Removal of Covered Class Actions Under SLUSA: The Failure of Plain Meaning and Legislative Intent as Interpretative Devices, and the Supreme Court's Decisive Solution

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REMOVAL OF COVERED CLASS ACTIONS UNDER SLUSA: THE FAILURE OF PLAIN MEANING AND LEGISLATIVE INTENT AS INTERPRETATIVE DEVICES, AND THE SUPREME COURT’S DECISIVE SOLUTION

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INTRODUCTION

Should a claim, based in federal law and filed in state court, be removable to federal court under the Securities Act of 1933 and the Securities Litigation Uniform Standards Act of 1998 (SLUSA)? The answer to that seemingly simple question has not been clear.¹ For the last ten years, various court opinions and academic articles have parsed the plain meaning of SLUSA and the legislative intent surrounding the statute and have come down on different sides of what is, at its core, a simple issue.² Different district courts have reached different conclusions, and some district courts have even reached contrasting conclusions at different times.³ This indecision regarding the proper forum for 1933 Act claims initially filed in state court has created uncertainty for both plaintiffs and business owners, who now cannot be sure which court will eventually decide the claim at issue. Fortunately, in 2006, the Supreme Court handed down an opinion that should answer the nagging removal question.⁴ Since the Kircher v. Putnam Funds Trust decision, several courts in different federal jurisdictions have used the Supreme Court's language to cut through the normative confusion and lay down the law as it currently stands.⁵ It is the position of this Note that, in lieu of Kircher, claims based solely in federal law and initially filed in state court are not removable under the 1933 Act and its SLUSA amendment.⁶

There are two ways that courts have interpreted the removal provision of the 1933 Act. For the purposes of this Note, they will be referred to as the "narrow interpretation" and the "broad interpretation." The narrow interpretation holds that only claims based in state law, not claims based in federal law, are removable to federal court.⁷ The broad interpretation holds that claims based in either state or federal law are removable to federal court under the 1933 Act.⁸ With only these two options, one would not think it strenuous for courts to definitively coalesce around a single

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¹ See Unschuld v. Tri-S Sec. Corp., No. 06-02931, 2007 U.S. Dist. LEXIS 68513, at *3 (N.D. Ga. Sept. 14, 2007) ("Although the question is straight-forward, the answer has been anything but simple.").
² See id.
³ See infra Part I.
⁵ See infra Parts III, IV.
⁶ See infra notes 14-21 for the language of SLUSA that is at issue.
⁷ See infra Part I.
⁸ Id.
interpretation. In reality, finding a consensus has been much more difficult.

For such a straightforward topic, SLUSA’s removal question has given rise to a fair amount of literature. Some articles deal not with which claims should be removable, but with the related issue of whether a state or federal appellate court should hear an appeal of a district court’s remand order following an attempted removal out of state court.\(^9\) Other articles attempt to synthesize the current case law and statutory provisions to create a workable and non-contradictory interpretation of the removal provision.\(^1^0\) Still other articles approach the removal question from a mostly normative perspective.\(^1^1\) Both William Synder and Jordan Costa appear to have reached their respective conclusions about how the law should be interpreted prior to their writing, and they both manage to get to their own (directly opposing) conclusions by using essentially the same group of facts.\(^1^2\) The purpose of this Note is to take a step back from the strong opinions that have permeated the discussion up to this point and look at the direction in which the law is actually going, not the direction in which some believe it should go. While the law may change, this present-focused approach on the current state of the law will be more immediately helpful to practitioners of securities law than more abstract, theoretical, or speculative exercises.

\(^9\) See Thomas F. Lamprecht, Note, How Can It Be Wrong When It Feels So Right? Appellate Review of Remand Orders Under the Securities Litigation Uniform Standards Act, 50 VilL. L. REV. 305, 338 (2005) (finding that SLUSA precludes appellate review of remand orders, meaning that federal appellate courts are “not available to ensure consistency and accuracy of the districts courts’ application of SLUSA”).


\(^1^1\) Compare William B. Snyder, Jr., Comment, The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court, 85 N.C. L. REV. 669 (2007) (interpreting the removal provision broadly so as to close any loopholes that Congress may have inadvertently created, and dismissing Kircher while claiming that the statutory language and legislative intent strongly support the author’s broad reading of the statute), with Jordan A. Costa, Note, Removal of Securities Act of 1933 Claims After SLUSA: What Congress Changed, and What It Left Alone, 78 St. John’s L. REV. 1193 (2004) (interpreting the removal provision strictly and finding that the plain meaning and legislative intent of the statute only allow for removal of state law claims).

\(^1^2\) See supra note 11.
Unlike the works by Synder and Costa, this Note begins with no preconceived notions about what the law should be. Rather, its purpose is to determine the current state of the law. While this Note reaches the same conclusion—that only state law claims are removable under SLUSA (the narrow interpretation)—as Costa, it does so for different reasons. Although Costa relies on the interpretative tools of plain meaning and legislative intent, this Note explains that, especially in this case, they are faulty and incomplete ways to arrive at the correct meaning of a statute. Instead, this Note will focus on the ebb and flow of recent judicial tides from one interpretation to another, ending with what, this Note contends, the Supreme Court has interpreted the law to be.

Part I of this Note will highlight the problem that courts around the country have had interpreting the SLUSA amendment to the 1933 Act. It will also identify the federal districts that have handed down conflicting decisions, as well as districts that have issued internally inconsistent opinions. Part II of this Note will illustrate why neither the plain meaning doctrine, nor focusing on legislative intent, provides a clear and acceptable answer to the removal question. Part III will evaluate the Supreme Court's recent decision in *Kircher* and explain why this decision puts an end to the interpretative controversy. Part IV will examine federal district courts that have relied on *Kircher* to conclude that the narrow interpretation of SLUSA is the correct one. Although some courts have failed to realize the full implications of *Kircher*'s holding, Part IV will analyze these misguided decisions and show that at least one court that previously favored the broad interpretation has cited the *Kircher* opinion in overturning its own decision in favor of the narrow interpretation. This movement is indicative of a slow shift in the judicial understanding of proper removal procedure under SLUSA. This Note will show that despite the pervasive confusion regarding the removal issue, the Supreme Court's decision in *Kircher* is decisive on the matter, and a narrow interpretation of SLUSA's removal provision is the correct one.

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I. LOWER COURTS HAVE BEEN UNABLE TO REACH AN INTERPRETATIVE CONSENSUS

A. The SLUSA Amendment to the Securities Act of 1933

To identify the removal problem, one must first go through a difficult but necessary series of statutory gymnastics exercises. Before the SLUSA amendment to the 1933 Act, the Act provided for concurrent state and federal jurisdiction for all claims arising under the 1933 Act: “[N]o case arising under [the 1933 Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States.” This statute put plaintiffs in securities actions in the driver’s seat of their litigation. They could choose their preferred venue for the trial and remain there. Defendant companies were forced to accept a plaintiff’s choice of venue and, consequently, the plaintiff’s choice of law. By allowing plaintiffs freedom over the choice of venue, Congress gave all plaintiffs a commanding upper hand in any subsequent litigation.

