

2009

Securities Class Actions, CAFA and a Countrywide Crisis: A Call for Clarity and Consistency

Denise Mazzeo

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Denise Mazzeo, *Securities Class Actions, CAFA and a Countrywide Crisis: A Call for Clarity and Consistency*, 78 Fordham L. Rev. 1433 (2009).

Available at: <https://ir.lawnet.fordham.edu/flr/vol78/iss3/13>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Securities Class Actions, CAFA and a Countrywide Crisis: A Call for Clarity and Consistency

Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law; B.A., 2007, Villanova University. I would like to thank Professors Susan Block-Lieb and James Jalil for their guidance. I would also like to thank my friends and family for their endless encouragement and support.

SECURITIES CLASS ACTIONS, CAFA, AND A COUNTRYWIDE CRISIS: A CALL FOR CLARITY AND CONSISTENCY

*Denise Mazzeo**

The unfolding of the credit crisis raises novel issues in securities litigation. This Note explores the conflict between the nonremoval provision of the Securities Act of 1933 ('33 Act) and the removal provisions of the Class Action Fairness Act of 2005 (CAFA), and their interplay in the context of class actions involving mortgage-backed securities. Circuits are currently split over whether or not such class actions are removable under CAFA. The Seventh Circuit and the Southern District of New York have held that class actions asserting only '33 Act claims are removable under CAFA unless they fall within one of CAFA's exceptions, while the Ninth Circuit has found that the '33 Act's nonremoval provision trumps CAFA. This Note unpacks the historical purposes and legislative histories of CAFA and the federal securities laws, and examines them under the lens of the current financial crisis. The Note argues that the Seventh Circuit interpretation is superior because it gives effect to all of CAFA's provisions, as well as the historical purposes of the '33 Act. CAFA applies to all class actions, including securities class actions, but not to individual securities actions. Individual securities actions are not removable under the '33 Act, thus giving effect to the nonremoval provision and its historical purposes of providing investor protection. While looking to the past is instructive, courts should consider the present situation. Though they are not traded on a national exchange, mortgage-backed securities are currently at the heart of the nationwide credit crisis. To that end, this Note proposes that the approach with the most clarity and consistency is to allow for removal to federal courts of securities cases that are of real national importance.

* J.D. Candidate, 2010, Fordham University School of Law; B.A., 2007, Villanova University. I would like to thank Professors Susan Block-Lieb and James Jalil for their guidance. I would also like to thank my friends and family for their endless encouragement and support.

TABLE OF CONTENTS

INTRODUCTION.....	1434
I. PAST TO PRESENT: THE EBB AND FLOW OF INVESTOR PROTECTION	
UNDER THE FEDERAL SECURITIES LAWS.....	1440
A. <i>The Securities Act of 1933</i>	1440
B. <i>The Private Securities Litigation Reform Act of 1995</i>	1445
C. <i>Securities Litigation Uniform Standards Act of 1998</i>	1449
D. <i>The Class Action Fairness Act of 2005</i>	1452
E. <i>The Current Context: A Countrywide Crisis</i>	1458
II. CONFRONTING THE CLASS ACTION CONFLICT.....	1464
A. <i>The Ninth Circuit Approach: Luther v. Countrywide</i>	1464
B. <i>The Southern District of New York Approach: New Jersey Carpenters v. HarborView Mortgage</i>	1467
C. <i>The Seventh Circuit Approach: Katz v. Gerardi</i>	1471
III. KATZ: THE KEY TO CLARITY AND CONSISTENCY.....	1474
A. Unlocking CAFA and Concurrent Jurisdiction: Understanding the False Dichotomy.....	1474
B. Reconciling the Past-Present Paradox: The Flow of Investor Protection in the Current Crisis.....	1477
C. Opening the Federal Court Door for Countrywide Class Actions.....	1478
CONCLUSION: A CONFLICT RIPE FOR RESOLUTION.....	1479

INTRODUCTION

“Only a foolish optimist can deny the dark realities of the moment Practices of the unscrupulous money changers stand indicted in the court of public opinion, rejected by the hearts and minds of men.”¹ Seventy-five years after these remarks were first uttered in President Franklin Delano Roosevelt’s (FDR) 1933 Inaugural Address, they seem prescient as the country finds itself in a familiar predicament. The financial crisis that began with the foundering of the housing market and subprime mortgages has already been hailed as “the most significant financial crisis since the Great Depression.”² And yet, remarkably, in almost the same breath, there is a sense of optimism: “we have the policy mechanisms in place fighting it, which is something we didn’t have during the Great Depression.”³ Yet as the crisis unfolds and the global economy continues to endure the effects of the subprime debacle, we are confronted with troubling questions: With the aforementioned policies in place and seventy-five years of history under

1. Franklin D. Roosevelt, U.S. President, First Inaugural Address (Mar. 4, 1933), available at <http://www.archives.gov/education/lessons/fdr-inaugural/#documents>.

2. S. REP. NO. 111-1, at 2 (2009) (statement of Sen. Schumer, Chairman, Joint Econ. Comm.); see also Jon Hilsenrath et al., *Worst Crisis Since '30s, with No End Yet in Sight*, WALL ST. J., Sept. 18, 2008, at A1.

3. Hilsenrath et al., *supra* note 2.

our belt, how is it that we have found ourselves in another financial crisis?⁴ Are these the statements of a “foolish optimist,”⁵ or are these policies still effective?⁶

These policy mechanisms began with the first federal securities legislation: the Securities Act of 1933 ('33 Act).⁷ The first federal securities laws were enacted at the behest of FDR. In the wake of the Crash of 1929, investor protection was of utmost importance, and the '33 Act was enacted within mere weeks of FDR's inauguration.⁸ Overall, the '33 Act was designed to afford broad remedies for defrauded investors.⁹ One such protection the '33 Act afforded, *inter alia*, was a private right of action.¹⁰ Indeed, the '33 Act not only allowed plaintiffs to choose whether to bring suit in state or federal court by providing for concurrent jurisdiction, but Congress took a rare step in the pro-plaintiff direction by inserting a nonremoval provision into the Act, thereby preventing defendants from removing cases brought under the '33 Act to federal court.¹¹ Nonremoval

4. “[T]he nagging question remain[s] of how such an old problem could resurface after 70 years despite the Securities Act of 1933, written and amended over the years to prevent such abuses.” CHARLES R. GEISST, *WALL STREET: A HISTORY: FROM ITS BEGINNINGS TO THE FALL OF ENRON* 388 (2004).

5. Roosevelt, *supra* note 1.

6. See GEISST, *supra* note 4, at ix–x (“After the 1930s, it was thought, incorrectly, that scandals in which investors were bilked of billions of dollars and many financial institutions seriously compromised would not occur again. . . . [T]he assumption remained fundamentally intact until 2001 [with the fall of Enron]. Events developing since that time only prove that the centuries-old conflict between Washington and Wall Street will continue.”).

7. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)).

8. See GEISST, *supra* note 4, at 228 (noting that the Securities Act of 1933 ('33 Act) was passed within weeks of President Franklin D. Roosevelt's taking office, but the drafting had actually begun during the interregnum; indeed, during “the first few weeks of the new administration, final drafting on the proposed legislation was furious”); *id.* at 227 (“[B]anking and securities legislation was the first item on the new administration's agenda . . .”).

9. See *id.* at 229 (“The Securities Act did not actually control the behavior of bankers; instead, it was meant to protect investors from fraudulent new securities offerings.”); *id.* at 388 (noting that the '33 Act was written and amended over the years to prevent abuses of small investors). Even Justice William O. Douglas, who argued in the 1930s that the '33 Act was a political statement rather than effective protection for investors, at least acknowledged that such investor protections are—and should be—the fundamental purpose of the federal securities laws. See William O. Douglas, *Protecting the Investor*, 23 *YALE REV.* 521, 521–22 (1934) [hereinafter Douglas, *Protecting the Investor*] (suggesting that “the Act is significant politically” and “symbolic of a shift of political power” but that it lacks “deep insight into the requirements for protection of investors” and thus falls short of its purpose); William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 *YALE L.J.* 171, 173 (1933) (noting that certain flaws in the '33 Act “detract attention from the fundamental purpose of the Act—protection of investors”).

10. Securities Act of 1933 § 11, 15 U.S.C. § 77k (providing for civil liabilities on account of false registration statements).

11. Securities Act of 1933 § 22(a), 15 U.S.C. § 77v(a) (providing that cases brought in state court under the '33 Act may not be removed to federal court).

provisions are rare exceptions, rather than the rule.¹² The general removal statute provides, “Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”¹³ By contrast, section 22(a) of the ’33 Act, the antiremoval provision, states, “Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”¹⁴ Despite ample opportunity to do so, this antiremoval provision has been largely untouched for almost three-quarters of a century.¹⁵

History serves as a reminder that investor protection seems to ebb and flow with the market.¹⁶ In times of economic troubles and bear markets, investor protection generally increases;¹⁷ in times of prosperity and bull markets, Congress seems to be less concerned with protecting investors, and more so with deregulating and preventing litigious abuses of the system.¹⁸ Historically, in order to change the tide from bear market to bull,

12. In some rare instances, an Act of Congress proscribes removability for various reasons. *See, e.g.*, 28 U.S.C. § 1445 (2006) (listing certain types of nonremovable actions).

13. *See id.* § 1441(a); *see also* S. REP. NO. 109-14, at 9 (2005), *reprinted in* 2005 U.S.C.C.A.N. 4, 10 (“The concept of ‘removing’ cases from state courts to federal courts is based largely on the same core premise as diversity jurisdiction—i.e., that an out-of-state defendant in a state court proceeding should have access to an even-handed federal forum.”).

14. 15 U.S.C. § 77v(a).

15. *See* Thomas Lee Hazen, *Allocation of Jurisdiction Between the State and Federal Courts for Private Remedies Under the Federal Securities Laws*, 60 N.C. L. REV. 707, 741 (1982) (“[D]espite numerous opportunities to correct any oversight, more than forty years have elapsed without alteration of these provisions.”); *infra* notes 75–78 and accompanying text.

16. “The swings in political ideology that caused Wall Street and the banks to be regulated and then deregulated decades later provide a good microcosm of American history in the twentieth century.” CHARLES R. GEISST, *UNDUE INFLUENCE: HOW THE WALL STREET ELITE PUT THE FINANCIAL SYSTEM AT RISK* 288 (2005). For an overview of how Wall Street’s history traces the ebb and flow of investor protection, *see id. passim*; *see also* GEISST, *supra* note 4.

17. *See, e.g.*, GEISST, *supra* note 4, at 4 (noting that in the wake of the 1929 Wall Street scandals, “[i]nvestor protection became the new watchword” during the 1934 New Deal legislation); *id.* at 6 (from the time securities legislation was passed in 1933, “the public demanded to be protected from investment bankers, who became public enemy number one during the 1930s”); *id.* at 399–400 (discussing how the massive Enron fraud caused the investing public to distrust corporate America and Wall Street in the wake of that debacle, just as it had in the 1930s, and thus beckoned protective regulation in the form of the Sarbanes-Oxley Act); *id.* at 400–01 (arguing that the unraveling of the markets in the 1990s was due to legislation that favored deregulation, as opposed to investor-protecting regulations).

18. *See, e.g., id.* at 274 (discussing the parallels between the unprecedented prosperity of the bull markets of the 1920s and 1950s, including “aggressive stock promoters, corporate expansion, and a generally favorable regulatory attitude”); *id.* at 5 (noting that as Wall Street embraces an economies-of-scale attitude in order to expand, “the old protections are quickly falling by the wayside in favor of integrating all sorts of banking activities under one roof”); *id.* at 371 (discussing the 1990s—the greatest bull market in history—a decade marked by

investor confidence has been the key.¹⁹ Although the purpose of '33 Act was to restore confidence in the national markets by providing broad protections for defrauded investors,²⁰ some of those protections were whittled away during the 1990s—a period characterized by economic prosperity.²¹ Indeed, in 1995, Senators Paul Sarbanes, Barbara Boxer, and Richard Bryan were so confident as to state that “our markets today are the largest and most vibrant in the world. This is so not in spite of the Federal securities laws, but in part because of [them].”²² This statement coincided with the beginning of a series of securities reforms characterized by receding investor protections—beginning with the enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA).²³ The PSLRA made it more difficult for plaintiffs to bring securities class action lawsuits in federal court. The PSLRA was followed by the enactment of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which sought to plug up one major loophole left open by the PSLRA: bringing securities class actions in state courts to avoid the procedural hurdles of federal court.²⁴ SLUSA amended the nonremoval provision of the '33 Act by adding section 77p(c), which carves out an exception from the nonremoval provision for class actions involving covered securities, or securities sold on

deregulation under Chairman of the Federal Reserve Alan Greenspan, who coined it the “decade of irrational exuberance”); *id.* at 388 (describing small investors during the prosperous 1990s as “lambs” . . . being led to slaughter while believing that they were protected by securities laws,” and noting that proving that small investors have been defrauded or misled is even more difficult than usual during a bull market, when the focus is on expanding the markets).

19. *Id.* at 276 (“Part of the reason [that the federal securities laws of the 1930s were finally accepted by Wall Street] could be attributed to investor confidence. A boom was coming, and it was clear that if the new investor of the 1950s was to be drawn to investments, he would have to feel comfortable in the markets.”). Moreover, when the decline of the late 1960s brought a “wave of change” to Wall Street, the federal securities laws were “recognized as bringing more stability to the markets than they ever experienced before,” as investors now felt safer. *Id.* at 298–99.

20. *See supra* note 9 and accompanying text.

21. *See* S. REP. NO. 104-98, at 37 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 715 (discussing the strength of the U.S. capital markets in the early 1990s).

By every measure, the United States capital markets are the largest and strongest in the world. . . . [F]or 1993, U.S. equity market capitalization stood at \$5.2 trillion, over one-third of the world total. The U.S. markets continue to grow

The growth of trading on our exchanges is a sign of the strength of our markets. Average daily trading volume on the New York Stock Exchange increased from 44.9 million shares in 1980, to 156.8 million shares in 1990, to 291.4 million shares in 1994. The NASDAQ and American Stock Exchanges have experienced similar gains in trading volume.

Id. (footnotes omitted); *see also* GEISST, *supra* note 4, at 371 (the prosperous 1990s were known as the decade of “irrational exuberance” due to the unprecedented expansion of the capital markets).

