ns, Inc.*, No. 18336, 19292, 19293, 2000 WL 1654504, at \*3 (Del. Ch. Oct. 17, 2000) ("[N]one of the pending lawsuits . . . is entitled to any special status as the lead or coordinating lawsuit simply by virtue of having been filed earlier than any other pending action.").

156. Armour, Black & Cheffins, in a follow up to their original empirical piece, suggest four factors contribute to the out-of-Delaware trend: "(i) statements by Delaware judges betraying doubts about the nature of lawsuits plaintiffs' lawyers tend to bring (ii) Delaware judges began cutting plaintiff lawyers' fees; (iii) Delaware courts retreated from the 'first to file' custom in choosing lead counsel; (iv) and (iv) plaintiffs' lawyers beginning to file tagalong derivative suits, usually outside Delaware because expedited discovery is often easier to obtain elsewhere." Armour, Black & Cheffins, *Delaware's Balancing Act*, *supra* note 116, at 39-40. Comments of Stuart Grant, a Delaware plaintiff's attorney, suggest that plaintiffs may bring marginal cases in other jurisdictions as they do not play well in Delaware. Bennett, *supra* note 129; Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 611 (2006) (arguing that plaintiffs' attorneys' perceptions of judicial attitudes influence forum where cases are filed).

157. One commentator refers to the resilience of plaintiffs' counsel as the "Whac-a-Mole effect" and notes that "if certain avenues of mass litigation are foreclosed, [mass action litigators] find other avenues." Erichson, *supra* note 9, at 1607.

158. CORNERSTONE RESEARCH, RECENT DEVELOPMENTS, *supra* note 97, at 4 (finding 2/3 of lawsuits are filed within two weeks of an announcement); Searcey & Jones, *supra* note 128 (noting merger objection suits are started within hours of the M & A announcement); *TCW Tech. Ltd. P'ship.*, 2000 WL 1654504, at \*3 ("Too often judges of this Court face complaints filed hastily, minutes or hours after a transaction is announced, based on snippets from the print or electronic media. Such pleadings are remarkable, but only because of the speed with which they are filed in reaction to an announced transaction."); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 957 (Del. Ch. 2007) ("The reality is that every merger involving Delaware public companies draws shareholder litigation within days of its announcement. An unseemly filing Olympiad typically ensues, with the view that speedy filing establishes a better seat at the table for the plaintiffs' firms involved.").

three months.<sup>159</sup> Also, in the M&A class actions, defendants have added incentive to settle as soon as possible, not only to avoid litigation but also to complete the transaction at hand.<sup>160</sup> Today most M&A objection suits seek injunctive relief, with attorney fees comprising the only monetary component of the settlement.<sup>161</sup> Business lobbyists may convince Congress to view the M&A cases as a species of strike suit, the very situation that led to the PSLRA and SLUSA in the first place.<sup>162</sup>

One potential result of the proliferation of multi-forum M&A objection suits is total congressional repeal of the SLUSA Delaware Carve-Out, thereby forcing these class actions into federal court where they will be subject to the procedural provisions of the PSLRA. Another less drastic solution would be for Congress to revisit SLUSA and restrict the carve-out to litigation actually filed in the courts of an entity's state of incorporation. This would largely solve the multi-forum issue and, given Delaware's status as the leading state of incorporations, make the Delaware Chancery Court the sole forum for a majority of M & A cases. There is evidence that Congress originally inserted the Delaware Carve-Out in SLUSA, and the internal affairs/corporate governance exception in CAFA, in light of the prestige and competency

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159. See *supra* notes 152–53 and accompanying text.

160. See CORNERSTONE RESEARCH, RECENT DEVELOPMENTS, *supra* note 97, at 9 (finding that over 2/3 of lawsuits involving large M & A transactions settle within 60 days); Brief of Special Counsel, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890-VCL, slip op. at 28 (Del. Ch. Mar. 11, 2011) (“Settlements in multi-jurisdictional deal litigation are nearly always reached quickly—defendants trying to preserve their transactions need to resolve potential injunction motions before the deals close.”).

161. CORNERSTONE RESEARCH, RECENT DEVELOPMENTS, *supra* note 97, at 10–11 (finding that 82% of the settlements of its sample settle for additional disclosures only plus attorneys' fees); ADVISEN, *supra* note 128 (noting few M & A objection suits result in monetary settlement). Advisen reports that plaintiffs' attorneys collect an average of \$500,000 per M & A objection suit. ADVISEN, *supra* note 128; see also ADVISEN, *supra* note 95, at 2. Stanford Law School Professor Joseph Grundfest, director of the Stanford Class Action Clearinghouse, attributes the increase in federal M & A filings to plaintiffs' lawyers scrambling for new business. Karen Sloan, *Securities Class Actions Inched Up in 2010; Those Targeting M&As Surged*, NAT'L L.J. (2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202478518537>; see also Margaret Cronin Fisk, *Merger Claims Drive Rise in Securities Class Actions, Study Says*, BLOOMBERG (Jan. 20, 2011), <http://www.bloomberg.com/news/2011-01-20/merger-claims-drive-rise-in-securities-class-actions-study-says.html>.