After SLUSA was enacted in 1998, the original removal prohibition remained largely intact; as a basic matter, all cases filed under the Act were still non-removable, “[e]xcept as provided in subsection (b).” Subsection (c) of SLUSA elaborates: “Removal of covered class actions. Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).” Therefore, any covered class action that meets the requirements set out in subsection (b) became removable from state court under SLUSA.

The basic definition of a covered security is not subject to dispute in this context. Nor is there confusion about the general meaning of a covered class action. However, the specific definition of the covered

15. 15 U.S.C. § 77p(a) (2000). This Note will cite to the statutory provisions in the United States Code, not the individual amendments of SLUSA.
18. 15 U.S.C. § 77p(f)(2) (2000). This definitional section of SLUSA spells out quite clearly the different ways that a class action becomes a covered class action. Important factors include the number of persons or class members involved, whether there are common questions of law or fact among the participants, the type of damages sought, and
class actions mentioned in subsection (c)—the actions that are "set forth in subsection (b)" and are now removable under the new SLUSA regime—is in question. SLUSA's definitional section does not include an explicit articulation of what types of claims must be alleged in a covered class action for the action to be removable to federal court.

This statutory labyrinthine journey ends at subsection (b), the only section of SLUSA to attempt to define exactly what kinds of covered class actions are newly removable: "Class action limitations. No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party...." All courts that have tackled the removal question have had to decide this ultimate issue: whether subsection (b)'s reference to covered class actions based upon the statutory or common law of any state means that only state law claims, and not federal law claims (specifically, claims arising under the 1933 Act), are now removable under SLUSA. In other words, does subsection (b) implicitly protect, by prohibiting their removal, certain types of class actions that allege only causes of action arising out of federal law from subsection (c)'s general grant of removal authority?

The question is complicated by the circumstances surrounding the enactment of SLUSA. In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA). Lawmakers took this action after observing "ways in which the class action device was being used to injure 'the entire U.S. economy.'" These abuses usually took the form of frivolous lawsuits, otherwise known as strike suits, filed not to correct a wrong or recover on behalf of a group of aggrieved investors, but to make quick money by causing a company, even one that may not have done anything wrong, to settle the plaintiff's claim instead of wasting time and resources litigating the issue. As a solution to this problem, PSLRA was

whether the action is a derivative action. Id. If the drafters of SLUSA had been as explicit with the definition of the "covered class actions," specifically referred to in subsection (c), the confusion currently surrounding the issue could have easily been avoided.

24. See id. (citing "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent as clients'" as problems with the current class action system) (quoting H.R. REP. NO. 104-369, at 31 (1995)).
meant to dissuade frivolous lawsuits and greedy lawyers. PSLRA imposed limits on recoverable damages and attorney's fees, mandated a stay of discovery proceedings until any motions to dismiss had been resolved, and required that all claims be stated with specificity and particularity (often referred to as heightened pleading requirements).

While PSLRA changed the way that class action lawsuits would be conducted at the federal level, it did not address those actions filed initially in state court under the 1933 Act's concurrent jurisdiction provision. As a result, plaintiffs who wished to avoid the heightened pleading requirements, and who may not have had enough information prior to discovery to succeed on a motion to dismiss, took advantage of the concurrent jurisdiction provision and filed their actions in state court. The "litigation of class actions [in state courts] involving nationally traded securities had previously [before PSLRA] been rare," but after the passage of PSLRA, state courts were flooded with class action lawsuits. It was against this backdrop of plaintiffs flocking to state court to avoid PSLRA requirements that Congress enacted SLUSA.

B. Divergent Interpretations of the Current Law

1. The Narrow Interpretation—First and Seventh Circuits

Since the enactment of SLUSA, federal district courts have split on whether the narrow interpretation or the broad interpretation of the removal provision is correct. District courts in the First Circuit favor the narrow interpretation. After reviewing the statutory language and the

25. See id.
26. Id. at 81-82.
27. See supra note 18 and accompanying text.
28. Often, a plaintiff or class of plaintiffs may suspect that something is wrong with the way a company is conducting its business, but lack sufficient proof. Before PSLRA, such a plaintiff could file a claim, immediately begin discovery proceedings, and potentially find the evidence they needed to succeed on a claim. Targeted companies contended that this immediate discovery opened the door to costly and malicious harassment by plaintiffs looking for a quick settlement. With PSLRA's mandated stay of discovery until a ruling on a motion to dismiss, a plaintiff must have sufficient evidence to defeat that motion in hand before filing a suit.
29. Dabit, 547 U.S. at 82.
30. Id. ("To stem this 'shift' 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...Congress enacted SLUSA.").
legislative history of SLUSA, the Tyco court concluded that neither element supports the view that all cases under the 1933 Act should be removable to federal court. Rather, the court found that SLUSA permits only the removal of securities claims based in state law. The Tyco court reached that conclusion two years before the Supreme Court spoke on the issue in Kircher.

District courts in the Seventh Circuit also favor the narrow interpretation. Nauheim v. Interpublic Group was a case of first impression for the court. In this action alleging solely federal claims of material misrepresentations to shareholders in connection with the defendant company's impending merger, the court denied the defendant's motion for removal on the ground that the language of SLUSA clearly and unambiguously permitted only the removal of state law claims. Like the Tyco decision in the First Circuit, Nauheim was decided well before Kircher.

2. The Broad Interpretation—Third, Fourth, and Sixth Circuits

Several other district courts favor the broad interpretation of SLUSA. District courts in the Third Circuit appear to have adopted a pragmatic response to the problem, attempting to do for Congress what they believe Congress was unable to achieve through statute alone. In Rovner v. Vonage Holdings, the plaintiffs brought claims against the defendant company based solely on the federal 1933 Act. In deciding that the case properly belonged in federal court, the Rovner court stressed that a statute should be read as a whole while looking at the context in which it was

32. Id. at 121-22.
33. Id.
35. Id. at *4.
36. Id. ("Where, as here, the words of a statute are clear and unambiguous, our inquiry is complete.").
38. Rovner, 2007 WL 446658, at *1 ("Because the Complaint raises allegations under §§ 11, 12(a)(2), and 15 of the Securities Act, and does not allege any state statutory or common law violations, Plaintiff argues that the matter must be remanded to New York State Court.").
written.\textsuperscript{39} The court stressed that the purpose of SLUSA was to send all the potentially problematic cases to the federal level, and found that the influx of federally-based cases into state court "prevented the Act [SLUSA] from fully achieving its objectives."\textsuperscript{40} Allowing plaintiffs to litigate federal cases in state court was "irreconcilable with the congressional findings."\textsuperscript{41} \textit{Rovner} and \textit{Pinto v. Vonage Holdings} were both decided in 2007. Important to the focus of this Note is the fact that neither decision mentions \textit{Kircher}. The plaintiffs in these actions may have concluded that the narrow interpretation was not a promising line of argument, but subsequent cases have proven them wrong.\textsuperscript{42}