22. S. REP. NO. 104-98, at 37, *reprinted in* 1995 U.S.C.C.A.N. 679, 715.

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

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

a national exchange.²⁵ The stated rationale for expanding removal jurisdiction for these securities was to create a “uniform national approach” to securities litigation involving securities that are important in the national market, i.e., “nationally-traded” (covered) securities.²⁶

While SLUSA’s scope was limited to securities class actions, Congress applied the same rationale to class actions in general in 2005 by enacting the Class Action Fairness Act (CAFA).²⁷ CAFA amended the requirements for diversity jurisdiction by establishing original jurisdiction in the federal courts for large, costly class actions—that is, those exceeding \$5,000,000 in controversy, and in which any one plaintiff is diverse from at least one defendant—because such class actions are more likely to be nationally important.²⁸ CAFA also provided for such class actions to be removable to federal court,²⁹ creating a potential conflict with the nonremoval provision of the ’33 Act.³⁰ This conflict has been the source of much litigation in the unfolding of the credit crisis.³¹

In the wake of the historic subprime meltdown, there has been a proliferation of securities class action lawsuits.³² These cases not only include classic securities fraud cases raising section 10(b) claims under the Securities Exchange Act of 1934 (’34 Act), but cases involving mortgage-backed securities that are not traded on a national exchange, which are typically brought under the ’33 Act.³³ While, normally, such cases cannot be removed to federal court under section 22 of the ’33 Act, some courts have read CAFA to override this nonremoval provision and allow certain securities class actions to be removed.³⁴ Neither CAFA nor SLUSA is a model of clarity and, as a result, courts looking to their legislative histories have come to conflicting conclusions regarding the interplay of these statutes in the realm of securities class actions.³⁵ The crux of the confusion seems to be the dichotomy between the overall design of CAFA and

25. 15 U.S.C. § 77p (1998).

26. S. REP. NO. 105-182, at 3 (1998) (noting that benefits could flow to investors from this “uniform national approach” to “nationally-traded securities”); *see id.* at 5 (observing that there are national markets for certain securities). However, the Senate report expressed concern for the exposure of securities issuers to potentially crushing liability, a concern that outweighed “fragmentation of investor remedies,” “[a]t a time [of] increasingly experiencing and encouraging national and international securities offerings and listings, and expending great effort to rationalize and streamline our securities markets.” *Id.* at 3. In other words, during a time of increasing economic prosperity, Congress was more concerned with protecting issuers than with protecting the dual state and federal forum remedies for defrauded investors. *Id.*

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

28. *See* 28 U.S.C. § 1332(d)(2) (2006). In other words, complete diversity is no longer required for federal diversity jurisdiction; minimal diversity is sufficient. *Id.*

29. *See id.* § 1453(b).

30. *See* 15 U.S.C. § 77(v)(a).

31. *See infra* notes 214–23 and accompanying text.

32. *See infra* note 214 and accompanying text.

33. *See infra* notes 217–21 and accompanying text.

34. *See infra* Part II.B.

35. *See infra* notes 285–90 and accompanying text. *See generally infra* Part II.

SLUSA to protect corporate defendants and to federalize class actions, versus the overall pro-plaintiff design of the '33 Act, which specifically contains a nonremoval provision for securities claims brought under the '33 Act.³⁶ This Note examines the ensuing split in authority in the context of the current credit crisis.

The current financial crisis—which has been dubbed a “crisis of confidence”³⁷—offers a unique context in which to resolve the conflict, as it takes place at a critical intersection in economic history. The issues raised form a nexus between the very concerns that prompted the two removal provisions at issue: (1) affording broad protections for defrauded investors as a mechanism for maintaining confidence in our nation’s capital markets and (2) curbing abuses that undermine that very confidence, stifle the markets, and prevent federal courts from hearing cases of national importance. Throughout the country’s financial history, the ebb and flow of investor protection has created a false dichotomy between investor protection and market interests in deregulation. This Note proposes that today, despite what they were in the past, the two need not be mutually exclusive. Understanding this is critical to embracing the proper solution to the current conflict between the '33 Act and CAFA—two pieces of legislation that are couched in such dichotomous language.

This Note addresses the conflict between the nonremoval provision of the '33 Act and CAFA’s removal provision in the context of cases stemming from the current credit crisis. Recently, a split in the federal circuit courts of appeals emerged over which provision should prevail when in conflict.³⁸ Part I of this Note explores the historical development of the relevant securities laws and how they have come into play in the context of the financial crisis. The tensions between the goals of the past and the present have created a false dichotomy between the ostensibly competing goals of protecting investors and shoring up the capital markets. These tensions have surfaced in the current crisis of confidence, which disturbingly parallels the crisis of the 1930s.³⁹ Courts have grappled with the interplay of section 22’s nonremoval and CAFA’s removal provisions in mortgage-backed securities cases. Part II of this Note examines the current split in authority that is craving clarification: the U.S. Court of Appeals for the Ninth Circuit concludes that the '33 Act’s nonremoval provision trumps CAFA, while the U.S. Court of Appeals for the Seventh Circuit and the U.S. District Court for the Southern District of New York maintain that class actions brought under the '33 Act are removable pursuant to CAFA. Part III of this Note argues that the Seventh Circuit approach is superior

36. See *infra* notes 178–84.

37. *Federal Reserve’s First Monetary Policy Report for 2008: Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, 110th Cong. 1 (2008) [hereinafter *Monetary Policy Hearings*] (statement of Sen. Christopher J. Dodd, Chairman, S. Comm. on Banking, Housing, and Urban Affairs).

38. See *infra* Part II.

39. See *infra* note 373 and accompanying text (discussing parallels between the current crisis and the Great Depression); *infra* Part I.A.

because it gives full effect to the text and historical purposes of both CAFA and the '33 Act. The Note concludes that, not only is the Seventh Circuit's approach true to the historical purposes of both statutes but, perhaps more importantly, the result under this approach—federalizing class actions involving securities implicated in a nationwide crisis—is the most suitable solution for today's crisis of confidence. Looking toward tomorrow, in order to restore confidence, the issue of concurrent jurisdiction under the '33 Act must be clarified with respect to CAFA and treated with consistency across the circuits. The current conflict is ripe for resolution.

I. PAST TO PRESENT: THE EBB AND FLOW OF INVESTOR PROTECTION UNDER THE FEDERAL SECURITIES LAWS

In order to understand the context of the current split in authority, it is crucial to comprehend the evolution of the legislation and, in particular, the jurisdictional provisions of this legislation. The following sections proceed in chronological order. Part I.A examines the background and historical purposes of the '33 Act. Part I.B then reviews various legislative efforts to reform the securities class action framework, beginning with the PSLRA.⁴⁰ Part I.C then turns to the PSLRA's complement, SLUSA, passed in 1998.⁴¹ Part I.D explores CAFA and its underpinnings, especially with respect to its interplay with the securities framework.⁴² Finally, Part I.E discusses the current securities class action scheme in the context of the unfolding credit crisis.

A. *The Securities Act of 1933*

The '33 Act came at the nadir of the Great Depression, when the stock market and the national economy were deeply entrenched in crisis. The late 1920s had witnessed egregious securities scandals that laid waste to the American capital markets.⁴³ In the decade after World War I, fifty billion dollars in new securities were floated in the United States; half of them were worthless.⁴⁴ It was generally believed that many underwriters and securities dealers were not in the practice of "fair, honest, and prudent dealing," but rather, were engaged in "[h]igh-pressure salesmanship" of these fraudulent securities.⁴⁵ They freely made "[a]lluring promises of easy

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

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

42. This Note does not intend to provide a thorough exploration of each of the Class Action Fairness Act's (CAFA) purposes or provisions; rather, it intends to give a general overview of CAFA with an emphasis on its purposes and provisions that specifically pertain to securities class actions.

43. See Laylin K. James, *The Securities Act of 1933*, 32 MICH. L. REV. 624, 625-30 (1933) (discussing the egregious scandals and ensuing stock market crash leading to the enactment of the '33 Act).

44. H.R. REP. NO. 73-85, at 2 (1933).

45. See, e.g., *id.*

wealth . . . with little or no attempt to bring to the investor's attention those facts essential to estimating the worth of any security."⁴⁶ Thousands of Americans had invested their life savings in these worthless securities and were left with nothing.⁴⁷ The rest is history.

"The events of 1929 made an indelible imprint on the United States. Much of the faith that had been shown in markets, institutions, and politicians would quickly give way to skepticism and a longing for effective leadership."⁴⁸ In spite of the many state securities statutes that existed at the time of the crash, the public sustained severe losses at the hands of securities dealers and corporations.⁴⁹ In response, the new President, Roosevelt, saw a clear need to restore confidence in the markets with securities legislation.⁵⁰

Roosevelt was a driving force behind securities reform and the creation of the '33 Act.⁵¹ Just weeks after his Inaugural Address, President Roosevelt sent a message to Congress recommending the legislation that would protect investor confidence.⁵² He demanded that the issuance of new securities be accompanied by "full publicity and information" and insisted that "no essentially important element [of the issuance] be concealed from the buying public."⁵³ Roosevelt's message conveyed a "broad purpose of protecting investors" in order to "bring back public confidence."⁵⁴ As such, his proposal to "let the seller also beware" put the "burden of telling the whole truth on the seller."⁵⁵

Roosevelt procured the efforts of Felix Frankfurter to help draft the new bill.⁵⁶ Frankfurter assembled a team of drafters, including James Landis,

46. *Id.*; see also Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 335 (1988) (chronicling the "[get] rich quick" schemes the public was caught up in during the 1920s).

47. H.R. REP. NO. 73-85, at 2. Individuals were not the only ones who suffered grievous losses from the "irresponsible selling of securities": industry and real estate suffered as a result of the "deliberate overstimulation" of demand for securities, creating an artificial market that collapsed. *Id.*; cf. *infra* notes 196–200 and accompanying text (discussing, similarly, how the intentional overstimulation of subprime borrowing for those with bad credit played a role in the subprime crisis).

48. GEISST, *supra* note 4, at 196.

49. See H.R. REP. NO. 73-85, at 1. For an overview of the blue sky laws, the state statutory framework in place up until the '33 Act, see Keller & Gehlmann, *supra* note 46, at 331–34.

50. See H.R. REP. NO. 73-85, at 1–2 (including a message from President Roosevelt calling for congressional action in light of the dire situation); S. REP. NO. 73-47, at 2 (1933) (noting that federal securities legislation is necessary to restore public confidence in the markets); see also GEISST, *supra* note 4, at 228 ("A federal law was needed to plug the gaps in the patchwork of state laws.")

51. See Keller & Gehlmann, *supra* note 46, at 338–42 (noting Roosevelt's role in galvanizing federal securities legislation).

52. See H.R. REP. NO. 73-85, at 1–2.

53. *Id.* at 2.

54. *Id.*

55. *Id.*

56. GEISST, *supra* note 4, at 228.

Benjamin Cohen, and Thomas Corcoran.⁵⁷ Landis brought to the table an expertise in administrative law as well as state blue sky laws, while Cohen and Corcoran offered their practical expertise of corporations and securities laws acquired through clerking and practicing law.⁵⁸ The drafters—Landis in particular—carefully recognized the need for the precise balance of detail in the statute: they sought to avoid excessive generalities as well as excessive detail that might have the effect of limiting the discretion of administrators.⁵⁹ It should not be overlooked that the drafters of the '33 Act were influenced by the British philosophy of disclosure, and The British Companies Acts of 1908 and 1929 served as models for the legislation.⁶⁰ The stated purpose of the '33 Act is “to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.”⁶¹ In furtherance of the goal of full disclosure, the '33 Act (1) requires securities issuers to file a registration statement⁶² and (2) holds those who file the statements liable for any misstatements or omissions by expressly providing for private rights of action.⁶³ Congress recognized that enabling investors injured by fraud to recover lost funds or damages in private actions could play an important role in assuring compliance with securities laws.⁶⁴

57. See Keller & Gehlmann, *supra* note 46, at 340–41 (discussing the qualifications of the drafters of the '33 Act and, thus, their familiarity with the needs of the federal securities legislation framework); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959) (recounting from firsthand experience the legislative history behind the '33 Act).

58. Keller & Gehlmann, *supra* note 46, at 340–41.

59. *Id.* at 341. Indeed, one of the drafters—James Landis—noted that a 1933 Conference Report “deliberately contained language commenting upon the meaning of certain of the most contentious provisions of the bill in the hope that the language as an expression of the ‘intent’ of Congress would control the administrative and judicial interpretation of the act.” Landis, *supra* note 57, at 47.

60. Keller & Gehlmann, *supra* note 46, at 341. The civil liabilities provisions of the '33 Act were drawn generally from the Companies Act, but they were “carefully revised” by the drafters of the '33 Act, who were “particularly anxious through the imposition of adequate civil liabilities” to achieve the goals of the '33 Act. Landis, *supra* note 57, at 35.

61. H.R. REP. NO. 73-85, at 1 (1933). While the '33 Act provides for regulation of securities sold through the mail or instruments of interstate commerce, the Securities Exchange Act of 1934 ('34 Act), the complement to the '33 Act, provides for regulation of the securities exchange markets and the operations of corporations listed on the national exchanges. See Keller & Gehlmann, *supra* note 46, at 330.

62. See 15 U.S.C. § 77f (2006) (requiring registration statements to be filed for securities offerings); *id.* § 77g (listing disclosure requirements in registration statements); *id.* § 77j (listing disclosure requirements in prospectuses); *id.* § 77aa (requiring certain information schedules in registration statements).

63. *Id.* § 77k.

64. See H.R. REP. NO. 73-85, at 9 (providing victims of fraudulent securities schemes with the ability to recover where sellers made false statements, omissions, or otherwise failed to exhibit due care); see also Douglas, *Protecting the Investor*, *supra* note 9, at 524 (arguing that the “spectre of liability” in the Act is what will give real protection); Keller & Gehlmann, *supra* note 46, at 344–45; Landis, *supra* note 57, at 35 (noting that the drafters viewed civil liabilities provisions as crucial to achieving compliance with the securities laws).

