

Circuit Court Decisions Addressing SLUSA

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Third Circuit: SLUSA Does Not Preclude Opt-Out Actions That Were Never Actually Combined With a “Covered Class Action”

On September 12, 2019, the Third Circuit held that SLUSA does not preclude plaintiffs from bringing individual suits under state law after opting out from a securities-related class action unless the opt-out suit and the class action were “somehow combined, in whole or in part, for case management or for resolution of at least one common issue.” *North Sound Capital v. Merck & Co.*, 938 F.3d 482 (3d Cir. 2019) (Krause, C.J.). The court found that SLUSA generally does not preclude opt-out suits that did not “coincide for some period” with a class action because “[i]f two cases never overlap, a court cannot combine them.”

SLUSA’s “mass action provision” defines a “covered class action” to include “any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which . . . (I) damages are sought on behalf of more than 50 persons; and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.” 15 U.S.C. § 78bb(f)(5)(B)(ii). The Third Circuit “consider[ed] what Congress meant by the broader phrase ‘otherwise proceed as a single action for any purpose.’” The court explained that it was “hard-pressed to imagine any scenario in which two cases that never overlap [in time] could function as a single lawsuit on any dimension, as the mass action provision requires.”

Seventh Circuit: SLUSA Precludes State-Law-Based Securities Fraud Class Actions Even If the Proposed Class Consists of Fifty or Fewer Members

On January 24, 2019, the Seventh Circuit held that the Securities Litigation Uniform Standards Act (“SLUSA”) precluded a state law-based securities fraud class action brought on behalf of a class consisting of fewer than fifty proposed members. *Nielen-Thomas v. Concorde Inv. Servs.*, 914 F.3d 524 (7th Cir. 2019) (Flaum, C.J.).

The court found that Subparagraph (II) of “SLUSA’s ‘covered class action’ definition includes any class action brought by a named plaintiff on a representative basis, regardless of the proposed class size.”^[1] The court stated that an “obvious implication” of its “interpretation is that no putative securities class actions that are based on state law and otherwise meet SLUSA’s requirements (they involve a covered security, allege

a misrepresentation in connection with that security, etc.) can proceed in either federal or state court under SLUSA.”

The Seventh Circuit noted that SLUSA was enacted “to combat a specific problem—litigants were attempting to circumvent the PSLRA’s barriers to federal securities class actions by filing their class actions under state law instead.” The court explained that “[t]his purpose could be easily frustrated if plaintiffs bringing a state-law securities class action could simply allege that they represented a class of no more than fifty people.” Absent SLUSA preclusion, “such suits could proceed through the courts until discovery identified the entire class of plaintiffs.” If it turned out that “the actual class could include more than fifty persons, . . . by that time the abuses that the PLSRA sought to prevent would have already taken place.”

[1] SLUSA provides that a “single lawsuit” constitutes a “covered class action” if, *inter alia*, “(I) damages are sought on behalf of more than 50 persons or prospective class members,” or “(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated.” 15 U.S.C. § 78bb(f)(5)(B)(i).

Authors and
Contacts

Paul Gluckow

Partner and General Counsel

pgluckow@stblaw.com

+1-212-455-2653

Jonathan Youngwood

Partner

jyoungwood@stblaw.com

1-212-455-3539

Peter Kazanoff

Partner

pkazanoff@stblaw.com

+1-212-455-3525