District courts in the Fourth Circuit have gone the way of the courts in the Third Circuit and adopted a broad interpretation of SLUSA's removal provision.\textsuperscript{43} The plaintiffs in \textit{Lowinger v. Johnston} were a class of stockholders who purchased shares in the defendant company while relying on documents filed with the Securities and Exchange Commission that hid the company's looming losses.\textsuperscript{44} The only claims at issue were based on the 1933 Act.\textsuperscript{45} While acknowledging that the issue had not previously arisen in the Fourth Circuit, the \textit{Lowinger} court eschewed any independent inquiry into the facts surrounding the enactment of SLUSA and relied entirely on one case from the Second Circuit.\textsuperscript{46} The Second Circuit jurisprudence on this issue has been murky at best,\textsuperscript{47} and the opinion the \textit{Lowinger} court cited did not contain a particularly robust inquiry into the statute. It is therefore difficult to say exactly what factors the court found most persuasive in considering the removal issue. Still, whatever the reason, in this jurisdiction, solely 1933 Act claims are removable under SLUSA.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{39} \textit{Id.} at *4.
\item \textsuperscript{40} \textit{Id.} at *5.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{See infra Part IV.}
\item \textsuperscript{43} \textit{See} \textit{Lowinger v. Johnston}, No. 05-316-H, 2005 WL 2592229 (W.D.N.C. Oct. 13, 2005).
\item \textsuperscript{44} \textit{Id.} at *1-2.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.} at *4 (quoting Cal. Pub. Emples. Ret. Sys. v. WorldCom, Inc., 368 F.3d 86 (2d Cir. 2004)).
\item \textsuperscript{47} \textit{See infra} notes 56-61 and accompanying text.
\item \textsuperscript{48} It is also important to note that unlike the Third Circuit's decisions that avoided \textit{Kircher}, the Fourth Circuit's decision in \textit{Lowinger}, and the cases that the \textit{Lowinger} court relied on in reaching the broad interpretation, were all decided well before \textit{Kircher}. Additionally, it is worth pointing out that district court judges are not necessarily bound by the decisions of their brethren in the same circuit. It is therefore possible that different
The final circuit in which district courts have expressed an unwavering enthusiasm for the broad interpretation of SLUSA is the Sixth Circuit.\footnote{In re King Pharmaceuticals, Inc., 230 F.R.D. 503 (E.D. Tenn. Feb. 6, 2004); Kulinski v. Am. Elec. Power Co., No. 2-03-412, 2003 WL 24032299 (S.D. Ohio Sept. 19, 2003).} The court in King decided the issue quickly and succinctly: “Both the legislative history and common sense support the removability of class actions filed in state court asserting claims exclusively under the 1933 Act.”\footnote{In re King Pharmaceuticals, \textit{supra}, at 505. The court also cited the possibility of confusion of issues created by having concurrent class actions asserting similar claims in both state and federal court. \textit{Id}.} The opinion cited no precedent and gave no reasoning. It also avoided any consideration of the plain meaning of the statute, by instead jumping straight to Congress’s purpose in passing SLUSA.\footnote{\textit{Id}; see infra Part II.B for a discussion of Congress’s intent.} In Kulinski \textit{v. American Electric}, plaintiffs brought claims under the 1933 Act alleging misleading and untrue statements by the defendant company in connection with a dividend reimbursement plan that induced shareholders to buy additional stock while the company’s stock plummeted.\footnote{Kulinski, 2003 WL 24032299, at *1.} The Kulinski court found that the language of the statute and the legislative intent both supported a broad reading of the removal provision.\footnote{\textit{Id.} at *1-4.} In so doing, the court cited heavily to a California federal district court case\footnote{Brody v. Homestore, Inc., 240 F. Supp. 2d 1122 (C.D. Cal. 2003).} that has since been limited and ignored by a series of subsequent district court cases in the Ninth Circuit.\footnote{\textit{See infra} notes 69-77 and accompanying text.}

3. Inconsistent Circuits—Second, Fifth, and Ninth Circuits

Plaintiffs filing federal claims in courts in the First and Seventh Circuits know that their cases will likely end up in state court. Conversely, plaintiffs filing in courts in the Third, Fourth, and Sixth Circuits can be fairly certain that their cases will be decided in federal court. The real danger with having differing interpretations of SLUSA lies in the fact that in courts in the Second, Fifth, and Ninth Circuits, plaintiffs may have little
or no idea where their claims will ultimately be decided; those circuits, at various times, have embraced both the narrow and broad interpretations.

In the Second Circuit, the District Court for the Eastern District of New York reached opposite conclusions in the span of seven months. In *Irra v. Lazard*, with the now Chief Judge Dearie writing the opinion, the court found that state courts should handle a claim by plaintiffs that alleged the defendant offered misleading statements in the course of a public offering under Section 11 of the 1933 Act. The decision relied heavily on the fact that the “Second Circuit has interpreted almost identical language” in other cases. The *Irra* court concluded, with no other explanation, that because “[p]laintiffs’ claims are based solely on the Securities Act,” they are not removable under SLUSA. In the later case of *Rubin v. Pixelplus*, with the then Chief Judge Koram authoring the opinion, the court reached the opposite conclusion in a similar situation involving claims arising solely under the 1933 Act. In finding that the case should be removable, the court considered both the statutory language and the legislative intent of SLUSA and arrived at what it considered a “reasonable construction.” In doing so, the *Rubin* court avoided mentioning its previous decision in *Irra*.

The Fifth Circuit is another circuit where district courts have reversed their interpretation of SLUSA within the course of a year. The decision in *Waste Management* was the first time a court in the Fifth Circuit dealt with the removability issue under SLUSA. After looking extensively at the statutory language and the purpose of Congress in passing the


58. Id. at *1 (citing *Dabit v. Merrill Lynch*, 395 F.3d 25, 33 (2d Cir. 2005), *rev’d on other grounds*, 547 U.S. 71 (2006)).

59. Id.


61. Id. at *6. The *Rubin* court dealt with the *Kircher* decision at some length and reached the conclusion that it supported a broad interpretation of the removal statute. This Note contends that this court’s reading of the Supreme Court’s decision is incorrect. See infra Part IV.


63. *In re Waste Mgmt.*, 194 F. Supp. 2d at 596.
amendment to the 1933 Act, the court concluded that "the removal sections under SLUSA are expressly and precisely drawn and limited." There was no statutory ambiguity; the court was convinced that Congress knew exactly what it was doing in passing SLUSA, and meant to allow the removability of only claims based in state law. A year later, in *Alkow v. TXU*, the court undertook a "careful reading of the statute" and decided that the SLUSA amendment would be rendered useless if it were read to only permit the removal of state law based claims. The court also expressed a desire to help Congress fulfill its intent in curbing frivolous lawsuits that frustrated the purpose of SLUSA. In adopting a broad interpretation, the *Alkow* court did not mention the *Waste Management* decision.

The Ninth Circuit, specifically the district court for the Central District of California, is the final jurisdiction where courts have adopted different interpretations of the removal provision. In *Brody v. Homestore*, a case which dealt with federal claims arising from a kick-back scheme by the defendant company, the court found that the removal provision should be construed broadly. The court looked at Congress’s legislative findings when SLUSA was passed, as well as the intent and purpose behind the amendment. The *Brody* court avoided an analysis of the statutory language, except to note that the removal amendment was added to a section of the 1933 Act that up to that point had allowed for concurrent

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64. *Id.* For the *Waste Management* court, it might have mattered that they found no deceptive motive on the part of the plaintiffs: "[T]his Court observes that there is no allegation, no less any evidence, in this action that Plaintiffs are attempting to fraudulently plead around SLUSA to avoid removal into state court." *Id.*

65. *Id.*


67. *Id.*

68. *Id.* at *2 ("In short, Congress intended SLUSA to prevent the exact maneuver used by the Alkows here.").