Although the '33 Act was largely based on preexisting state statutory and common-law fraud principles, the Act intentionally deviated from these models and imposed fewer pleading requirements as a form of greater investor protection.⁶⁵ Moreover, an examination of the procedural and substantive differences between the '33 Act and the '34 Act,⁶⁶ which served to counterbalance the '33 Act, is instructive; the '34 Act addressed a different type of harm and allowed for a wider range of claims than the '33 Act; thus the barriers for '34 Act claims are naturally higher.⁶⁷

Another form of enhanced investor protection that the drafters of the '33 Act consciously recognized is the nonremoval provision of the Act.⁶⁸ Section 22 of the '33 Act, which confers concurrent jurisdiction on state and federal courts over private causes of action brought under the '33 Act,⁶⁹ provides that “no case arising under [the Securities Act of 1933] and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”⁷⁰ Remarkably, there is a dearth of legislative history on section 22 of the '33 Act.⁷¹ While the lack of legislative history behind an unconventional provision is perplexing, given that section 22 belongs to “a rather exclusive club of federal non-removal provisions,”⁷²

65. Specifically, the '33 Act did not require plaintiffs to prove reliance, loss causation, or any particular state of mind of any defendant. *See* Douglas, *Protecting the Investor*, *supra* note 9, at 524 (“The common law with its insistence upon the presence of an intent . . . to defraud, of a causal relation . . . and of a reliance . . . presented almost insuperable procedural barriers to recovery.”); *cf. infra* Part I.B (discussion of the Private Securities Litigation Reform Act of 1995 (PSLRA)). However, in stark contrast with the litigious 1990s when the PSLRA was enacted, the “failure on the part of many with just claims to seek reparation [was] most conspicuous” during the financial scandals of the 1930s. Douglas, *Protecting the Investor*, *supra* note 9, at 525.

66. *See* 15 U.S.C. § 78a.

67. *See* *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 186, 206 (1976) (noting that the '33 Act and the '34 Act are interrelated). However, the '34 Act was intended to address a different type of wrongdoing. *Id.* at 194–95 (the '33 Act was designed to protect investors from fraud and promote full disclosure through the imposition of civil liabilities, while the '34 Act was meant to protect against manipulation of stock prices and promote efficient securities trading); *id.* at 208, 212 & n.32 (the '33 Act was meant to address negligent conduct, while the '34 Act is specifically meant to address intentional misconduct). Since section 10(b) of the '34 Act addresses intentional, and not negligent, wrongdoing, plaintiffs face some different procedural requirements. *Id.* at 186, 208–09.

68. *See* 15 U.S.C. § 77v(a); *infra* note 77 and accompanying text.

69. 15 U.S.C. § 77v(a) (providing that “[t]he district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts”).

70. *Id.* Compare this provision with the '34 Act, which exclusively provides for federal jurisdiction. Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (providing that “[t]he district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter”).

71. *See* Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 632 & nn.83–84 (2006) (observing the lack of legislative history on section 22).

72. *Id.* at 633.

looking to the rationales behind other analogous nonremoval provisions⁷³ underscores the overall pro-plaintiff nature of these provisions.⁷⁴

Notwithstanding the paucity of legislative history behind section 22, in 1934 Congress did note the conflict between the nonremoval provision of the '33 Act and the exclusive jurisdiction provision of the '34 Act—and even considered an amendment to grant exclusive federal jurisdiction over '33 Act claims⁷⁵—but expressly declined to do so.⁷⁶ The proposal was opposed by Landis, who was “instrumental in inserting the exclusive jurisdiction provision into the 1934 Act.”⁷⁷

With respect to private rights of action, the securities legislation landscape and section 22 remained largely untouched until the 1990s.⁷⁸ This speaks to the vital role that the availability of private rights of action play in the capital markets today. “The SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages” and are a “powerful deterrent against violations of the securities laws.”⁷⁹ The success of capital markets is critically dependent upon investor confidence in the integrity of the markets,⁸⁰ and private securities actions are crucial to maintaining that confidence.⁸¹

73. *See id.* at 633–34 & nn.90–95 (discussing various interests served by other federal nonremoval provisions, including “preserving a plaintiffs’ choice of forum”).

74. *Id.* at 634 & nn.93, 95 (noting that both the U.S. Supreme Court and Congress have recognized in worker’s compensation and tort cases that federal nonremoval provisions are an expression of congressional intent to give plaintiffs an absolute choice of forum in order to avail themselves of procedural advantages). “Applying these rationales to the 1933 Act and its overall pro-plaintiff nature, one court concluded that the non-removal provision of the 1933 Act, ‘like others of the same genre, has the evident purpose of favoring plaintiffs’ choice of forum.’” *Id.* at 634 (quoting *Pinto v. Maremont Corp.*, 326 F. Supp. 165, 167 n.2 (S.D.N.Y. 1971)).

75. *See Hazen, supra* note 15, at 741–42 (noting that the American Bar Association proposed an amendment in 1933 to eliminate state courts’ concurrent jurisdiction).

76. 78 CONG. REC. 8563, 8571 (1934) (statement of Sen. Byrnes) (noting that the Senate bill, like the '33 Act, gives concurrent jurisdiction, while the House version of the bill gives exclusive jurisdiction to the federal courts); *Cook, supra* note 71, at 633 & nn. 85–88.

77. *Hazen, supra* note 15, at 741 (citing 78 CONG. REC. 8666, 8717 (statement of James M. Landis)).

78. *Cook, supra* note 71, at 633 n.87 (observing that the nonremoval provision remained unchanged until the Securities Litigation Uniform Standards Act of 1998 (SLUSA)); *Keller & Gehlmann, supra* note 46, at 331 (observing in 1988 that, “[w]hile the Securities Act and the Exchange Act have been amended over the years, ‘the basic concepts and objectives of the original statutes have not been changed’” (quoting ROBERTA S. KARMEL, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA 44 (1982))).

79. S. REP. NO. 104-98, at 8 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 687.

80. *See id.* (“The success of the U.S. securities markets is largely the result of a high level of investor confidence in the integrity and efficiency of our markets.”).

81. *See id.* at 37, *reprinted in* 1995 U.S.C.C.A.N. 679, 715 (“That confidence is maintained because investors know they have effective remedies against persons who would defraud them. Both Republican and Democratic Chairmen of the Securities and Exchange Commission have stressed the integral role of the private right of action in maintaining investor confidence.”); *see also id.* at 38, *reprinted in* 1995 U.S.C.C.A.N. 679, 716 (“Given the continued growth in the size and complexity of our securities markets, and the absolute

Nevertheless, abusive practices in private securities litigation can equally undermine confidence in and the success of the market. During the prosperous economy of the 1990s, Congress's concern with abusive securities litigation practices supplanted its Depression era concerns with protecting defrauded investors. Parts I.B and I.C explore two subsequent pieces of securities legislation and how they have altered the securities litigation landscape: the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act.

B. *The Private Securities Litigation Reform Act of 1995*

The PSLRA brought sweeping procedural changes to the federal securities law framework. The reform legislation added a new section 27 to the '33 Act, including various procedural provisions.⁸² These were intended to sieve out "strong cases" from "weak" cases in an effort to eliminate "abusive practices."⁸³

Though Congress acknowledged that the enactments of the '33 and '34 Acts were intended "to promote investor confidence in the United States securities markets"⁸⁴ and "help to deter wrongdoing,"⁸⁵ the wrongdoings that Congress was concerned with during the Great Depression were perpetrated by securities issuers. By contrast, in 1995 when the economy was much stronger, the tide of Congress's focus turned from the wrongdoings of securities issuers to the wrongdoings of securities plaintiffs and plaintiffs' attorneys. Rather than focus on creating private rights of action for investors, this time Congress lamented what it felt had become an "excessively litigious society."⁸⁶ Congress was confronted with substantial concerns over "abusive" securities claims threatening the integrity of the

certainty that persons seeking to perpetrate financial fraud will always be among us, private actions will continue to be essential to the maintenance of investor protection." (statement of the Director of the U.S. Securities and Exchange Commission's (SEC) Division of Enforcement in 1993)).

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

83. H.R. REP. NO. 104-50(I), at 14 (1995) (referring to statements made by Arthur Levitt, chairman of the SEC at the time, to the effect that "in order for investors to have confidence in the securities markets, they must have confidence in their right to seek fair recovery from those that may defraud them"). However, Levitt also notes that if the system fails to distinguish between "strong cases and weak cases," it fails to serve both of its purposes, namely, serving as a deterrent and assuring that fraud victims recover their losses. *Id.* at 14-15.

84. S. REP. NO. 104-98, at 4, *reprinted in* 1995 U.S.C.C.A.N. 679, 683; *see also* H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730 ("The overriding purpose of our Nation's securities laws is to protect investors and to maintain confidence in the securities markets . . .").

85. H.R. REP. NO. 104-369, at 31, *reprinted in* 1995 U.S.C.C.A.N. 730, 730 ("[P]rivate lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing. . .").

86. H.R. REP. NO. 104-50(I), at 14. Compare this with the sentiment at the time the '33 Act and '34 Act were passed—that many defrauded investors with just claims never sought legal redress. *See supra* note 65.

system⁸⁷ and their adverse effects on the growth of the economy.⁸⁸ According to congressional reports, it was Congress's understanding that both investors and the national economy suffer when innocent parties are forced to pay "exorbitant 'settlements'" in meritless lawsuits.⁸⁹ To this end, Congress hoped that the PSLRA "[would] return some fairness and common sense to [the] broken securities class action litigation system, while continuing to provide the highest level of protection to investors in our capital markets."⁹⁰

The systematic "abusive" practices that led to PSLRA's enactment embodied several characteristics: (1) routinely filing frivolous suits alleging cookie-cutter violations of the federal securities laws whenever there was a significant change in stock price, (2) targeting deep-pocketed defendants, and (3) abusing discovery practices in the hopes that the defendant would make a quick and sizeable settlement in order to avoid the expense of litigation.⁹¹ This systematic abuse was often accomplished through the manipulation of class action plaintiffs at the hands of their own lawyers.⁹²

These systematic practices informed the procedural changes made to the '33 Act by the PSLRA's new section 27.⁹³ One procedural change was the creation of a "safe harbor provision" for both the '33 and '34 Acts.⁹⁴ Although the hallmark of the federal securities laws is full disclosure to investors of information relevant to the financial condition of securities, it was argued by some members that the "threat of mass shareholder litigation" perverted this purpose and instead caused a "chilling" effect

87. See S. REP. NO. 104-98, at 4, *reprinted in* 1995 U.S.C.C.A.N. 679, 683; *see also* H.R. REP. NO. 104-369, at 31, *reprinted in* 1995 U.S.C.C.A.N. 730, 730 (raising the concern that the system is being undermined by "abusive and meritless" suits).

88. See H.R. REP. NO. 104-50(I), at 14 (expressing concern about the "high costs for the American economy" that are concomitant with "dramatic growth in litigation").

89. See H.R. REP. NO. 104-369, at 32, *reprinted in* 1995 U.S.C.C.A.N. 730, 731 (commenting that the issuer's own investors "are always the ultimate losers" when an "insurer must pay lawyers' fees, make settlement payments, and expend management and employee resources in defending a meritless suit"); *see also id.* at 37-38, *reprinted in* 1995 U.S.C.C.A.N. 730, 736-37 (noting the injurious effect that "joint and several liability" has on the entire economy when qualified directors turn down positions to avoid the risk of unlimited exposure to meritless lawsuits).

90. S. REP. NO. 104-98, at 4, *reprinted in* 1995 U.S.C.C.A.N. 679, 683 (quoting *Securities Litigation Reform Proposals: Hearings on S. 240, S. 667, and H.R. 1058 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 104th Cong. 36 (1995) (statement of Sen. Pete Domenici)).

91. H.R. REP. NO. 104-369, at 31, *reprinted in* 1995 U.S.C.C.A.N. 730, 730 (discussing evidence of abusive practices committed in private securities litigation); S. REP. NO. 104-98, at 8-9, *reprinted in* 1995 U.S.C.C.A.N. 679, 687-88.

92. See H.R. REP. NO. 104-369, at 31, *reprinted in* 1995 U.S.C.C.A.N. 730, 730 (discussing "the manipulation by class action lawyers of the clients whom they purportedly represent.").

93. See Private Securities Litigation Reform Act of 1995 § 27A, 15 U.S.C. § 77z-2 (2006) (amending the '33 Act's liability provisions by creating a safe harbor provision for certain forward-looking statements). For an overview of the PSLRA and its provisions, see THOMAS LEE HAZEN, *LAW OF SECURITIES REGULATION* § 7.17[1] (5th ed. 2009).

94. 15 U.S.C. §§ 77z-2(c), 78u-5(c) (2006).

on disclosure of “forward-looking” information.⁹⁵ As a result, instead of receiving more information, investors actually receive less.⁹⁶ The purpose of the safe harbor provision is to encourage issuers to make “forward looking statements” without “fear of open-ended liability.”⁹⁷ Additionally, the PSLRA imposed a scienter requirement for those filing claims under the ’33 and/or ’34 Acts.⁹⁸ This requirement imposed a heightened pleading standard demanding “particularity” of the plaintiff.⁹⁹ The new section also required a showing of loss causation to make out a successful claim.¹⁰⁰ The PSLRA also specifically addressed securities class actions: it established the “most adequate plaintiff” requirement for claims under the ’33 or ’34 Acts.¹⁰¹ Proponents of this measure asserted that it protects investors who join a class action against “lawyer-driven lawsuits” by counterbalancing the lawyer’s control with a lead plaintiff who has substantial holdings of the securities.¹⁰² The goals of this and other provisions are to effectively transfer primary control of securities litigation from lawyers to the investors and to reduce the settlement value of frivolous suits.¹⁰³ The lead plaintiff is also required to file a sworn certification statement to address the “professional plaintiff” problem.¹⁰⁴

The discovery stay, another procedural change imposed by the PSLRA, was a response to Congress’s observation that discovery in securities class actions can resemble a “fishing expedition,” the cost of which often forces defendants to settle in abusive class actions.¹⁰⁵ This provision seeks to minimize costs incurred by the defendant while a motion to dismiss or a motion for summary judgment is pending.¹⁰⁶ A new provision calling for stricter application of Rule 11 of the Federal Rules of Civil Procedure

95. S. REP. NO. 104-98, at 5, *reprinted in* 1995 U.S.C.C.A.N. 679, 684 (quoting Safe Harbor for Forward-Looking Statements, Securities Act Release No. 7101, Exchange Act Release No. 34,831, Investment Company Act Release No. 20,613, 57 SEC Docket 1999 (October 13, 1994)); *see also id.* at 9–10, *reprinted in* 1995 U.S.C.C.A.N. 679, 688–89 (noting that such abusive litigation threatens the very underpinnings of the securities laws—disclosure to investors—by deterring forward-looking statements); *id.* 15–18, *reprinted in* 1995 U.S.C.C.A.N. 679, 694–97 (discussing the safe harbor for forward-looking statements).