162. ADVISEN, MANAGING RISK THROUGH THE ECONOMIC RECOVERY: AN ADVISEN BRIEFING 6 (2011) (noting that some regard merger objection suits as strike suits designed to settle quickly without regard to the merits of the claim). Indeed, harsh language in several Delaware Chancery Court opinions and proceedings comes very close to categorizing many M & A objection suits as “strike suits.” See, e.g., *In re Cox Comm'ns, Inc. S'holders Litig.*, 879 A.2d 604, 608 (Del. Ch. 2005) (“[H]astily-filed, first-day complaints . . . serve no purpose other than for a particular law firm and its client to get into the medal round of the filing speed (also formerly known as the lead counsel selection) Olympics.”); *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 945–64 (Del. Ch. 2010) (replacing lead counsel and noting that they were “frequent fliers” who did not litigate anything before entering into a settlement MOU with defense counsel).

of the Delaware courts.<sup>163</sup> It is apparent that “for one reason or another, Delaware’s corporate law seems to enjoy great respect on Capitol Hill.”<sup>164</sup> Given the shift away from the Delaware courts, some question the viability of the Delaware Carve-Out as it currently stands.<sup>165</sup>

Short of congressional action, states could help alleviate the multi-forum litigation debacle by adopting a more formal system of state coordination. State action could take the form of uniform laws or interstate judicial cooperation and communication. Many state judges do communicate with one another in the case of duplicate class action filings, and attempt to agree which court should initially proceed with the litigation.<sup>166</sup> Of course, at present, no rule or state compact compels cooperation. Perhaps states that are major players in the class action arena could enter into a multi-state (or state/federal) compact that mimics the federal Multi-District Litigation Panel. Certainly the “Anywhere But Chancery” trend should motivate Delaware to consider such a compact, but the inefficiencies in the current, uncoordinated state system should animate other states as well.<sup>167</sup> Ultimately, only a national solution brokered by Congress would truly solve this multi-forum dilemma, albeit at the cost of one more blow to federalism.

Recently, we have witnessed some pushback from corporations that must defend suits in multiple jurisdictions. Perhaps taking the hint from dicta in Vice Chancellor Laster’s March, 2010 *Revlon* decision,<sup>168</sup> some

163. Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005) (noting that Delaware’s Senator Carper was one of eight original sponsors, and one of a handful of Democratic supporters, of the Senate version of CAFA); Leo E. Strine, *Delaware’s Corporate-Law System: Is Corporate America Buying An Exquisite Jewel Or A Diamond In The Rough? A Response To Kahan & Kamar’s Price Discrimination In The Market For Corporate Law*, 86 CORNELL L. REV. 1257, 1273–74 (2001) (suggesting expertise and efficiency of Delaware Courts may explain Delaware Carve-Out in SLUSA).

164. Kahan & Rock, *supra* note 163, at 1588.

165. See, e.g., Armour, Black & Cheffins, *Delaware’s Balancing Act*, *supra* note 116, at 65–66; Committee on Securities Litigation, *Coordinating Related Securities Litigation*, *supra* note 130, at 9.

166. See, e.g., *In re Allion Healthcare Inc. S’holders Litig.*, No. 5022-CC, slip op. at 10 n.12 (Del. Ch. Mar. 29, 2011) (noting a preferred approach for defendants to file a common motion in all implicated jurisdictions asking the judges to confer and decide “in the interest of comity and judicial efficiency, if nothing else, what jurisdiction is going to proceed and go forward and which jurisdictions are going to stand down and allow one jurisdiction to handle the matter . . . . It is a method that has worked for me in every instance when it was tried.”); *In re ICX Techs., Inc. S’holder Litig.*, No. 5769-VCL, at 4 (Del. Ch. Feb. 2, 2011) (“I do think that in this brave new world of multijurisdictional proceedings, that the respective courts need to be kept informed about what’s going on.”); *In re Burger King Holdings, Inc. S’holders Litig.*, No. 5808-VCL, at 10 (Del. Ch. Jan. 19, 2011) (“It’s simply a matter of making sure [the other court] has the information, because this is one of these many situations that we have these days, when there is multiforum litigation going on.”).

167. Cf. Brian M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision* (Boston Coll. Law Sch., Working Paper No. 112, 2011), available at [http://ssrn.com/abstract\\_id=1699464](http://ssrn.com/abstract_id=1699464) (suggesting an interstate compact as the solution but arguing that states other than Delaware would have little incentive to join).