71. The court specifically relied on the fact that "a number of securities class action lawsuits have shifted from Federal to State courts." *Id.* at 1124.
jurisdiction.\textsuperscript{72} The court failed to explain why it found that fact particularly persuasive.\textsuperscript{73}

After the \textit{Brody} decision, the Ninth Circuit district courts began to shift toward a narrower interpretation. In \textit{Hawaii Structural Ironworkers v. Calpine Corporation}, the court acknowledged that statements by members of Congress may indicate that they intended to have SLUSA apply to all claims, not just those founded in or brought under state law.\textsuperscript{74} However, the court also found that the language of the statute itself was plain and clear and adopted the narrow approach, holding: “[W]here the language of the statute is clear, it is not up to the Court to modify it to effect Congress’s likely intent.”\textsuperscript{75} Similarly, the court in \textit{Pipefitters v. Salem Communications} found that the language of the removal provision was clear, not subject to competing interpretations, and that a narrow interpretation would not render the language meaningless.\textsuperscript{76} The court agreed with the reasoning of the \textit{Hawaii Structural Ironworkers} court that the inquiry should stop when the language is clear.\textsuperscript{77} The court remanded the action back to state court for action in accordance with its understanding of the narrow interpretation.

There is a general and widespread sense of uncertainty regarding the proper interpretation of SLUSA’s removal provision in light of recent rulings, particularly those decisions in district courts in the Second, Fifth, and Ninth Circuits. Courts have demonstrated a tendency to ignore prior decisions when it suits their needs and have given varying weight and importance to statutory language and legislative intent. Even then, the courts have interpreted the facts of SLUSA in various ways. As the law currently stands, there is a definite split at the district court level across the country, and the traditional methods of determining how the removal provision of SLUSA should be interpreted have proved insufficient.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{72} Id. at 1123-24.
\item \textsuperscript{73} That has not stopped other courts from relying on the \textit{Brody} decision. See supra note 54.
\item \textsuperscript{74} \textit{Hawaii Structural Ironworkers}, 2003 WL 23509312, at *2.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} \textit{Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Commc’ns Corp.}, No. 05-2730-RKG, 2005 U.S. Dist. LEXIS 14202, at *5-7.
\item \textsuperscript{77} Id. at *5, 7, 8 (“Legislative history is irrelevant to the interpretation of an unambiguous statute.” (quoting Davis v. Michigan Dep’t of Treasury, 489 U.S. 803, 808 n.3 (1989))).
\end{itemize}
\end{footnotesize}
II. THE CURRENTLY ACCEPTED INTERPRETATIVE FRAMEWORKS HAVE PROVEN INADEQUATE TO ANSWER THE SLUSA REMOVAL QUESTION

A. The Plain Meaning of the Statute Is Vague and Open to Interpretation

When interpreting a statute, courts initially look to the plain meaning of the words that the legislature used when drafting the law.\(^{78}\) The goal of the courts is to give meaning to every word of the statute.\(^ {79}\) If the words can be interpreted to reach an understandable and rational conclusion, the interpretative inquiry ends there. When the law is plain and clear on its face, courts have no obligation to change the law to better conform with Congress’s original intent.\(^ {80}\) The courts that have determined that the meaning of the relevant SLUSA statute is plain and unambiguous have almost uniformly adopted the narrow interpretation of the removal statute.

The courts that do find SLUSA’s language clear spend very little time in the analysis. They often merely recite the words of the statute followed by a perfunctory and conclusory summation, as though the meaning of the statute is so obvious that it needs no more explanation.\(^ {81}\) While this represents the spirit behind the plain meaning framework, simply holding that "the plain language of the Securities Act, as amended by SLUSA, clearly and unambiguously permits the removal of only those covered class action complaints that are based on State statutory or common law,"\(^ {82}\) without offering reasons for that conclusion, strongly suggests a

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78. See, e.g., Reves v. Ernst & Young, 507 U.S. 170, 177 (1993); Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). It will become axiomatic that in this case, it is difficult to discern any clear legislative intention, let alone a contrary legislative intention. See infra Part II.B.

79. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").


81. See Nauheim v. Interpublic Group of Cos., No. 02-C-9211, 2003 WL 1888843, at *3 (N.D. Ill. Apr. 16, 2003) (deciding that the plain meaning was applicable after repeating the statutory language with no explanation); see also Jeffery T. Cook, Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws, 55 Am. U. L. Rev. 621, 624 (2006) ("The heart of the PSLRA … does not apply to 1933 Act claims. Nor does SLUSA, which by its plain language applies only to state law claims.").

type of judicial pre-determinism. In reading the holdings of courts that have adopted the narrow interpretation of the removal provision, one often gets the impression that the court had made up its mind before considering the applicable statute. Other courts deal only briefly with the complex statutory construction arguments of those who would prefer a broad interpretation. This is not to say that the courts reach the wrong result; it is certainly possible that SLUSA is perfectly clear to them. However, it also must be acknowledged that the statute is arguably dense and potentially confusing. Courts that find it to be clear would do well to explain more thoroughly how they reached their conclusion.

Courts that have held that the language is murky rather than clear and unambiguous are guilty of the same sin of under-explanation. Their brief discussions of why the language is not clear are similarly subject to the criticism that the court has already decided the result of the case and simply needs a path to the broad interpretation of the removal provision. In rejecting the plain meaning approach, the main ambiguity that these courts have pointed to is the language of 15 U.S.C. § 77p(c). Defendants in these removal cases have argued that the phrase “as set forth in subsection (b)” should only apply to the term “covered security,” and not “covered class action” as well. Such an interpretation would essentially render both state and federal claims removable. One court has gone a step further than simply highlighting the ambiguity regarding what phrase “as set forth in subsection (b)” modifies and has implicitly accepted the broad interpretation as the plain and clear one.

The point of this section is not to weigh in on the merits of either side of the plain meaning argument. At the very least, it is obvious that the language of subsections (b) and (c) of 15 U.S.C. § 77p is not as clear as it


84. 15 U.S.C. § 77p(c) (2000) (“Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)”)(emphasis added).


86. See Brody v. Homestore, Inc., 240 F. Supp. 2d 1122, 1123 (C.D. Cal. 2003) (finding somewhat contradictorily that the language of SLUSA was clear enough to support defendant’s interpretation while at the same time indicating that the statute is “inartfully [sic] (or even inaccurately) worded”).
could be. Because the removal provision suffers from this deficiency, the plain meaning doctrine is certainly not the ideal framework for courts to determine the scope of removal. A more concrete method that does not suggest that a court is trying to rationalize a result would give either side more credibility.