96. *Id.* at 5, *reprinted in* 1995 U.S.C.C.A.N. 679, 684.

97. H.R. REP. NO. 104-369, at 32, 42–46, *reprinted in* 1995 U.S.C.C.A.N. 730, 731, 741–45.

98. 15 U.S.C. §§ 77z-2(b), 78u-5(b). It is unclear whether the PSLRA’s procedural requirements apply to ’33 Act claims brought in state court. *See Cook, supra* note 71, at 636 n.113.

99. H.R. REP. NO. 104-369, at 41, *reprinted in* 1995 U.S.C.C.A.N. 730, 740; S. REP. NO. 104-98, at 15, *reprinted in* 1995 U.S.C.C.A.N. 679, 694.

100. *See* S. REP. NO. 104-98, at 23, *reprinted in* 1995 U.S.C.C.A.N. 679, 702.

101. 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I), 78u-4(a)(3)(B)(iii)(I).

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

103. *See* S. REP. NO. 104-98, at 6–7, 12, *reprinted in* 1995 U.S.C.C.A.N. 679, 685–86, 691.

104. *Id.* at 10–11, *reprinted in* 1995 U.S.C.C.A.N. 679, 689–90.

105. *See* S. REP. NO. 104-98, at 14, *reprinted in* 1995 U.S.C.C.A.N. 679, 693; *see also* 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3).

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

provides for attorney sanctions for pursuing meritless litigation.¹⁰⁷ The PSLRA also created a “fair share” rule. By modifying joint and several liability, this provision seeks to insulate outside directors and parties who do not have knowledge of securities violations from liability for damage caused by others.¹⁰⁸ Finally, the legislation creates an opportunity for victims of abusive securities lawsuits to recover their attorneys’ fees.¹⁰⁹

The PSLRA was met with mixed reviews. Proponents of the Reform Act included, generally speaking, accountants, securities firms, and the high-technology industry. They believed they were victims of meritless lawsuits and benefitted from PSLRA’s new procedural rules.¹¹⁰ Opponents of the legislation recognized a need for some reforms, but countered that securities class actions played a critical role in protecting investors from fraud.¹¹¹ Critics have expressed concerns that the provisions may frustrate meritorious lawsuits.¹¹²

The consequences of the PSLRA—both intended and unintended—help to inform the trajectory of the subsequent legislation. The *Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995* observed that the effect of the PSLRA was that the discovery stay, coupled with the heightened pleading standards, made it more difficult for plaintiffs to bring and prosecute securities class action lawsuits.¹¹³ The SEC Report concluded that “the most significant development in securities litigation post-Reform Act” was an increase in the number of securities class actions filed in state court.¹¹⁴

107. See 15 U.S.C. §§ 77z-1(c)(2), 78u-4(c)(2); see also S. REP. NO. 104-98, at 13–14, reprinted in 1995 U.S.C.C.A.N. 679, 692–93.

108. See H.R. REP. NO. 104-369, at 32, 37–39, reprinted in 1995 U.S.C.C.A.N. 730, 731, 736–38; S. REP. NO. 104-98, at 20–23, reprinted in 1995 U.S.C.C.A.N. 679, 699–702.

109. H.R. REP. NO. 104-369, at 32, 39, reprinted in 1995 U.S.C.C.A.N. 730, 731, 738.

110. U.S. SEC, OFFICE OF THE GEN. COUNSEL, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 (1997), <http://www.sec.gov/news/studies/lreform.txt> [hereinafter SEC REPORT].

111. See, e.g., S. REP. NO. 104-98, at 36, reprinted in 1995 U.S.C.C.A.N. 679, 714 (Sens. Paul Sarbanes, Richard Bryan, and Barbara Boxer support deterring frivolous lawsuits, but argue that the bill does not protect the ability of the investors to sue under the securities laws, and thus “threatens the capital formation process by undermining the confidence on which our markets depend”); SEC REPORT, *supra* note 110. It should be noted that the report cites to testimony given by William Lerach, who later pled guilty to conspiracy for his involvement in an alleged scheme to bribe people to become plaintiffs in securities class action lawsuits. See CORNERSTONE RESEARCH: SECURITIES CLASS ACTION CASE FILINGS, 2007: A YEAR IN REVIEW 19 (2007) [hereinafter CORNERSTONE STUDY 2007], available at http://securities.stanford.edu/clearinghouse_research/2007_YIR/20080103-01.pdf (discussing Lerach’s guilty plea).

112. See SEC REPORT, *supra* note 110, pt. II.B (quoting President Bill Clinton’s veto message, in which he stated that he was unwilling to sign legislation that would have the effect of “closing the courthouse door” on investors with legitimate claims).

113. See *id.* pt. II.A.

114. See *id.* pt. I; see also JOSEPH A. GRUNDFEST ET AL., SECURITIES CLASS ACTION LITIGATION IN Q1 1998: A REPORT TO NASDAQ FROM THE STANFORD LAW SCHOOL SECURITIES CLASS ACTION CLEARINGHOUSE pt. II (1998), <http://securities.stanford.edu/research/reports/19980602q1.html> [hereinafter STANFORD REPORT] (commenting that a

During the first year after the PSLRA's enactment, many of the state cases were being filed contemporaneously with federal cases,¹¹⁵ apparently in an attempt to circumvent some of the new federal procedural requirements imposed by the Act—particularly the discovery stay.¹¹⁶

The SEC's report to the president offered several reasons to help explain this increase in state court filings. First, some plaintiffs were filing in state court in order to avoid the discovery stay imposed by the Act.¹¹⁷ In state court, plaintiffs may be able to take advantage of more lenient state discovery rules, which enable plaintiffs to obtain the facts necessary to withstand a motion to dismiss.¹¹⁸ Moreover, even though state courts traditionally do not provide remedies as broad as the federal remedies for securities fraud, there may be other advantages, including nonunanimous jury verdicts, punitive damages, and aiding and abetting liability.¹¹⁹ These unintended consequences of the PSLRA were the focus of the next congressional legislative response, which is the subject of Part I.C of this Note: the Securities Litigation Uniform Standards Act.

C. *Securities Litigation Uniform Standards Act of 1998*

Though PSLRA made significant changes to private causes of action under the federal securities laws, the jurisdictional provisions, including the nonremoval provision of the '33 Act, remained untouched. As a result, plaintiffs asserting claims under the '33 Act were able to sidestep the new pleading and procedural requirements implemented by PSLRA by filing in state, rather than federal, court.¹²⁰ SLUSA sought to plug up this jurisdictional loophole by making federal court the venue for most securities class action lawsuits. It did so by creating an exception to the nonremoval provision of the '33 Act for cases involving covered securities.¹²¹ SLUSA amended section 22 of the '33 Act by adding

significant concern that has arisen in the wake of the PSLRA is that plaintiff's attorneys have shifted a significant portion of class action activity to state court in an apparent attempt to evade the Act's procedural restrictions).

115. According to the SEC Report, of the 105 federal actions filed in 1996, at least twenty-six were tied to a parallel state action, and the Stanford Securities Class Action Clearinghouse counted thirty-nine stand-alone state court actions. SEC REPORT, *supra* note 110, pt. VII.A.

116. See SEC REPORT, *supra* note 110, pt. VII (reporting that forty percent of the securities class actions filed in the first ten months of 1996 were filed in state court, compared to just over twenty percent in 1995).

117. *Id.* pt. VII.A.

118. *Id.*

119. *Id.*

120. See Michael A. Perino, *Fraud and Federalism: Preempting Private Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 273 (1998) (deeming the shift in forum, from federal court to state court, in securities fraud class action litigation an "unintended by-product" of PSLRA, and suggesting that plaintiffs are resorting to state courts in order to avoid the procedural hurdles of the PSLRA—a strategy that threatens to undermine the policies behind the legislation).

121. Securities Litigation Uniform Standards Act of 1998 § 101(a)(3), 15 U.S.C. § 77p(c) (2006). For an overview of SLUSA, see HAZEN, *supra* note 93, § 7.17[2].

§ 77p(c),¹²² which provides that “[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.”¹²³ A “covered security” is a security that is traded on a national exchange, such as the New York Stock Exchange, the NASDAQ, or the American Stock Exchange.¹²⁴

SLUSA was spurred by the unintended side effects of PSLRA observed in the years immediately following its enactment,¹²⁵ namely, the marked increase in securities class actions being filed in state courts—a rare phenomenon until the passage of the PSLRA.¹²⁶ Even more peculiar was that this development was reflected primarily in suits involving publicly traded securities, which were rarely litigated in state court prior to the PSLRA.¹²⁷ This increase threatened to undermine the very intent of the PSLRA¹²⁸ by using state courts to do the very same thing it sought to avoid in federal courts.¹²⁹ To that end, SLUSA sought to cure this infirmity by enacting “national standards” for securities class actions involving “nationally traded securities,” while still preserving state remedies available

122. Securities Litigation Uniform Standards Act of 1998 § 101(a)(3), 15 U.S.C. § 77p(c); see 15 U.S.C. § 77v(a). The nonremoval provision of the '33 Act now reads, in relevant part, as follows: “Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.” *Id.*

123. *Id.* § 77p(c); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

124. See 15 U.S.C. § 77r(b) (defining “covered security” for purposes of SLUSA).

125. See, e.g., SEC REPORT, *supra* note 110; JOSEPH A. GRUNDFEST & MICHAEL A. PERINO, STANFORD LAW SCH., 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 (1997), http://securities.stanford.edu/research/studies/19970227firstyr_firstyr.html [hereinafter GRUNDFEST-PERINO STUDY] (discussing the effects of the PSLRA).

126. H.R. REP. NO. 105-803, at 14 (1998) (Conf. Rep.) (citing GRUNDFEST-PERINO STUDY, *supra* note 125). The congressional report cited evidence indicating that the decline in the level of class action securities fraud litigation in federal courts has been met by “an almost equal increase in the level of state court activity, largely as a result of a ‘substitution effect’ whereby plaintiffs resort to state court to avoid the new, more stringent requirements of federal cases.” *Id.* Prior to the PSLRA, there was “essentially no significant securities class action litigation brought in State court.” *Id.*; see also SEC REPORT, *supra* note 110, *passim* (finding a significant increase in state filings).

127. See Perino, *supra* note 120, at 307–11 & tbls.III–IV, 334. See generally GRUNDFEST-PERINO STUDY, *supra* note 125.

128. H.R. REP. NO. 105-803, at 14 (citing GRUNDFEST-PERINO STUDY, *supra* note 125); see also Securities Litigation Uniform Standards Act of 1998 § 2, 15 U.S.C. § 78(a) (noting that, since the enactment of the PSLRA in 1995, “considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts,” preventing that Act from “fully achieving its objectives”).

129. See H.R. REP. NO. 105-803, at 14–15 (noting that plaintiffs’ lawyers have sought to circumvent the PSLRA’s provisions “by filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act’s procedural or substantive protections against abusive suits are available”).

to certain plaintiffs and “not changing the current treatment of individual lawsuits.”¹³⁰

SLUSA makes federal court the venue for “most,” but not all, securities class action lawsuits.¹³¹ “Covered securities” are the touchstone of SLUSA; covered securities are securities that are publicly traded on a national exchange.¹³² Under SLUSA, class actions relating to a “covered security” alleging fraud or manipulation “must be maintained pursuant to the provisions of Federal securities law, in Federal court (subject to certain exceptions).”¹³³ One reason covered securities were singled out by SLUSA is that companies with publicly traded securities cannot control where their securities are traded after an initial public offering; thus, issuers of such securities cannot choose to avoid jurisdictions that present unreasonable litigation costs.¹³⁴ In effect, “a single state can impose the risks and costs of its peculiar litigation system on all national issuers.”¹³⁵ As a result, SLUSA intended to adopt a “uniform national approach” to securities class actions involving nationally traded securities.¹³⁶

While the legislative history in some instances makes plain that SLUSA “only covers precisely those securities defined in the National Securities Markets Improvements Act (NSMIA), principally those securities that are traded on national exchanges,”¹³⁷ the SLUSA amendment is hardly a model of clarity with respect to its effect on ’33 Act claims in state court.¹³⁸

130. *Id.* at 2; *see also* Perino, *supra* note 120, at 334 (“The inclusion of securities that trade on national markets certainly makes sense because most of the shift to state court has involved cases alleging some type of fraudulent activity in connection with the purchase or sale of [nationally traded] securities.”).

131. H.R. REP. NO. 105-803, at 13.

132. Drawing the line at “covered securities” is consistent with SLUSA’s predecessor, the National Securities Markets Improvement Act (NSMIA). *See* Pub. L. No. 104-290 (1996) (NSMIA amended the ’33 Act by adding section 18(b), which exempts “covered securities” from state regulation of securities offerings); H.R. REP. NO. 105-803, at 13; Perino, *supra* note 120, at 334–35 (analyzing the proposal to apply NSMIA’s “national” standard in the private action context).

133. H.R. REP. NO. 105-803, at 13. Exceptions were carved out for four types of actions, including the following: (1) certain actions based on law of the state in which issuer is incorporated; (2) actions brought by states and political subdivisions and state pension plans; (3) actions by party to a contractual agreement; and (4) certain shareholder derivative actions. *Id.* at 13–14.

134. S. REP. NO. 105-182, at 5 (1998) (quoting Keith P. Bishop).

135. H.R. REP. NO. 105-803, at 15 (citation omitted).

136. S. REP. NO. 105-182, at 3.

137. *Id.* at 5.

138. Courts that have had occasion to consider whether or not SLUSA allows the removal of ’33 Act claims filed in state court often arrived at conflicting conclusions. *See In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 596 (S.D. Tex. 2002) (holding that such claims are not removable); *accord* *Haw. Structural Ironworker’s Pension Trust Fund v. Calpine Corp.*, No. 03CV0714BTM(JFS), 2003 WL 23509312 (S.D. Cal. Aug. 27, 2003) (remanding to state court and holding that the plain language of § 77(p)(c) allows only for the removal of state law claims, not claims brought under the ’33 Act); *Nauheim v. Interpublic Group of Cos.*, No. 02-C-9211, 2003 WL 1888843, (N.D. Ill. Apr. 16, 2003). *Contra* *Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122 (C.D. Cal. 2003) (finding that Congress intended to authorize broad removal of securities actions filed in state court, including ’33 Act claims).