168. *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) (“Perhaps greater

companies have amended their bylaws or charters to provide that Delaware courts are the exclusive jurisdiction for settling intra-corporate disputes, including derivative and fiduciary duty claims. Corporate advisors to Delaware corporations are increasingly recommending this strategy.<sup>169</sup> Venue provisions in charters should pass muster because charter amendments require shareholder approval. With the uncertainty of shareholder approval, however, many of the companies taking this route prefer to place the exclusive venue provision in their bylaws, which only requires approval by the board of directors.<sup>170</sup> At least one federal court, however, refused to dismiss a derivative suit for improper venue against certain directors of the Oracle Corporation, even though the company had a bylaw in place granting exclusive jurisdiction of derivative suits to the Delaware Court of Chancery.<sup>171</sup> While recognizing the validity of forum selection contracts, the court stated, “[O]racle cannot persuasively contend that its bylaws are like any other contract . . . while simultaneously arguing that it was permitted under corporate law to amend those bylaws in a manner that it could not have achieved under contract law.”<sup>172</sup>

## VI. CONCLUSION

Congress enacted SLUSA and CAFA to preclude and preempt securities class actions in state court—and it has largely been successful.

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judicial oversight of frequent filers will accelerate their efforts to populate their portfolios by filing in other jurisdictions . . . . If they do, and if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”). Before *Revlon*, the number of exclusive venue provisions in corporate charters and bylaws was quite low, but the popularity of these provisions has grown in recent months. By December 31, 2012, 195 public companies had adopted or were in the process of adopting exclusive Delaware charter and bylaw forum selection provisions. CLAUDIA H. ALLEN, *STUDY OF DELAWARE FORUM SELECTION IN CHARTERS AND BYLAWS* (last updated Apr. 7, 2011), available at [http://www.ngelaw.com/files/Uploads/Documents/Exclusive\\_Forum\\_Provisions\\_Study\\_4\\_7\\_11.pdf](http://www.ngelaw.com/files/Uploads/Documents/Exclusive_Forum_Provisions_Study_4_7_11.pdf).

169. See, e.g., Joseph Grundfest, *Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches* (Stanford Law Rock Center for Corporate Governance, Working Paper No. 91, 2010), available at <http://ssrn.com/abstract=1690561>; Latham & Watkins, *Designating Delaware’s Court of Chancery as the Exclusive Jurisdiction for Intra-Corporate Disputes: A New “Must” for Delaware Company Charter or Bylaws*, CORP. GOVERNANCE COMMENT. 4 (Apr. 2010), available at [http://www.lw.com/upload/pubContent/\\_pdf/pub3510\\_1.pdf](http://www.lw.com/upload/pubContent/_pdf/pub3510_1.pdf); see also Quinn, *supra* note 167 (analyzing rationale of many companies who do not adopt such clauses).

170. ALLEN, *supra* note 168. As of December 31, 2011, 35.4% of issuers who have adopted or are in the process of adopting exclusive venue provisions did so in their bylaws, while 55.9% proceeded or are proceeding by means of a charter provision. *Id.* However over 95% of the exclusive venue charter provisions were adopted as part of an IPO or other transaction that does not require shareholder approval.

171. *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. Jan. 3, 2011).

172. *Id.* at 1174.

In combination, these statutes leave little room for plaintiffs' lawyers to bring traditional securities stock-drop class actions in state court. The data depicting class action filings in state court from 1996–2010 confirms that very few traditional securities class actions now proceed in state court, and that they are primarily confined to local controversies involving private offerings. Similarly, in spite of the theoretical controversy over the appropriate interaction between SLUSA and CAFA and Section 11 of the 1933 Act, very few IPO cases now proceed in state court.

Regarding M&A transactions, the data tells a different story. The number of M&A class action objection suits has mushroomed over the past few years and state court is indeed the preferred venue for this litigation. Taking advantage of the SLUSA "Delaware Carve-Out," plaintiffs' counsel are filing merger objection class actions in record numbers and in multiple forums, usually alleging a violation of state fiduciary duty law or related violations under state securities statutes.

This multi-forum litigation is causing increasing problems for defendants, the judiciary, and sometimes even for plaintiffs' counsel who must negotiate with uncooperative members of their brethren. Increasingly, Delaware judges are openly lamenting, if not criticizing, the multi-forum practice as Delaware loses cases to other jurisdictions.

Merger activity continues to increase along with a corresponding increase in multi-forum M&A objection suits.<sup>173</sup> Perhaps effective state coordination or self-help venue restrictions in corporate charters could help stem this tide. Absent a major change, however, the proliferation of M&A objection suits is likely to come to the attention of Congress. Much like the alleged abuses concerning traditional securities class actions that led to the passage of the PLSRA in 1995, SLUSA in 1998, and CAFA in 2005, we should not be surprised to see congressional action eliminating or restricting the Delaware Carve-Out.

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173. See, e.g., CORNERSTONE RESEARCH, RECENT DEVELOPMENTS, *supra* note 97, at 2 (finding the average number of merger objection suits for largest transactions rose from 5.4 in 2010 to 6.1 in 2011).