It should be noted that, in some judicial circles, the plain meaning doctrine is losing favor, or at least its long assumed primacy in statutory interpretation. For example, in *State v. Courchesne*, a case that dealt with the correct interpretation of a statute providing for aggravating factors in criminal prosecutions of multiple murders, the Connecticut Supreme Court explicitly rejected the plain meaning doctrine of statutory interpretation in favor of an approach that combined the language of the statute with the court's analysis of the judicial intent. The court held that because of the plain meaning rule's potentially inconsistent nature when faced with poorly drafted statutes, it is not "a useful rubric for the process of statutory interpretation." The court also found that the plain meaning rule can be self-contradictory when the plain meaning of words leads to ridiculous or unworkable results, and that it requires courts to make a difficult threshold determination of ambiguousness. The *Courchesne* Court seemed puzzled by the general acceptance of the plain meaning

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89. *Id.* at 568. Specifically, the court found that for "especially heinous, cruel, or depraved" aggravating factors to apply against a criminal defendant convicted of multiple murders, "it is not necessary under that statutory scheme that the defendant in the present case intentionally, or callously or indifferently, inflicted extreme pain, suffering or torture on both of his victims, so long as he is shown to have done so with respect to one of his victims." *Id.*

90. *Id.* at 582.

91. *Id.* at 582-83.

92. *Id.*
doctrine, finding that the constitutionally required separation of powers does not compel or demand a certain method of statutory analysis that ignores legislative intent, and that courts should be free to employ a "purposive and contextual method of interpreting statutes."\footnote{Id. at 588 ("The [Connecticut] constitution says nothing about what type of language the legislature must employ in performing its tasks, and nothing about what method or methods the judiciary must employ in ascertaining the meaning of that language.").}

In response to the \textit{Courchesne} decision, the Connecticut State Legislature took the highly unusual—and potentially unconstitutional\footnote{It appears that the Connecticut Legislature is clearly stepping on, and possibly over, the boundary between the legislative and judicial branches by mandating how courts should approach statutory interpretation. It would seem to be an issue ripe for academic study and comment.}—step of dismissing the reasoning of the Connecticut Supreme Court and codifying court standards for statutory interpretation.\footnote{Conn. Gen. Stat. Ann. § 1-2z (West 2009).} The Legislature essentially mandated the plain meaning rule in dictating that courts should first attempt to ascertain the meaning of the statute from the words used and the meaning of the surrounding statutes.\footnote{Id.} Subsequently, "if after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."\footnote{Id. (emphasis added).} In addition to directing courts how to do their jobs, the Legislature has put the court system at the mercy of poorly drafted statutes. In Connecticut, the possibility now exists that a statute may only be legally subject to one interpretation, despite a clearly contrary intention by the Legislature. In that situation, reviewing courts would not be permitted to adopt a contrary interpretation.\footnote{In a strange and arguably counterproductive move, the Legislature has essentially removed its own safety net. Drafters of statutes now only have one opportunity to get the language correct; courts will no longer correct the Legislature's careless drafting mistakes.}

As of the end of their last term, the Connecticut Supreme Court has declined to rule on the constitutionality of the Legislature's apparent intrusion into the realm of separation of powers.

This Note does not pretend that the plain meaning doctrine is on its death bed, a few decisions away from obsoleteness. It is almost certain that courts will continue to accept the doctrine. This section is merely
intended to illustrate that at least some courts and commentators believe that a thorough and comprehensive approach—one that strives for accuracy in statutory interpretation—involves more than just examining the arguably straightforward meaning of the words the relevant legislature used. Certainly in considering the proper interpretation of SLUSA, the plain meaning doctrine has proven to be an imperfect and malleable instrument.

B. The Legislative History of the Statute Is Unclear

When statutory language is open to more than one reasonable interpretation, courts attempt to find the meaning "which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested."99 Courts are supposed to divine what Congress really meant from the compilation of transcripts of congressional hearings, debates, and floor speeches, in addition to the codified legislative findings.

It should be noted from the outset that this method of statutory interpretation is inherently problematic. Judge Alex Kozinski, Chief Judge of the Ninth Circuit, has commented that "consulting legislative history is like 'looking over a crowd of people and picking out your friends.'"100 Such an acknowledgement of the limitations of looking to legislative history should give courts pause before using it as the determinative factor in divining statutory meaning. Courts on both sides of the removal issue selectively use legislative history to reinforce their conclusions.101 There are sections of the legislative history of SLUSA pertaining to the removal of state and federal law claims to federal court that supposedly support both the broad and narrow interpretations; as such, looking to that history is another unsatisfactory way of attempting to correctly interpret the statute. The failure of legislative history to yield conclusive results

101. These excerpts seem to be used to justify and rationalize the holding, as opposed to being used to actually understand the statute. Courts use legislative history in the same way they use the plain meaning doctrine—selectively and without important context. See supra notes 81-86 and accompanying text.
removes the need for a concrete and authoritative interpretation of
SLUSA.102

Courts that favor a narrow interpretation of the removal provision
point to the first sentence of SLUSA as conclusive proof that Congress
intended to allow cases arising under federal law to be litigated in state
courts. The sentence indicates that the Act's purpose is "to limit the
conduct of securities class actions under State law."103 Using that
language, courts have found that a narrow interpretation of the statutory
provision does just that; it forbids the use of state law in state court, while
still allowing the use of federal securities law in state court.104

Courts also find supportive language for the narrow interpretation of
the removal provision in SLUSA's conference reports. Specifically, some
courts have endorsed the statement that the purpose of SLUSA was to stop
plaintiffs from attempting to "evade the protections that federal law
provides against abusive litigation by filing suit in State court, rather than
Federal Court."105 By narrowly construing removal, courts can close the
statutory loophole by forbidding plaintiffs from basing a claim in state
law; in so doing, they obey the mandate that the proper arena for certain
cases will be in the federal system, while allowing other claims based on
federal law to remain in the state court where plaintiffs originally filed.106

Many courts that have adopted the narrow interpretation have not
given sufficiently complete opinions on what the legislative history
contains. Having found the language of the statute unambiguous, they
often view such an inquiry as superfluous.107 Other courts that interpret
SLUSA narrowly deal with the legislative history cursorily, finding that
although certain statements or documents may suggest one interpretation
or another, the legislative history, taken in its entirety, is too cloudy to

102. Thankfully, the Supreme Court has seen fit to comment on the interpretative
morass in a way that some courts, and this Note, contend is conclusive. See infra Part III.
104. See Nauheim v. Interpublic Group of Cos., Inc., No. 02-C-9211, 2003 WL
1888843, at *5 (N.D. Ill. Apr. 16, 2003); Unschuld v. Tri-S Security Corp., No. 06-
106. See Nauheim, 2003 WL 1888843, at *5; see also Unschuld, 2007 U.S. Dist.
LEXIS 68513, at *27. However, the logic of the reasoning that the narrow interpretation
accomplishes the goal of the abovementioned statement seems tenuous at best.
107. See Patenaude v. Equitable Life, 290 F.3d 1020, 1025 (9th Cir. 2002); see also
interpret. As the legislative history is “murky insofar as it suggests an answer to the question before the Court,” courts favoring a narrow interpretation have found that it lacks enough probative force to be reliable or dispositive.