Although Congress ostensibly intended for SLUSA to make federal courts the exclusive forum for claims involving nationally traded securities,¹³⁹ SLUSA has actually reached the anomalous result of permitting removal of state law actions.¹⁴⁰ While Congress lamented the shift to state courts, this sentiment contradicted its previously expressed intent for investors to have the opportunity to do precisely that when federal courts failed to provide investors with adequate protection.¹⁴¹ Some members of Congress argued against SLUSA, much as they did against the PSLRA, asserting that eliminating state court remedies leaves investors without an effective remedy.¹⁴²

While various courts grappled with SLUSA's provisions and purposes, a subsequent piece of legislation—the Class Action Fairness Act of 2005—attempted to reform the class action landscape as a whole and introduce some semblance of uniformity. Ironically, CAFA has inadvertently had the opposite effect, spawning more litigation over its effects on the pre-CAFA securities jurisdictional framework.

D. *The Class Action Fairness Act of 2005*

As early as 1998—the same year that SLUSA was enacted—Congress began deliberating about plans to enact comprehensive class action litigation reform measures.¹⁴³ These plans eventually culminated in the

See generally Seth Aronson et al., *Securities Litigation Uniform Standards Act: 2008 Update*, in *PLI SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2008*, at 221, 231–32 (2008) (citing a series of conflicting decisions interpreting SLUSA's effect on removal of cases under the '33 Act); 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, 1195, 1207–17 (2004) (noting that the imprecise language in the SLUSA amendment to the '33 Act's nonremoval provision results in difficulties in its application, leading to conflicting court decisions and unpredictability).

139. *See* H.R. REP. NO. 105-803, at 15 (“The solution to this problem is to make Federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities.”).

140. *See* Cook, *supra* note 71, at 638.

141. *See* S. REP. NO. 105-182, at 23–24, 24 n.3 (statement of Sen. Jack Reed) (pointing out that many of his colleagues voted in favor of the PSLRA with the understanding that if investors were not provided with adequate protection at the federal level, they could avail themselves of the opportunity to file a state suit if they so chose); *see also* HAZEN, *supra* note 93, § 7.17[2][A] (noting that SLUSA's failure to modify the concurrent jurisdiction provision of the '33 Act evidenced an intent not to preclude lawsuits brought under the '33 Act from state court).

142. S. REP. NO. 105-182, at 11–12 (statement of Sens. Sarbanes, Bryan, and Johnson) (opposing PSLRA and SLUSA on the grounds that eliminating state court remedies leaves innocent investors without an effective remedy).

143. *See* H.R. 3789, 105th Cong. (1998) (introducing the Class Action Jurisdiction Act of 1998). The reforms sought in the Class Action Jurisdiction Act made repeat appearances on the congressional agenda under a variety of names for a number of years before some of them were eventually realized in CAFA. *See, e.g.*, S. REP. NO. 108-123 (2003) (the Class Action Fairness Act of 2003); 148 CONG. REC. H838-01 (2002) (the Class Action Fairness Act of 2002); S. REP. NO. 106-420 (2000) (the Class Action Fairness Act of 2000); H.R. REP. NO. 106-320 (1999) (the Interstate Class Action Jurisdiction Act of 1999).

enactment of CAFA.¹⁴⁴ CAFA sought to expand diversity jurisdiction over class actions in order to allow class actions of a national nature to be heard in federal court.¹⁴⁵ To that end, it eliminated the complete diversity requirement and modified the amount-in-controversy requirement for lawsuits that can be characterized as class actions.¹⁴⁶ Now, under CAFA, federal district courts have “original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000 . . . and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant.”¹⁴⁷ Essentially, by expanding diversity jurisdiction, CAFA broadly provides for the removal of class action lawsuits that are likely to be of national importance.¹⁴⁸ However, CAFA does not apply to certain class actions, including those Congress had already addressed in SLUSA—those involving covered securities.¹⁴⁹

A main concern that led Congress to pass this legislation allowing for removal of nationwide class actions is similar to the primary concern that guided the enactment of SLUSA for securities class actions: the exponential increase in state court filings.¹⁵⁰ Congress was concerned that cases that were of national importance were being systematically filed in particular state courts that had a reputation for being plaintiff friendly, on the theory they would be more likely to hear unmeritorious cases than federal courts.¹⁵¹

One malady CAFA aimed to cure was lawyer-driven lawsuits.¹⁵² Resourceful lawyers sought to “game the system” by craftily pleading around diversity requirements.¹⁵³ They did so for their own gain in the form of enormous attorneys’ fees, which were obtained at the expense of both defendants—who may not have been in the wrong, yet were effectively coerced into settling in order to avoid potentially bankrupting

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

145. Class Action Fairness Act § 2(b), 28 U.S.C. § 1711 (2006).

146. In a vein similar to SLUSA, CAFA closed a loophole by extending its reach to “mass actions.” See Class Action Fairness Act § 4(a)(2), 28 U.S.C. § 1332(d)(11)(B)(i) (deeming mass actions, or actions in which “monetary relief claims of 100 or more persons are proposed to be tried jointly” and involve “common questions of law or fact,” a removable category of class actions for CAFA’s purposes).

147. 28 U.S.C. § 1332(d)(2).

148. *Id.* (providing for the removal of “any” civil action meeting the criteria set forth in the statute).

149. See *infra* notes 167–78 and accompanying text.

150. One report states that federal class action filings had increased by more than 300% over the preceding ten years, while class action filings in state courts increased by more than 1000%. See S. REP. NO. 109-14, at 13 (2005), reprinted in 2005 U.S.C.C.A.N. 4, 13–14.

151. See Jeffrey L. Roether, Note, *Interpreting Congressional Silence: CAFA’s Jurisdictional Burden of Proof in Post-removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2751, 2753–54 (2007) (discussing reasons why plaintiffs’ lawyers prefer to bring class actions in state court).

152. See *id.* at 2751–57 (discussing the perceived abuses by plaintiffs’ lawyers that riddled the class action system).

153. See S. REP. NO. 109-14, at 10, reprinted in 2005 U.S.C.C.A.N. 4, 11 (noting that lawyers who preferred to litigate in state courts were able to “game the system” due to loopholes in the “complete diversity” and “amount-in-controversy” requirements).

litigation—and the plaintiffs themselves, who were often left with mere “coupon settlements” or, in some cases, even worse off than they were before.¹⁵⁴ To address the problem of lawyer-driven lawsuits, CAFA established a Consumer Class Action Bill of Rights.¹⁵⁵

This Note focuses on the second result of this systematic “abuse” of class actions that CAFA sought to eliminate: the practice of forum shopping for “magnet” states.¹⁵⁶ Like SLUSA, CAFA was concerned with the nationwide effect of state forum shopping.¹⁵⁷ State courts were effectively setting national policy,¹⁵⁸ which Congress felt should be left to the federal courts¹⁵⁹ in order to comport with the purposes of diversity jurisdiction.¹⁶⁰ As such, a primary purpose of CAFA, as stated in the Act itself, is to restore

154. *See id.* at 14–21, *reprinted in* 2005 U.S.C.C.A.N. 4, 15–22; 148 CONG. REC. H838-01, H839 (2002) (statement of Rep. Pryce); *id.* at H840 (statement of Rep. Goodlatte); *id.* at H844 (statement of Rep. Pence). “Coupon settlements” are settlements “in which class members receive nothing more than promotional coupons to purchase more products from the defendants.” S. REP. NO. 109-14, at 15, *reprinted in* 2005 U.S.C.C.A.N. 4, 16; *id.* at 15–20, *reprinted in* 2005 U.S.C.C.A.N. 4, 16–20 (citing numerous examples of coupon settlements).

155. *See* S. REP. NO. 109-14, at 27–28, *reprinted in* 2005 U.S.C.C.A.N. 4, 27–28.

156. *See* 151 CONG. REC. H723-01, H726 (2005) (statement of Rep. Sensenbrenner) (noting the “exponential increase in State class action cases in a handful of ‘magnet’ or ‘magic’ jurisdictions, many of which deal with national issues” and that, as a result, these courts end up “setting policy for the entire country”); 148 CONG. REC. H838-01, H842 (2002) (statement of Rep. Cox) (discussing the rise of “forum shopping”—a practice whereby clever lawyers “get to pick the one place in America where [they] know [they] are going to win, whether [they] are right or whether [they] are wrong”). Representative Cox also asserted that such forum shopping has resulted in a handful of local courts making law for an entire nation. *Id.* The magnet jurisdictions consistently referred to are “Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida.” *Id.*; *see also* Roether, *supra* note 151, at 2756–57 (describing the abuses that plague these magnet jurisdictions).

157. *See* S. REP. NO. 109-14, at 4, *reprinted in* 2005 U.S.C.C.A.N. 4, 5 (discussing the perceived consequence that many multistate or nationwide cases were being heard in state, and not federal, courts).

158. *See id.* (stating that a “key reason” for the problems with the class action system was that “most class actions [were] adjudicated in state courts” where governing rules are applied unfairly and inconsistently). This becomes important because these actions in state court could potentially set national policy. *Id.*, *reprinted in* 2005 U.S.C.C.A.N. 4, 6; Roether, *supra* note 151, at 2757–58 (observing that one state court could potentially dictate to forty-nine others what the law should be, which “flies in the face of basic federalism principles” because other states would have to abide by the deciding state court’s law regardless of its own policy choices).

159. S. REP. NO. 109-14, at 5, *reprinted in* 2005 U.S.C.C.A.N. 4, 6 (“Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court.”).

160. *See id.* at 5, 7–8, *reprinted in* 2005 U.S.C.C.A.N. 4, 6, 8–9 (stating that the purpose of diversity jurisdiction is to allow cases to be heard in a forum that is not unfair to out-of-state defendants); Roether, *supra* note 151, at 2754–55 (pointing out that large class actions involving diverse parties implicate the precise historical concerns that the founders felt were deserving of federal court protection).

the intent of the framers of the Constitution¹⁶¹ by “providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”¹⁶²

At the same time, CAFA strives to carve out opportunities to exempt from its jurisdictional reach claims that are primarily local in nature and “lack national implications.”¹⁶³ There are two ways that such claims can remain in state court: (1) if certain diversity-related criteria are met¹⁶⁴ or, failing that, (2) in certain instances where it is unclear whether a case is national or local in nature, CAFA accords federal courts the discretion to decline jurisdiction by looking to a “totality of the circumstances.”¹⁶⁵

Unlike SLUSA, the scope of CAFA is not limited to securities; it applies to nationwide class actions as a whole.¹⁶⁶ CAFA’s legislative history is replete with examples of “abusive” tort, pharmaceutical, and environmental class actions,¹⁶⁷ but never mentions the plethora of “abusive” securities actions with which SLUSA was preoccupied.¹⁶⁸ Indeed, the only express

161. S. REP. NO. 109-14, at 24, *reprinted in* 2005 U.S.C.C.A.N. 4, 24 (“Clearly, a system that allows state court judges to dictate national policy . . . from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism.”).

162. Class Action Fairness Act § 2, 28 U.S.C. § 1711 (2006) (findings and purposes of the Act); *see id.* (expressing concern that over the past decade there have been “abuses of the class action device” that have “undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are . . . keeping cases of national importance out of Federal court”); *see also* 148 CONG. REC. H838-01, H842-43 (statement of Rep. Cox) (arguing that the system as it existed before CAFA frustrated the intent of the Framers for diversity jurisdiction to guard against local prejudice).

163. 151 CONG. REC. S1076-01, S1079 (2005) (statement of Rep. Dodd); *see also* S. REP. NO. 109-14, at 36-37, *reprinted in* 2005 U.S.C.C.A.N. 4, 35 (explaining that claims that are of “national or interstate interest” argue in favor of the matter being handled in federal court).

164. *See* 28 U.S.C. § 1332(d)(4)(B) (exempting cases in which at least two-thirds of the plaintiff class and primary defendants are citizens of the state in which the action is filed).

165. Specifically, if greater than one-third but fewer than two-thirds of the plaintiff class and primary defendants are citizens of the state in which the action is filed, the federal court may, “in the interests of justice” exercise discretion to decline jurisdiction by looking to a “totality of the circumstances.” *Id.* § 1332(d)(3). Specifically, this test looks to six factors: (1) whether the suit involves matters of “national or interstate interest”; (2) whether the claims will be governed by the laws of a state other than those of the forum state; (3) “whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction”; (4) whether there is a “distinct nexus” between the forum the case was brought in and the class members, the alleged harm, or the defendants; (5) whether the aggregate number of plaintiffs that are citizens of the forum state is substantially larger than any other state, and the citizenship of other plaintiffs is widely dispersed among other states; and (6) whether parallel class actions asserting the same or similar claims have recently been filed. *Id.*; *see* S. REP. NO. 109-14, at 36-38, *reprinted in* 2005 U.S.C.C.A.N. 4, 35-37 (elaborating on these six factors).

166. *See supra* notes 147-48 (noting that CAFA applies to “any” civil action that meets its criteria).

167. *See, e.g.*, S. REP. NO. 109-14, at 36, *reprinted in* 2005 U.S.C.C.A.N. 4, 35 (also using nationally distributed pharmaceuticals as an example of a nationally significant case); S. REP. NO. 108-123, 38-39 (2003) (using nationally distributed pharmaceuticals as an example of a case of “national or interstate interest”).

168. *See supra* notes 125-30 and accompanying text.

mention of securities class actions to be found in the legislation and its history is made explicitly to carve out an exemption for certain types of securities class actions.¹⁶⁹ CAFA expressly enumerates three types of class actions to which it does not apply, sometimes called the (1) SLUSA (or covered securities), (2) corporate governance, and (3) securities exceptions.¹⁷⁰ Under the SLUSA exception, CAFA does not apply to “any class action that solely involves a claim . . . concerning a covered security.”¹⁷¹

Under the securities exception, CAFA does not cover cases that “solely involv[e] . . . a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security.”¹⁷² This carve-out for certain securities claims can be explained in part by the fact that CAFA came at a time that had just witnessed major corporate frauds.¹⁷³ As a result, when CAFA was being debated in Congress in the wake of these scandals, opponents pointed to the examples of Enron, Adelphia, and WorldCom as evidence that investors needed more, or at least not less, protection in the class action context.¹⁷⁴ Arguments about CAFA are often couched in language that exemplifies the dichotomy of plaintiff protection versus corporate interests; opponents argue that federalizing class actions to “appease big business” would reduce plaintiffs’ chances of prevailing and “prevent many with viable claims from filing individual actions.”¹⁷⁵ This concern, at least with respect to securities, was met with the reassurance that CAFA expressly exempted certain securities frauds from the legislation.¹⁷⁶ However, an examination of the legislative history preceding these corporate fraud debacles reminds us that the carve-out for securities fraud class actions was always part of the plan, and thus

169. See *infra* note 170.

170. 28 U.S.C. § 1332(d)(9); *id.* § 1453(d) (stating that CAFA does not apply to actions solely involving a claim (1) “concerning a covered security”; (2) that relates to internal corporate governance; or (3) relating “to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security”).