Courts favoring a broad interpretation of the removal provision obviously think differently. In their view, certain excerpts of the legislative history prove conclusively that Congress meant to remove all securities claims from State court, and simply fell victim to sloppy or misleading drafting. This argument begins with the congressional findings of SLUSA, which state that PSLRA tried to prevent abuse in private securities fraud litigation. Courts favoring this approach next argue that since PSLRA’s enactment, the increasing number of plaintiffs filing in state court has prevented PSLRA from achieving its objectives. Congress therefore intended SLUSA to counter that shift. Allowing any securities claims to remain in state court would enable plaintiffs to do an end-around PSLRA. Therefore, the correct objective of SLUSA was to make “[f]ederal courts the exclusive venue for most securities class action lawsuits.”

Another potentially persuasive piece of legislative history that broad interpretation courts have deemed important is a statement in the Congressional Record from Representative Thomas Bliley, a Republican from Virginia. In support of SLUSA’s passage, Representative Bliley said: “The premise of this legislation is simple: lawsuits alleging violations that involve securities that are offered nationally belong to Federal court.” Some courts have cited this quote with approval, finding that it assists in clearing up the statutory jumble. Still, the wisdom of relying on the

108. See Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Comm. Corp., No. CV 05-2730-RGK, 2005 U.S. Dist. LEXIS 14202, at *8 (C.D. Cal. 2005) (“While some pieces of SLUSA’s legislative history might, standing alone, show a desire by Congress to move many security class action claims to federal court, when taken as a whole the legislative history does not show a ‘clearly contrary congressional intent.”’).
110. See supra notes 37-54 and accompanying text.
REMOVAL OF COVERED CLASS ACTIONS

statement of one out of five hundred and thirty five members of Congress recalls the cautioning words of Judge Kozinski.116

With such confusion over the proper interpretation of the words of the removal statute, as well as the lack of clarity regarding Congress’s intent in drafting the language, any decision that relies solely on these factors would seem to lack legitimacy. Courts can twist the facts surrounding SLUSA to support either the narrow or broad interpretation. Until recently, the ground had been tread so many times that there was “nothing very original left to say about [the] ... running dispute.”117 That was the situation until 2006, when the Supreme Court handed down a “tiebreak[ing]”118 ruling that should have provided an appropriate framework in which to analyze the removal question and eliminated any further need to use plain meaning or legislative intent.

III. THE TIEBREAKER: THE SUPREME COURT’S DECISION IN KIRCHER

Kircher v. Putnam Funds Trust was a case involving a remand by a district court of a class action securities claim based in state law.119 The main issue in the case was whether the Seventh Circuit had the jurisdiction to review the district court’s decision to remand a claim back to state court based on the district court’s apparent lack of subject matter jurisdiction.120 This question—whether a federal or state court has the power to review a remand decision—is another problem caused by the inarticulateness of SLUSA.121

In Kircher, the district court concluded that the plaintiffs were “injured as ‘holders’ of mutual fund shares, not [as] purchasers or sellers.”122 As

116. See supra note 100 and accompanying text. In this case, the crowd that one is peering out over is the Congress. Citing to one “friend” at the expense of all others seems to be an exercise of questionable validity. It is not unreasonable to be skeptical of the gloss that any representative puts on a bill. It is equally likely that another representative has an equally persuasive, yet substantively different, interpretation. Selectively omitting all Congressional evidence but that which agrees with a particular position gives that position an air of illegitimacy.


118. Id. at *31.


120. Id. at *31-32.

121. See supra note 9 and accompanying text.

holders, the district court reasoned that the plaintiffs did not satisfy the section of SLUSA that allows for the removal of claims that arise "in connection with the purchase or sale of a covered security," and the court, therefore, remanded the case back to state court. The Seventh Circuit reversed and ruled for the defendant trust fund, allowing the removal of the claim.

Subsequent to these rulings, and just three months before its decision in Kircher, the Supreme Court tackled the exact question of what "in connection with the purchase or sale of a covered security" actually means. In Dabit, the Court found that holders of mutual fund shares are included in subsection (b)'s list of precluded, removeable claims. The ultimate Kircher ruling was therefore procedural, not substantive, when it held that under federal law, the case should never have been heard on appeal at the federal level. In Kircher, the Court did express optimism that the state courts would read Dabit on remand and decide the case accordingly.

In holding that the Seventh Circuit overstepped its jurisdiction in hearing the appeal from the district court, the "majority opinion [in Kircher] went further and ... [i]n doing so ... made a pronouncement that, albeit dictum, purported to set a standard that would dictate the result in this case." After the ultimate issue of the case had been decided, Justice Souter elaborated on the scope of SLUSA and removal generally. Although the pertinent part of the ruling with regard to this Note's removal issue is admittedly dictum, several different courts that have considered the issue in light of Kircher have found that the narrow interpretation of the removal provision is the correct one.

124. Kircher, 547 U.S. at 638.
125. Kircher v. Putnam Funds Trust, 403 F.3d 478 (7th Cir. 2005).
127. Id.; Kircher, 547 U.S. at 638 n.5.
128. 28 U.S.C. § 1447(d) (2000) (stating that an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise").
130. Id. at 635.
131. Id. at 639.
133. Kircher, 547 U.S. at 646.
Specifically, the *Kircher* Court held that, when deciding which claims are removable under subsection (c), there is "no reason to reject the straightforward reading: removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." As has been discussed, one of the applicable parts of subsection (b) refers to any "covered class action based upon the statutory or common law of any State." This tracks with the reasoning of the district court in *Kircher*. Although the district court was incorrect in determining that holders were not precluded and not removeable, the Supreme Court acknowledged that the lower court was correct to say that the failure of a claim to conform to any part of subsection (b), not just that part dealing with covered securities, can be grounds for a court to deny removal.

It is noteworthy that the *Kircher* Court referred to removed cases and subsection (b) in the same breath. Courts favoring the broad interpretation have argued that the subsection (b) limitation applies only to covered securities, not covered class actions. By including the two terms together, the Court suggested that the limitation on removal in subsection (c) should apply to particular class actions, not simply to particular covered securities.

The *Kircher* Court continued by explaining that "if the action is not precluded [under subsection (b)], the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it." In other words, an action will only be precluded from the concurrent jurisdiction of the 1933 Act, and can only be removed, if the action meets all of the required elements of subsection (b). If a claim is not precluded, perhaps because the claim does not implicate state or common law, or because the incorrect kind of covered security is alleged, the Court recommended labeling the claim as unremovable and sending the claim back to state court. It is through this mechanism that the concurrent jurisdiction of the 1933 Act is preserved for federally based claims.

138. *Kircher*, 547 U.S. at 638 n.5.
139. See supra notes 85-86 and accompanying text.
140. *Kircher*, 547 U.S. at 644.
141. See infra notes 142-44 and accompanying text for an explanation of why all, not just some, of the provisions of subsection (b) must be met for issue preclusion and removability.
The logic of *Kircher* regarding the effect that a subsection (b) covered security provision can have on removability can be directly applied to the question at issue in this Note. While *Kircher* dealt with one specific phrase of SLUSA, the broad versus narrow question deals with a different phrase in the same statutory section. However, an internally consistent interpretation of SLUSA can only be achieved by giving the state law provision as much power as the covered security provision. To read the statute as allowing only the covered security provision to prohibit removal, particularly given the lack of statutory language stating that one provision or clause in that subsection should be given more weight than another provision, would render the introductory language in subsection (b) useless.

By ruling that subsection (b)(1) can prohibit removal, the *Kircher* Court seemed explicitly to say that if a claim fails to meet any one of the requirements of subsection (b), removal is not an option. Therefore, if a claim is brought that is not based upon the statutory or common law of a state, the proper action for the federal courts is to remand the claim back to the state level. It follows, then, that a claim based in federal law, which is not precluded by the state or common law language in subsection (b), should be entertained at the state level.

IV. THE SUBSEQUENT DISTRICT COURT REACTION—
SOME SEMBLANCE OF UNIFORMITY?

A. *Kircher* as an Endorsement of the Narrow Interpretation

After the 2006 *Kircher* decision, several courts faced the narrow versus broad interpretative question. The courts that identified *Kircher* as

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143. 15 U.S.C. § 77p(b) (2000) ("[B]ased upon the statutory or common law of any State.").
144. For example, not asserting: (1) an untrue statement or omission of material fact, (2) a statement in connection with the purchase of a covered security, (3) a manipulative or deceptive device, or (4) a claim based in state or common law. See 15 U.S.C. § 77p(b) (2000).
145. The Supreme Court appears to implicitly embrace the plain meaning argument discussed supra Part II.A, insofar as it finds the statute self-explanatory on its face. In determining what actions should properly be precluded, the Court makes no reference to legislative history or legislative intent. *Kircher*, 547 U.S. at 643-44.
a forceful statement by the Supreme Court adopted the narrow interpretation.

While recognizing that the Kircher decision did not perform the long and complex textual analysis that other courts have used to analyze the removal provision, the Unschuld court still viewed it as a "rather emphatic and expansive statement."\(^{146}\) The Unschuld decision assumes, without explanation, that "[p]resumably, the Court was aware of the ongoing dispute about the removal of such claims."\(^{147}\) Though that claim may initially seem flimsy, it is reasonable to think that the Court decided to kill two SLUSA birds with one stone by answering the remand question\(^{148}\) and the question over exactly what claims are covered by the removal provision at the same time. Given the mass confusion that the removal provision has caused at the district court level,\(^{149}\) it is reasonable to believe that the Court was at least aware of the problem and willing to give their definitive interpretation.

Perhaps the strongest indication that Kircher endorses the narrow interpretation of the removal provision as the correct interpretation is the fact that courts are relying on it in their removal analysis. In addition to the Unschuld court, which found Kircher to be the factor that broke the deadlock between plain meaning and legislative history,\(^{150}\) a recent decision by a district court in the Central District of California overruled that same court’s 2005 adoption of the broad interpretation.\(^{151}\) The court in Layne v. Countrywide Financial found “highly persuasive the reasoning employed by the Unschuld court, which considers in depth ... the case law, including the recent Supreme Court decision,” and found that the SLUSA provision should be interpreted narrowly.\(^{152}\) The court also recognized that “its 2005 Purowitz\(^{153}\) decision reaches the contrary result.”\(^{154}\) In deciding that the narrow interpretation was correct, the Layne court used “a number of more recent authorities that inform the analysis


\(^{147}\) Id.

\(^{148}\) See supra notes 119-21.

\(^{149}\) See supra notes 31-77 and accompanying text.


\(^{152}\) Id.


\(^{154}\) Layne, No. 08-3262, n.1.
and prompt the conclusion that remand is now appropriate." Clearly, the Kircher opinion was the factor that so quickly changed this court’s mind.

B. Some Lower Courts’ Subsequent Failure to Conform to Kircher

Although it seems clear that the Supreme Court has decided the issue once and for all, several courts appear hesitant to change their position. Even after Kircher, the District Court of New Jersey, in Pinto and Rovner, avoided any discussion of the Supreme Court’s directed message. Neither case mentioned Kircher in coming to the conclusion that the broad interpretation was correct. In light of the Kircher Court going out of its way to address the issue, it appears that these courts, in failing to even mention Kircher, missed or ignored the new interpretation.

One post-Kircher court that mentioned the Supreme Court’s decision used a different excerpt from Kircher to embrace the broad interpretation. Specifically, the Rubin court found this passage in Kircher to be persuasive: “Section 77p(c)’s authorization for the removal ... is confined to cases ‘set forth in subsection (b),’ i.e. those with claims of untruth, manipulation.” To conclude that this section mandates a broad interpretation of the removal provision by including both federal and state law claims is to engage in a tortured and misleading word game. There is no dispute that removable claims must assert some level of untruth or manipulation. However, for the Rubin court to conclude that this mere recitation of some of the requirements for removal supports the broad interpretation is deceptive. It ignores the elements listed in the introduction of subsection (b), elements of the claim that must be fulfilled before even looking to the subparts of subsection (b) to see what the claim

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155. Id.
158. See supra notes 37-41 and accompanying text.
161. 15 U.S.C. § 77p(b)(1)-(2) (2000) (stating that any removable claims must allege "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security") (emphasis added).
specifically asserts. It ignores the familiar part of the statute that requires that the claim implicate a "statutory or common law of any State" that asserts untruths or manipulation. Simply stating that a claim asserts untruths or manipulation only satisfies one half of the subsection (b) test.

Additionally, the Kircher fragment the Rubin court cited does not specify federal and/or state law claims, but only speaks of ambiguous "cases...with claims of untruth, manipulation, and so on." The Rubin court would have a more persuasive argument if Kircher had referred to cases asserting either state or federal law. Barring this, the passage Rubin cites is too ambiguous to draw any conclusions from, and is certainly less helpful than the straightforward, clear section adopting the narrow interpretation. The Rubin decision and any of its progeny, therefore, misconstrue the statute and the Supreme Court’s reading of it in a desperate attempt to keep the broad interpretation of removal jurisdiction alive. The Kircher decision should properly be understood to “not confer removal jurisdiction under this scenario [where solely federal claims are filed in state court].”

One additional post-Kircher court that has tackled the removal issue adopted an interpretation that is as clever as it is improbable. In Knox v. Agria Corporation, a court in the Southern District of New York indicated that the broad interpretation was the correct way to understand SLUSA. However, the Knox court avoided basing its ruling on either plain meaning or statutory interpretation. Instead, it focused on SLUSA "differently from other courts" and held that it was not a "court of competent jurisdiction," and had no subject matter jurisdiction over the removability of 1933 Act claims. The Knox court arrived at this conclusion by going beyond the explicit limits of the removal text and without citing any decision from any other court for support. The Knox court went on to state that mention of covered class actions in subsection

163. Kircher, 547 U.S. at 642.
164. See supra notes 130-33 and accompanying text.
167. Id. at 422.
168. Id. at 423. Indeed, such an approach is completely unique to the removal question.
171. In fact, Knox claims that all the other courts “overlooked” this argument. Id. at 425.
(c)\textsuperscript{172} does not implicate subsection (b) at all; it is merely a term of art that can be defined more accurately in the definition section.\textsuperscript{173} Knox went further to claim that the reference to subsection (b) "has no substantive content."\textsuperscript{174} Again, the opinion cites no authority for the proposition that the drafters of the statute meant for the caveat in subsection (c) to have no effect.