171. See *id.* § 1332(d)(9); *id.* § 1453(d)(1).

172. See *id.* § 1453(d)(3); see also *id.* § 1332(d)(9)(C) (the securities exception).

173. See 148 CONG. REC. H838-01, H839 (2002) (statement of Rep. Frost) (“[A]t this very moment Congress is still trying to figure out how Enron executives managed to devastate the life savings of thousands of its employees and shareholders. . . . America has just witnessed the worst corporate robbery in history . . .”).

174. See, e.g., 149 CONG. REC. H5281-03, H5289 (2003) (statement of Rep. Sandlin) (“Do the names WorldCom, Enron and Arthur Andersen strike a familiar note? . . . This act should be called exactly what it is: the Corporate Wrongdoer Past, Present and Future Protection Act; and, by the way, do not forget to send the money.”).

175. Roether, *supra* note 151, at 2752.

176. See 148 CONG. REC. H838-01, H840 (2002) (statement of Rep. Pryce) (“Indeed . . . securities litigation is carved out entirely by this legislation. It would not cover Enron.”); 149 CONG. REC. H5281-03, H5289 (2003) (statement of Rep. Sensenbrenner) (responding that the bill “provides specific exemptions for the removal of class action cases to Federal court” for the types of wrongdoing mentioned by Representative Sandlin, cited *supra* note 174); 149 CONG. REC. H5281-03, H5282 (2002) (statement of Rep. Sensenbrenner) (pointing out from the outset that the legislation “specifically excludes a number of Federal securities and State-based corporate fraud lawsuits”).

these scandals could not be the only reason Congress had in mind for the securities carve out.¹⁷⁷ As Congress noted on multiple occasions, it intended to carve out securities fraud class actions in order to preserve the “carefully crafted” jurisdictional framework for securities actions already established by SLUSA.¹⁷⁸

The provision excepting certain securities actions from CAFA’s reach has raised issues as to how CAFA’s provisions should be construed. Ultimately, it is unclear whether the legislation as a whole should be read as a modest attempt to reform class actions or whether Congress intended to paint with a broad brush. The legislative history lends itself to both interpretations. On the one hand, congressional reports support the proposition that CAFA was intended to be a “modest, balanced step that would address some of the most egregious problems in class action practice.”¹⁷⁹ CAFA has repeatedly been described as “modest litigation reform” that “strikes in a narrow and appropriate way.”¹⁸⁰ To that end, it includes a “narrowly-tailored expansion of federal diversity jurisdiction” and “modest amendments to current removal provisions.”¹⁸¹ Yet, the legislative history also states that, “[o]verall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.”¹⁸² In the same vein, Congress has suggested that the exemptions to CAFA be construed narrowly;¹⁸³ however, it has also expressed strong intent from the beginning that these exceptions were vital

177. See H.R. REP. NO. 106-320, at 3 (1999) (carving out an exemption for class actions concerning covered securities).

178. S. REP. NO. 109-14 (2005), at 50, *reprinted in* 2005 U.S.C.C.A.N. 4, 42 (“The purpose of this provision is to avoid disturbing in any way the federal vs. state court jurisdictional lines already drawn in the securities litigation class action context by the enactment of [SLUSA].”); *see id.* at 49–50, *reprinted in* 2005 U.S.C.C.A.N. 4, 46–47 (“In order to be consistent with the exceptions to federal diversity jurisdiction granted under new section 1332(d), new subsection 1453(d) provides that the class action removal provisions shall not apply to claims involving covered securities or corporate governance litigation. In addition, claims concerning a covered security . . . are excepted from the class action removal rule as well. These are essentially claims against the officers of a corporation for a precipitous drop in the value of stock, based on fraud. Because Congress has previously enacted legislation governing the adjudication of these claims, it is the Committee’s intent not to disturb the carefully crafted framework for litigating in this context.” (footnote omitted)); *see also* S. REP. NO. 108-123, at 31 (2003) (exempting from its removal reforms “any securities class action cases governed by [SLUSA] and corporate governance cases”).

179. S. REP. NO. 109-14, at 5, *reprinted in* 2005 U.S.C.C.A.N. 4, 6; *see also id.* at 27, *reprinted in* 2005 U.S.C.C.A.N. 4, 27 (“[CAFA] is a modest attempt to address a number of the problems and abuses in the current class action system.”).

180. 151 CONG. REC. H723-01, H727 (2005) (statement of Rep. Boucher).

181. S. REP. NO. 109-14, at 27, *reprinted in* 2005 U.S.C.C.A.N. 4, 27.

182. *Id.* at 43, *reprinted in* 2005 U.S.C.C.A.N. 4, 41.

183. *See, e.g., id.* at 45, *reprinted in* 2005 U.S.C.C.A.N. 4, 42 (stating that the securities exemption is to be “narrowly construed”).

to the legislation.¹⁸⁴ These difficulties in applying CAFA have reared their heads in the context of the subprime crisis. Part I.E provides an overview of the subprime crisis and the surrounding circumstances that led to the conflict at the heart of this Note.

E. *The Current Context: A Countrywide Crisis*

In order to truly understand how the incongruous removal provisions at issue are important to the conflict at hand, and to make an informed assessment as to how they can be reconciled, it is critical to first understand the context in which the conflict has arisen.

During the year in which CAFA was enacted, Alan Greenspan, then-Chairman of the Federal Reserve, believed that a “bubble” in the national housing market was still unlikely to occur despite “froth” in some local markets.¹⁸⁵ This conjecture was based on the widely held assumption that housing markets were local—not national—in character.¹⁸⁶ Meanwhile, investors in mortgage-backed assets relied on this assumption to build portfolios of what they believed were assets from uncorrelated markets.¹⁸⁷ Paradoxically, it was the very proliferation of these portfolios that generated correlation in the market, and simultaneously made it easier for buyers with dubious credit to finance homes they could not afford.¹⁸⁸ “Only once investors realized that the housing market is a *national* market—not a local one—did it become clear that these securities were extraordinarily risky. Hence the collapse.”¹⁸⁹

The subprime meltdown has dominated financial news since early 2007, when “economic conditions triggered fears of widespread defaults in subprime mortgages”—the same mortgages that had been credited with inflating the housing bubble until it popped.¹⁹⁰ Trillions of dollars in losses were announced as “companies were forced to come to grips with subprime

184. See *supra* notes 174–77 and accompanying text (discussing the concern over CAFA’s applicability to securities class actions in the wake of corporate scandals such as Enron).

185. *The Economic Outlook: Hearing Before the J. Economic Comm.*, 109th Cong. 52 (2005) (testimony of Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System) (stating that, “[a]lthough a ‘bubble’ in home prices for the Nation as a whole does not appear likely, there do appear to be, at a minimum, signs of froth in some local markets where home prices seem to have risen to unsustainable levels”).

186. See *id.* at 52–53 (“The housing market in the United States is quite heterogeneous, and it does not have the capacity to move excesses easily from one area to another. Instead, we have a collection of only loosely connected local markets. . . . [T]he behavior of home prices varies widely across the Nation.”).

187. See David M. Levy & Sandra J. Peart, *An Expert-Induced Bubble: The Nasty Role of Ratings Agencies in the Busted Housing Market*, REASON ONLINE, Sept. 30, 2008, <http://www.reason.com/news/show/129116.html>.

188. See *id.*

189. *Id.*

190. Patrick R. Costello et al., *Important Developments in Securities Litigation in 2008*, 36 SEC. REG. L.J. 213, 218 (2008).

mortgage vulnerability.”¹⁹¹ The national economy has since witnessed major banks and institutions fail, economies teeter, and stock markets plummet.¹⁹² The foundering of former pillars of financial strength—Lehman Brothers, Bear Stearns, Merrill Lynch, and AIG—caused investor confidence in the financial system to plummet, which in turn caused credit markets to seize up.¹⁹³ The subprime crisis quickly turned into the credit crisis, which led to the global financial crisis.¹⁹⁴

The unprecedented widespread impact of subprime mortgages derives from several unique features of the subprime financial market.¹⁹⁵ First, universal expectations that housing prices could only go up facilitated subprime lending and borrowing for those with bad credit.¹⁹⁶ Due to the rise in home values, lenders were increasingly willing to lend money to individuals with low credit scores who were subject to a low level of income verification.¹⁹⁷ Borrowers thought they were safe in the belief that they could easily pay off their mortgage by selling off homes they could not afford at increased values.¹⁹⁸ The subprime loans were attractive to these

191. *Id.* Securities class actions related to the credit crisis have particularly high investor losses: in 2008 and 2009 median losses for these cases were over \$600 million; total investor losses were over \$450 billion in 2008, and these losses are on pace to surpass \$300 billion in 2009. STEPHANIE PLANCICH & SVETLANA STARYKH, NERA, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2009 MID-YEAR UPDATE; FILINGS REMAIN HIGH, FUELED BY CREDIT CRISIS AND PONZI SCHEME CLAIMS; MEDIAN SETTLEMENTS REMAIN UNDER \$10 MILLION 2 (2009) [hereinafter NERA 2009 STUDY], available at http://www.nera.com/image/Recent_Trends_Report_0709.pdf; see also PRICEWATERHOUSECOOPERS, 2008 SECURITIES LITIGATION STUDY 3 (2009) [hereinafter PwC 2008 STUDY], available at <http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF> (noting the loss of “trillions of investor dollars” and that federal resources committed in 2008 to bail out the financial markets exceed an estimated \$6.4 trillion); Yalman Onaran, *Banks’ Subprime Losses Top \$500 Billion on Writedowns*, BLOOMBERG, Aug. 12, 2008, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aSKLfqh2qd9o&refer=worldwide>; U.S. Banks To Write Down About \$44 Billion in Q4: Whitney, REUTERS, Nov. 26, 2008, <http://www.reuters.com/article/GCACreditCrisis/idUSTRE4AP3QY20081126>.

192. See PwC 2008 STUDY, *supra* note 191, at 2–3, 29 (discussing the demise of mortgage and financial institutions that failed due to their exposure to mortgage-backed securities, such as AIG, Lehman Brothers, Bear Stearns, and Merrill Lynch); *id.* at 29 (discussing the dramatic increase in bank failures as the economy worsened in 2008); Carrick Mollenkamp et al., *Crisis on Wall Street as Lehman Totters, Merrill Is Sold, AIG Seeks To Raise Cash*, WALL ST. J., Sept. 15, 2008, at A1; Andrew Ross Sorkin, *A Stunning Fall: JPMorgan Chase Pays Only \$2 a Share for Troubled Firm*, N.Y. TIMES, Mar. 17, 2008, at A1.

193. See S. REP. NO. 111-1, at 188–89 (2009).

194. “[A]nnus horribilis’ best sums up 2008. It will be remembered as the year in which the subprime crisis of 2007 evolved into a financial crisis with reverberating effects on financial markets and economies throughout the world.” PwC 2008 STUDY, *supra* note 191, at 3.

195. Arthur G. Boylan, *The Subprime Mortgage Market: Its Broad Impact and the Initial Hurdle for Securities Class Actions*, FED. LAW., Aug. 2008, at 20, 20.

196. *Id.*

197. *Id.* “The availability of easy, cheap credit with low underwriting standards inflated the demand for housing, which led to increased housing prices.” S. REP. NO. 111-1, at 187.

198. See Boylan, *supra* note 195, at 20; Jonathan C. Dickey, *Current Trends in Federal Securities Litigation*, in POSTGRADUATE COURSE IN FEDERAL SECURITIES LAW 1011, 1035 (ALI-ABA Course of Study, July 24–25, 2008).

borrowers—and ultimately fatal to them—because of their exotic features, such as “teaser” low initial interest rates.¹⁹⁹ However, an unexpected downturn in the housing market fueled the collapse of subprime lending and the subprime market.²⁰⁰ As housing prices declined, borrowers were unable to sell their homes at prices high enough to pay off their mortgages—something they had once taken for granted. Meanwhile, as low initial interest periods expired, subprime loan holders defaulted in record numbers, forcing some into foreclosure.²⁰¹

A second feature of the exotic subprime market contributed to the breadth of the crisis: increased securitization of the subprime loans.²⁰² Securitization is “the process by which banks and lenders pool mortgages [or other loans] with similar characteristics together, package the loans into bonds, and ultimately sell them to investors as securities.”²⁰³ The mortgage-backed security (MBS) was the most commonly securitized loan, totaling about \$6.1 trillion in the United States in early 2006.²⁰⁴ Traditional mortgages encompassed “a simple relationship between a bank and a borrower” in a local market; thus the impact of widespread default and “a major decline in the housing market would have a much more limited impact on the overall economy.”²⁰⁵ The subprime model, marked by increased securitization, expanded the impact because many more players were involved in the complex securitization process and because MBSs were so widely held.²⁰⁶ While lenders kept some of the bad loans on their own books, others were pooled together and securitized.²⁰⁷ These MBSs were structured in multiple levels of “tranches,” or mezzanines, according to their level of risk.²⁰⁸ This layering system allowed for the securities to obtain higher credit ratings by the ratings agencies than they otherwise would have.²⁰⁹ As a result, the ratings agencies typically rated MBS investments in the double-A to triple-A range.²¹⁰ In the prosperous housing climate, this made MBSs an attractive investment for mutual funds, hedge funds, insurance companies, and corporations.²¹¹ However, when the

199. Boylan, *supra* note 195, at 20.

200. *Id.*

201. *See Monetary Policy Hearings, supra* note 37, at 2 (statement of Sen. Dodd, Chairman, S. Comm. on Banking, Housing, and Urban Affairs) (describing the “foreclosure crisis” that continues to hit record levels: foreclosures for January 2008 were up fifty-seven percent from 2007 and “over 2 million Americans could lose their homes”); Dickey, *supra* note 198, at 1036.

202. Boylan, *supra* note 195, at 20.

203. *Id.*

204. *See* S. REP. NO. 111-1, at 186 (2009). The mortgage-backed security owed its explosive growth to the “perception of safety” of this type of loan. *Id.*

205. Boylan, *supra* note 195, at 20–21.

206. *Id.*; S. REP. NO. 111-1, at 187.

207. Boylan, *supra* note 195, at 21.

208. *Id.*

209. *Id.*

210. *Id.*

211. S. REP. NO. 111-1, at 187; Boylan, *supra* note 195, at 21.

housing market went belly-up, the value of these securities plummeted.²¹² The ubiquitous nature of subprime mortgages resulted in a widespread impact on the national economy; thus many different entities will play a role in credit crisis litigation.²¹³

Not surprisingly, in the wake of the credit crisis, a wave—a tsunami, even—of subprime securities lawsuits has followed.²¹⁴ Terms such as MBSs and collateralized debt obligations (CDOs) are now common parlance amongst the securities bar.²¹⁵ A majority of the class action cases have been filed in the Second Circuit.²¹⁶

212. S. REP. NO. 111-1, at 187; Boylan, *supra* note 195, at 21.

213. See Costello et al., *supra* note 190, at 218 (discussing the many players in the subprime mortgage and MBS business who present various potential targets for litigation); see also Jonathan C. Dickey et al., *Subprime-Related Securities Litigation: Where Do We Go from Here?*, IN SIGHTS: CORP. & SEC. L. ADVISOR, Apr. 2008, at 1, 3; Vikas Bajaj, *If Everyone's Finger Pointing, Who's To Blame?*, N.Y. TIMES, Jan. 28, 2008, at C1 (“It will be a multiring circus” (quoting Joseph A. Grundfest, former SEC Commissioner and Stanford Law Professor)).

214. See NERA 2009 STUDY, *supra* note 191, at 1, 3 (noting the surge in federal class action securities filings driven by the credit crisis, reaching 259 cases in 2008—a six-year high—and 127 new filings in the first half of 2009); PwC 2008 STUDY, *supra* note 191, at 5–6 (counting 210 securities class actions filed in 2008—a majority of which were related to the financial crisis—representing a twenty-nine percent increase over 2007 and a fifteen percent increase over the average number of filings since the PSLRA was enacted in 1995); Costello, *supra* note 190, at 213, 218 (stating that in the fifteen months ending on March 31, 2008, 448 subprime-related cases were filed, with securities cases accounting for twenty-three percent of those filings; securities fraud class actions accounted for over half of those securities filings); The D&O Diary, <http://www.dandodiary.com/2007/04/articles/securities-litigation/counting-the-subprime-lender-lawsuits/> (Apr. 28, 2007, 14:26 EST) (counting 199 subprime lender lawsuits as of Aug. 31, 2009); see also CORNERSTONE STUDY 2007, *supra* note 111, at 2, 5; Dickey et al., *supra* note 213, at 2–3. For the most recently updated Class Action Filings (CAF) index, see Stanford Securities Class Action Clearinghouse—Litigation Activity Indices, http://securities.stanford.edu/litigation_activity.html (last visited Nov. 9, 2009) (counting credit crisis class action filings for 2009 YTD). See also Stanford Securities Class Action Clearinghouse—Index of Filings, <http://securities.stanford.edu/companies.html> (last visited Nov. 9, 2009) (counting all securities class actions by quarter and court).

215. See PRICEWATERHOUSECOOPERS, 2007 SECURITIES LITIGATION STUDY (2008) [hereinafter PwC STUDY 2007], available at <http://10b5.pwc.com/PDF/2007%20SECURITY%20LIT%20STUDY%20W-LT.PDF> (observing that the most notable development of 2007 was the escalation of the subprime crisis; indeed, the American Dialect Society even voted “subprime” the Word of the Year for 2007). Some other studies have arrived at differing numbers due to varied counting methodologies, but agree that the credit crisis has generated a wealth of securities class action filings. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2009 MID-YEAR ASSESSMENT 2 (2009), available at http://securities.cornerstone.com/pdfs/2009_Mid-Year_Assessment.pdf (stating that the majority of securities class action filings in the first half of 2009 “contained allegations related to the credit crisis”). Even though the study counted eighty-seven securities class action filings for the first half of 2009—a 22.3% decrease from the filings in each half of 2008—a substantial portion continue to be related to the credit crisis. *Id.* at 2–3. Moreover, this study only tracks class actions involving exchange-traded securities, which does not include the filings related to mortgage-backed securities. *Id.* at 6.

216. See NERA, *supra* note 191, at 5 (observing that historically, securities class action filings are concentrated in the Second Circuit and the Ninth Circuit, but credit crisis filings have been heavily concentrated in the Second Circuit); PwC 2008 STUDY, *supra* note 191, at 17, 30 (noting that the Second Circuit accounted for the most filings, followed by the Ninth

Credit crisis class actions include “virtually every type of claim available under the Securities Act of 1933 and the Securities Exchange Act of 1934.”²¹⁷ Many of the complaints asserting claims of securities fraud against mortgage lenders allege overstatement of assets, understatement of loan loss reserves, and lowered underwriting standards to drive loan origination volume to unqualified borrowers who were likely to default.²¹⁸ Mortgage lenders and financial institutions have not only found themselves in federal court as defendants in securities class actions that assert claims under sections 10(b) and 20 of the ’34 Act, but they have also been sued in state court by holders of mortgage pass-through certificates claiming violations of sections 11, 12(a)(2), and 15 of the ’33 Act based on misrepresentations and omissions in the offering documents of these noncovered securities.²¹⁹ As compared to other types of securities class actions, a higher percentage of subprime cases involve claims under the ’33 Act.²²⁰ Commentators have observed that plaintiffs prefer to sue in state, rather than federal court.²²¹ This has been a source of tension in light of Congress’s attempts to concentrate certain class actions in federal court.²²² Plaintiffs in subprime cases have argued that their ’33 Act claims can be brought in state court—and must stay in state court—pursuant to the nonremoval provision in section 22 of the ’33 Act, while defendants seek removal to federal court based on CAFA’s provisions.²²³

The next section of this Note examines the conflict over which provision trumps—the nonremoval provisions of the ’33 Act or the removal provisions of CAFA—in securities class actions, particularly with respect to

Circuit, due to credit crisis-related filings); *see also* Dickey, *supra* note 198, at 1033; Dickey et al., *supra* note 213, at 2–3.

217. Boylan, *supra* note 195, at 21.

218. *See* PWC 2008 STUDY, *supra* note 191, at 31 (“The nature of the allegations found in these financial-crisis-related cases ranged from claims of inadequate reserves and overstatement of assets to inadequate disclosures.”); Boylan, *supra* note 195, at 21 (observing general allegations made in subprime suits); Dickey et al., *supra* note 213, at 3–4 (discussing theories of liability).

219. *See, e.g.*, *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1032–33 (9th Cir. 2008) (alleging violations of sections 11, 12(a)(2), and 15 of the ’33 Act); *N.J. Carpenters Vacation Fund v. HarborView Mortgage Loan Trust*, 581 F. Supp. 2d 581, 582 (S.D.N.Y. 2008) (alleging violations of sections 11, 12, and 15 of the ’33 Act); CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2008: A YEAR IN REVIEW 21–22 (2009), available at http://securities.stanford.edu/clearinghouse_research/2008_YIR/20090106_YIR08_Full_Report.pdf (noting the share of class actions alleging sections 11 and 12(2) claims reached its highest level in 2008); 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 12:6, at 743 (5th ed. 2009) (noting that class actions alleging ’33 Act claims regarding noncovered securities, such as mortgage-backed securities, have multiplied in the wake of the subprime crisis).

220. Costello et al., *supra* note 190, at 223 (citing James G. Bohn, *The Crisis Gets Its Judicial Legs: A Survey of Subprime Securities Class Actions*, 40 SEC. REG. & L. REP. 1178 (2008)).

221. *Id.* (citing The D&O Diary, <http://www.dandodiary.com/2008/07/articles/securities-litigation/section-11-lawsuits-coming-soon-to-a-state-court-near-you/> (July 21, 2008, 05:09 EST)).

222. *See supra* Part I.C–D.

223. *See* The D&O Diary, *supra* note 221.

cases involving MBSs. These MBS cases present unique difficulties because the securities plaintiffs are holders of mortgage pass-through certificates, which are not covered securities, i.e., the kind of securities which SLUSA makes removable.²²⁴ Charles Geisst reminds us that, since 1933, “advances in financial innovation, plus the determination of some to ignore the law, created a situation in which existing regulations proved too general in the face of an onslaught of new financial products.”²²⁵ SLUSA did not, in advance of the crisis, provide for the removal of noncovered securities such as MBSs. Meanwhile, noncovered MBSs indisputably carry national importance, a concept which goes to the heart of both CAFA and SLUSA. Nevertheless, CAFA left the language of the ’33 Act’s nonremoval provision untouched. To that end, some courts have construed CAFA’s provisions broadly to allow for removal of cases involving such securities,²²⁶ while others have administered a narrower reading of CAFA’s provisions, and maintain that the more specific ’33 Act trumps the general removal provisions of CAFA.²²⁷ Part II explores the current split in the circuits by examining three recent court decisions, each of which has employed a different approach to resolve this conflict.

In *Luther v. Countrywide Home Loans Servicing LP*,²²⁸ the U.S. Court of Appeals for the Ninth Circuit held that the specific nonremoval provision in section 22 of the ’33 Act trumps the general removal provisions of CAFA.²²⁹ In contrast, in its decision in *New Jersey Carpenters Vacation Fund v. HarborView Mortgage Loan Trust*,²³⁰ the U.S. District Court for the Southern District of New York held that CAFA trumped the ’33 Act because mortgage-backed securities cases deal with an issue of national importance—the nationwide credit crisis—and therefore are precisely the type of cases that Congress intended to be heard in federal court by way of CAFA.²³¹ A few months after *New Jersey Carpenters*, a decision in the U.S. Court of Appeals for the Seventh Circuit created a split in the circuits. In *Katz v. Gerardi*,²³² a case not involving MBSs,²³³ Judge Frank Easterbrook vacated the district court’s opinion, which allowed for remand under *Luther*, and held instead that a securities class action brought under the ’33 Act may be removed to federal court unless CAFA provides otherwise in its exceptions.²³⁴ Though *Katz* did not involve MBSs, the court held that CAFA does indeed supersede the ’33 Act and rejected the

224. See *supra* notes 121–24 and accompanying text.

225. GEISST, *supra* note 16, at 290.

226. See, e.g., *Katz v. Gerardi*, 552 F.3d 558 (7th Cir. 2009); *N.J. Carpenters Vacation Fund v. HarborView Mortgage Loan Trust*, 581 F. Supp. 2d 581 (S.D.N.Y. 2008).

227. See, e.g., *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008).

228. 533 F.3d 1031.

229. *Id.* at 1032.

230. 581 F. Supp. 2d 581.

231. *Id.* at 587–88.

232. 552 F.3d 558.

233. *Id.* at 561–62.

234. *Id.* at 562–63.

Luther line of reasoning that the '33 Act is more specific than CAFA in securities cases.²³⁵ *Katz* reasoned that in order to give effect to CAFA's exceptions, CAFA must apply to all class actions—including securities class actions—but, importantly, the court held that it does not apply to individual securities actions, which may not be removed to federal court.²³⁶ Part II will explore the arguments surrounding this split in the circuits.

II. CONFRONTING THE CLASS ACTION CONFLICT

This Part examines the conflict between the nonremoval provision of the '33 Act and the removal provisions of CAFA in the context of the mortgage-backed securities crisis. Lawsuits brought under the '33 Act arising out of the subprime crisis have consistently been initiated in state court pursuant to section 22 of the '33 Act. Defendants in these cases have routinely sought to remove these cases to federal court under CAFA.²³⁷ Part II.A examines the Ninth Circuit's decision in *Luther*, which held that class actions brought under the '33 Act cannot be removed to federal court because the specific nonremoval provision of the '33 Act trumped the general removal provisions of CAFA.²³⁸ Part II.B explores a subprime class action from the Southern District of New York in the Second Circuit, *New Jersey Carpenters*, which held that CAFA overrides the '33 Act's removal provision and that a case may be removed to federal court because mortgage-backed securities class actions are of national importance.²³⁹ Finally, Part II.C turns to Judge Easterbrook's decision in the Seventh Circuit case *Katz*, which held that CAFA allows for removal of all large class actions meeting certain criteria that do not fall within CAFA's specific exceptions—including class actions asserting only '33 Act claims—but that CAFA has no effect on individual securities actions.²⁴⁰

A. *The Ninth Circuit Approach: Luther v. Countrywide*

In July 2008, the Ninth Circuit held that a class action brought by holders of mortgage pass-through certificates alleging violations of the '33 Act was not removable to federal court, reasoning that the general grant of the right of removal of high-dollar class actions under CAFA did not trump section 22's specific bar against removal of cases arising under the '33 Act.²⁴¹

In November 2007, David Luther filed a class action in Los Angeles County Superior Court against Countrywide Home Loans and its subsidiaries and affiliates, on behalf of those who acquired hundreds of

235. *Id.* at 561–62.

236. *Id.*

237. See The D&O Diary, <http://www.dandodiary.com/2008/06/articles/subprime-litigation/subprime-investors-sue-rating-agency/> (June 8, 2008, 21:09 EST).

238. *Id.*

239. *N.J. Carpenters*, 581 F. Supp. 2d 581.

240. *Katz*, 552 F.3d 558.

241. *Luther*, 533 F.3d at 1032. But see *infra* notes 315–20 and accompanying text (discussing Judge Frank Easterbrook's criticism of the specificity rationale).

billions of dollars worth of mortgage pass-through certificates from the defendant.²⁴² The action alleged that the defendant violated sections 11, 12(a)(2), and 15 of the '33 Act "by issuing false and misleading registration statements and prospectus supplements for the mortgage pass-through certificates."²⁴³ Specifically, the plaintiffs in *Luther* alleged that the statements "omitted and misstated the credit worthiness of the underlying mortgage borrowers," and thus greatly underrepresented the risk of the investments.²⁴⁴ This allegedly caused the value of the certificates to substantially decline since many of the underlying mortgage loans became uncollectible.²⁴⁵ The defendant, Countrywide, removed the action to federal court pursuant to CAFA, but Judge Mariana R. Pfaelzer of the U.S. District Court for the Central District of California granted the plaintiff's motion to remand the case back to state court, holding that CAFA and the nonremoval provision of section 22 of the '33 Act "cannot mutually coexist and that the specific bar against removal in the '33 Act trumps CAFA's general grant of diversity and removal jurisdiction."²⁴⁶ The Ninth Circuit allowed Countrywide to appeal this decision.²⁴⁷ On appeal, the Ninth Circuit held that the pass-through certificates do not fall under the "covered securities" exception to the nonremoval provision.²⁴⁸ The court rejected Countrywide's argument that the longstanding nonremoval provision of the '33 Act was superseded by the more recent statute, CAFA, which was enacted in 2005.²⁴⁹ The court looked to rules of statutory construction in its decision.²⁵⁰ It ultimately relied upon the rule of specificity, a principle of statutory construction whereby the statute that deals more precisely with the subject matter trumps the more general statute, rather than the rule of recency, which defaults to the most recent statute when two statutes are in conflict.²⁵¹ The Ninth Circuit asserted that "'a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.'"²⁵² Between the '33 Act and CAFA, the court found the '33 Act to be the more specific statute since "it applies to the narrow subject of securities cases and section 22(a) more precisely applies only to claims arising under the Securities Act of 1933."²⁵³ CAFA, by contrast, applies to class actions in general.²⁵⁴ Therefore, the *Luther* court concluded that section 22(a) of the '33 Act

242. *Luther*, 533 F.3d at 1032.