The reasoning of the Knox court, in addition to lacking citation to any prior authority, is also belied by the court's apparent acceptance of the conclusion that the broad interpretation is the correct one. Before delving into its reasoning, the court bluntly states that the narrow interpretation "does not make sense."\textsuperscript{175} The decision also declares that "this Court's reading is consistent with Congress's general remedial intent in passing SLUSA."\textsuperscript{176} This suggests that the court was determined to adopt the broad interpretation in any way possible, even if it had to create a new and intellectually suspect interpretative approach.

The Knox court addresses Kircher in one paragraph before summarily dismissing it as inapplicable and "not to the contrary."\textsuperscript{177} As Kircher dealt with the removal of covered class actions raising state law claims, not 1933 Act claims, Knox reasoned that nothing the Court said would impact their decision in this case involving federal claims. That Knox relied on the fact that the Kircher court did not have to explicitly decide the federal law removal question in its decision indicates that the Knox court misunderstood the meaning of dicta. Simply because the Kircher decision did not hinge on the issue at hand does not mean that there are not lessons for other courts to learn regarding SLUSA interpretation. Dicta are statements made in a decision that are not determinative in the outcome, but are nonetheless important to the deciding court. Reliance by other courts\textsuperscript{178} on Kircher's dicta indicate that it is due more respect than the Knox court's cursory dismissal.

\textsuperscript{172} 15 U.S.C. 77p(c) (2006) ("Any covered class action brought in any State court involving a covered security, as set forth in subsection (b).").

\textsuperscript{173} Knox, 613 F. Supp. 2d at 423-24.

\textsuperscript{174} Id. at 424.

\textsuperscript{175} Id. at 423.

\textsuperscript{176} Id. at 425.

\textsuperscript{177} Id.

\textsuperscript{178} See supra notes 145-54 and accompanying text.
C. Did the Supreme Court Get Kircher Wrong?

One scholarly article has attempted to claim that the Supreme Court made a mistake in *Kircher*, and, despite the Court's language, the Court meant to adopt the broad interpretation. 179 William Snyder concedes that "language in *Kircher* suggests that the Court would adopt the narrow reading of SLUSA's removal provision in the context of federal claims brought under the Securities Act," 180 but he maintains that the Court's decision in *Merrill Lynch v. Dabit* 181 indicates the Court's true intentions. After noting that the Supreme Court has apparently provided conflicting guidance 182 with regards to SLUSA removal, Snyder again delves into the problematic legislative history to discern which specific claims the statute addresses. 183 While Snyder makes many of the same arguments regarding the legislative history as those courts that have adopted the broad interpretation, 184 he fails to give due deference to the fact that *Kircher* was decided almost three months after *Dabit*. 185 Presumably, any mistakes that the Court made in their *Dabit* decision could have been rectified by *Kircher*. It seems odd to assert that *Kircher* is the decision that was incorrect, especially considering that *Dabit* was likely fresh in the Court's mind when it considered *Kircher*.

Snyder's argument fails for another reason: the section of *Dabit* that he views as decisive in signaling an acceptance of the broad interpretation does not do so. The *Dabit* court was asked to decide the proper meaning of "in connection with the purchase or sale." 186 The Court held that the phrase should be interpreted broadly and expansively. 187 From that, Snyder argues that all of subsection (b), not just the applicable subpart, should be interpreted expansively. 188 Regardless of the fact that interpreting state and common law claims "expansively" to include federal claims would strain the bounds of credulity, making a mockery of both common sense and the statute, Snyder fails to mention that *Dabit* made clear that its expansive and broad interpretation applied specifically to the

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179. See Snyder, supra note 11.
180. Id. at 692.
182. Snyder, supra note 11, at 690-93.
183. Id. at 693-97.
184. See supra notes 111-15 and accompanying text.
185. Dabit was decided on March 21, 2006, Kircher was decided on June 15, 2006.
186. Dabit, 547 U.S. at 74; see supra notes 125-26 and accompanying text.
187. Dabit, 547 U.S. at 85.
188. Snyder, supra note 11, at 690-91.
one phrase in question. Unlike Kircher, Dabit did not make broad or sweeping claims about SLUSA that were outside the scope of the issue presented. It seems clear that Kircher’s pronouncement about the totality of subsection (b) trumps anything that Dabit said about a specific section not at issue here. While Snyder may wish to argue that a broad interpretation of all SLUSA should be the rule, it is clear from Kircher that, until Congress decides to amend the removal provision, the narrow interpretation of SLUSA is the rule.

Despite Kircher’s persuasive dicta, progress toward a uniform understanding of removal under SLUSA still appears elusive. Though several courts have adopted the narrow interpretation post-Kircher, other courts and commentators appear reluctant to change, and instead cling to inadequate interpretative tools or insufficient and incomplete arguments. Although the law is not as settled as it should be post-Kircher, courts that go into a removal question with an open mind and without preconceived notions should recognize the importance of the Kircher dicta and follow the lead of the Unschuld and Layne courts in embracing the narrow interpretation.

CONCLUSION

How courts interpret a statutory provision governing the removal of a claim alleging securities violations may initially seem like a minor problem. To those plaintiffs filing in state courts, however, it has a tremendous impact on how their case will progress. It becomes even more consequential when one considers the large amount of interpretative chaos that one small provision has caused. It is not the goal of this Note to speculate normatively on what the law should be, or about the various policy considerations that go into such a decision, or about the benefits of strictly regulating class action lawsuits. Rather, this Note is designed to remove any confusion about what the law is after Kircher, as well as to question the usefulness of both the plain meaning doctrine and the use of legislative history and intent when it comes to examining the removal provision.

The two interpretative frameworks that the courts dealing with SLUSA have used are both woefully inadequate methods of achieving the correct

189. Dabit, 547 U.S. at 85 ("Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase—‘in connection with the purchase or sale’—into SLUSA’s core provision.").

190. See supra Part I.
Plain meaning and legislative intent, when applied to SLUSA interpretation, are mere empty vessels that can be filled with facts that a court finds appropriate to justify its conclusion. In dealing with the removal provision, these methods embody post hoc reasoning that is more concerned with achieving the desired result than getting to the truth of the law. It is difficult to imagine another reason for the gross disparity of removal decisions at the federal district court level.

Presumably recognizing the difficulty the lower courts have had setting aside their beliefs about the law long enough to interpret it fairly, the Supreme Court responded in a way that answers the removal question for good. By stating in fairly clear and unambiguous terms that only claims filed under state law at the state level are removable because all of subsection (b) should be considered, the Court endorsed the narrow interpretation of SLUSA. That other courts have relied on the Court’s reasoning, even to the point of overturning recent contrary decisions, is further proof that the Court’s decision should be treated as final. The fact that other courts have ignored Kircher does not make it less relevant—it merely makes those courts mistaken. Commentators who believe that all securities claims filed in state law should be removable improperly disregard the importance of Kircher in their attempt to dictate what the law should be. As it stands after Kircher, SLUSA only allows the removal from state court of claims based in state law, not federal law.

J. Tyler Butts*

191. See supra Parts II.A, II.B.
192. See supra Part III.
193. See supra notes 130-40 and accompanying text.

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