243. *Id.* at 1032–33.

244. *Id.* at 1033.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1033 n.1

249. *Id.* at 1033–34.

250. *Id.* at 1034.

251. *Id.*

252. *Id.* (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

253. *Id.*

254. *Id.*

precluded removal of class actions alleging only violations of the '33 Act.²⁵⁵

Luther also distinguished itself from *Estate of Pew v. Cardarelli*,²⁵⁶ a Second Circuit case from May 2008, in which money market certificate holders brought an action that was successfully removed under CAFA, on the grounds that the court in *Pew* did not proceed under the '33 Act and, therefore, did not specifically address the interplay between section 22 and CAFA.²⁵⁷

There are other arguments for precluding removal of '33 Act claims under CAFA, most of which focus on protecting investor plaintiffs.²⁵⁸ Thomas Lee Hazen has proffered one justification for denying the right of removal: giving the securities plaintiff an absolute choice of forum facilitates the plaintiff's ability to enforce his private right of action.²⁵⁹ This is so because state court can prove to be less complex and less costly to the plaintiff.²⁶⁰ Professor Hazen has argued fervently against circumscribing the plaintiffs' absolute choice of forum, though he has conceded the importance of uniform treatment under the securities laws, and acknowledged that—to some degree—varying state holdings have compounded the lack of uniformity amongst the circuits and contributed to uncertainties in the law.²⁶¹ While Hazen has stood by *Luther* in terms of its

255. *Id.*

256. 527 F.3d 25 (2d Cir. 2008).

257. *Luther*, 533 F.3d at 1034.

258. The call for increased investor protection has returned in the wake of the practices that led to the subprime meltdown. See GEISST, *supra* note 16, at 290 ("But [when] safeguards were removed . . . the whole financial system became vulnerable to the abuses of the past."); *id.* at 9 ("The old Progressive arguments [calling for regulation during the 1920s] still reverberate occasionally when financial scandals erupt, but current thinking considers regulation and the safeguards it provided as relics of the past. But the emergence of another major scandal or the failure of a financial institution will quickly bring the arguments back from the dusty archives and position them center stage in an argument that is certainly not at an end."). But see ROBERT SOBEL, PANIC ON WALL STREET: A CLASSIC HISTORY OF AMERICA'S FINANCIAL DISASTERS—WITH A NEW EXPLORATION OF THE CRASH OF 1987, at 501–02 (2d ed. 1988) (cautioning against drawing lessons from the past, and suggesting that some of the safeguards put into place by the securities laws of the 1930s were obsolete fifty years later and that future panics require their own analysis, rather than references to FDR and 1929).

259. See HAZEN, *supra* note 93, § 7.17[2][B] (arguing that despite the tendency toward federalizing securities regulation and matters of national interest, denying removal of '33 Act claims is justified because private enforcement is facilitated by giving the plaintiff an absolute choice of forum).

260. *Id.* See generally Hazen, *supra* note 15, at 707 (arguing that "serious consideration should be given to banning removal"). Thomas Lee Hazen weighs the importance of providing a remedy for the small investor and the overcrowding of federal courts against factors such as federal expertise and uniformity of law, but still comes out on the same side as *Luther v. Countrywide Home Loans Servicing LP*. *Id.* Hazen calls for expanding the role of state courts in hearing claims arising under the federal securities laws—either "by way of legislative reforms or of increased awareness of injured investors." *Id.* at 745.

261. *Id.* at 711.

ultimate result—precluding removal of '33 Act claims under CAFA²⁶²—others have agreed with the rationale, but not the result, of hearing federal securities laws claims in state court.²⁶³ The next section examines the approach of the Southern District of New York, which arrived at the opposite result of the Ninth Circuit in *Luther*.

B. *The Southern District of New York Approach: New Jersey Carpenters v. HarborView Mortgage*

In *New Jersey Carpenters*, District Judge Harold Baer addressed what was then an issue of first impression in the Southern District of New York—whether CAFA overrides the nonremoval provision of the '33 Act.²⁶⁴ In deciding the question that Judge Baer recognized as presenting a “clear split in the Circuits,” the court looked to other Second Circuit decisions and held that the class action brought by holders of mortgage pass-through certificates alleging only claims arising under the '33 Act was removable to federal court under CAFA.²⁶⁵

The facts of this case were almost identical to those in *Luther*. On May 14, 2008, the plaintiffs, led by the New Jersey Carpenters Vacation Fund, filed a class action in New York State Supreme Court, alleging violations of sections 11, 12, and 15 of the '33 Act in connection with the issuance of HarborView Mortgage Loan Pass-Through Certificates.²⁶⁶ As in *Luther*, these mortgage backed securities were collateralized with loans underwritten by Countrywide.²⁶⁷ Also as in *Luther*, these Countrywide loans were alleged to have been made to “uncreditworthy borrowers.”²⁶⁸ The complaint alleged various misrepresentations in the prospectuses and registration statements of these MBSs, resulting in inflation of the value of the securities.²⁶⁹ The complaint also reasoned that New York state court was the proper jurisdiction and venue in which to hear this case based on the concurrent jurisdiction provision of section 22 of the '33 Act.²⁷⁰

262. See HAZEN, *supra* note 93, § 7.17[2][B] (citing *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008)).

263. See, e.g., The D&O Diary, <http://www.dandodiary.com/2008/03/articles/subprime-litigation/subprime-litigation-wave-rolls-on> (Mar. 13, 2008, 20:05 EST) (“Given the language in Section 22(a), Judge Pfalzer’s decision seems correct. However, the outcome seems undesirable. . . . It certainly does seem like putting federal securities class actions in state court opens up a can of worms.”).

264. *N.J. Carpenters Vacation Fund v. HarborView Mortgage Loan Trust*, 581 F. Supp. 2d 581, 582 (S.D.N.Y. 2008).

265. *Id.*

266. *Id.*

267. See Verified Complaint for Violations of Sections 11, 12 and 15 of the Securities Act of 1933 at 3, *N.J. Carpenters*, 581 F. Supp. 2d 581 (No. 08cv05093(HB)).

268. See *id.* at 29 (“In or around early 2007, disclosures began to emerge that revealed that investment banks and home loan lenders had issued billions of dollars of mortgage backed securities collateralized with home loans which were made to uncreditworthy borrowers, significantly inflating the value of those securities. At the center of these predatory lending practices was the world’s largest mortgage lender, Countrywide.”).

269. See *id.*

270. *Id.* at 5.

Additionally, many of the acts and transactions alleged occurred in substantial part in New York County; the securities offerings were actively marketed and sold in the county; and many of the named defendants maintained principal offices and residences in the county.²⁷¹ The defendants named in the case—HarborView (the issuer), as well as depositors, investment banks, and credit rating agencies—removed the case to the Southern District of New York pursuant to CAFA.²⁷² The plaintiffs moved to remand the case back to state court based on section 22(a)'s nonremoval provision, arguing that the '33 Act expressly granted the plaintiffs the right to choose its forum,²⁷³ citing *Luther*.²⁷⁴ In the alternative, the plaintiffs argued that even if CAFA did override the '33 Act, the case fell under CAFA's exception for securities, 28 U.S.C. § 1332(d)(9)(c).²⁷⁵ However, the plaintiffs contended that in order to override the '33 Act, the defendants must successfully argue that CAFA implicitly repealed SLUSA's amendments to the removal provisions of section 22(a).²⁷⁶ The plaintiffs cited to CAFA's legislative history, which they argued "evidences an intent to address abuses wholly unrelated to securities class actions and leave 'undisturbed' the SLUSA amendments."²⁷⁷

The defendants contended that the Ninth Circuit's decision in *Luther* was not controlling in light of the Second Circuit's decision in *California Public Employees' Retirement System v. WorldCom, Inc.*,²⁷⁸ which held that the removal provisions of the Bankruptcy Code overrode the antiremoval provision of the '33 Act.²⁷⁹ The defendants further contended that the conflicting language of the '33 Act and CAFA brought the statutory construction "Rule of Recency" into play and thus CAFA, which was passed in 2005, should control over the '33 Act.²⁸⁰

The district court denied the motion to remand the case back to state court.²⁸¹ In *Estate of Pew v. Caradelli*,²⁸² the Second Circuit found CAFA's language to be ambiguous, particularly with respect to the exceptions to removal, and thus chose to read the language of CAFA

271. *Id.*

272. *N.J. Carpenters*, 581 F. Supp. 2d at 582.

273. See Plaintiff's Memorandum of Law in Support of Its Motion to Remand at 8, *N.J. Carpenters*, 581 F. Supp. 2d 581 (No. 08-5093-HB) (asserting that in the '33 Act, "Congress expressly authorized aggrieved investors to bring claims under the Securities Act in either state or federal court").

274. *N.J. Carpenters*, 581 F. Supp. 2d at 582.

275. *Id.* at 585.

276. Plaintiff's Reply Memorandum of Law in Further Support of Its Motion to Remand at 5-7, *N.J. Carpenters*, 581 F. Supp. 2d 581 (No. 08-5093-HB).

277. *Id.*

278. 368 F.3d 86 (2d Cir. 2004).

279. Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Remand at 10-14, *N.J. Carpenters*, 581 F. Supp. 2d 581 (No. 08-5093-HB) (citing *WorldCom*, 368 F.3d 86 (2d Cir. 2004)).

280. *N.J. Carpenters*, 581 F. Supp. 2d at 586.

281. *Id.* at 582.

282. 527 F.3d 25, 30 (2d Cir. 2008).

together with the statutory context and legislative history; the district court followed suit.²⁸³ Based on the '33 Act alone, the case could not have been removed to federal court because it did not involve “covered securities,” and thus did not fall under SLUSA’s amendment to the nonremoval provision.²⁸⁴ However, the court recognized that, on their face, section 22(a) of the '33 Act and CAFA are in direct conflict with one another, and CAFA—which was enacted in 2005—would allow for the case to be removed.²⁸⁵ The court looked to the purposes of SLUSA and CAFA, both of which sought to concentrate class actions in federal court.²⁸⁶ The court interpreted CAFA’s language to create “original jurisdiction for and removability of *all* class actions that meet the minimal requirements and do not fall under one of the limited exceptions.”²⁸⁷

The court pointed to portions of CAFA’s legislative history expressing congressional intent for cases involving issues of “national concern” that have “national consequences” to be heard in federal court, rather than in a “magic” state jurisdiction.²⁸⁸ While the court conceded that this concern was not present in this case since New York is not one of the notorious “magic jurisdictions,” it found the “national” importance factor compelling.²⁸⁹ The brunt of the court’s decision therefore appeared to rely on the fact that the case addressed “head on an issue of national, if not global, importance—the mortgage-backed securities crisis.”²⁹⁰

The court disagreed with the plaintiff’s argument that the court should follow the Ninth Circuit’s decision in *Luther*—that the specificity of the nonremoval provision of the '33 Act overrides the general removal provision of CAFA.²⁹¹ The court was persuaded by the Second Circuit’s decision in *WorldCom*, which reconciled the conflicting removal provisions of the Bankruptcy Code with nonremoval provisions of the '33 Act.²⁹² In *WorldCom*, both of the provisions of the conflicting statutes were found to be “specific and narrowly-tailored.”²⁹³ The *WorldCom* court found the

283. *N.J. Carpenters*, 581 F. Supp. 2d at 584 & n.2 (citing *Pew*, 527 F.3d at 30); see also 2 McLAUGHLIN, *supra* note 219, § 12:6, at 727 (observing that CAFA’s poor draftsmanship has led some courts to look to its legislative history).

284. *N.J. Carpenters*, 581 F. Supp. 2d at 583.

285. *Id.*

286. *Id.* at 583 n.1 (stating that the SLUSA amendment providing for removal of covered securities was meant to close up loopholes left by the PSLRA, which sought to “stem the tide of private securities fraud . . . actions in State rather than federal court,” and that CAFA expanded federal diversity jurisdiction in order to allow “certain class actions that are national or international in scope” to be brought or removed to federal court).

287. *Id.* at 584.

288. *Id.* (citing 151 CONG. REC. S1086-01, S1103 (2005) (statement of Sen. Grassley)).

289. *Id.* at 585.

290. *Id.* (“Given the scale of damages and the vital importance of the issues raised by the case to the national economy, this case fits easily within the goals expressed in the debates that resulted in CAFA legislation.”).

291. *Id.* at 586.

292. *Id.* at 586–87 (citing *Cal. Pub. Employees’ Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004)).

293. *Id.* at 586.

central purpose of the Bankruptcy Code to centralize bankruptcy litigation in a federal forum to be compelling; thus this purpose overrode the nonremoval provision of the '33 Act.²⁹⁴ Furthermore, the general removal statute, 28 U.S.C. § 1441(a), expressly allows for exceptions “*as otherwise expressly provided by Act of Congress*” to legislate around the general right of removal; whereas the bankruptcy removal provision is intentionally sweeping in scope and does not contain any limiting language.²⁹⁵ The court compared CAFA to the Bankruptcy Code, reasoning both have “sweeping removal power” and the “sole limitations are those exclusively listed in the defined exceptions.”²⁹⁶

Finally, in determining whether CAFA should override the '33 Act, the court found the Second Circuit's decision in *Pew* to be the most compelling case.²⁹⁷ *Pew* addressed both CAFA and SLUSA with respect to removal and found “an overall design to assure that the federal courts are available for all securities cases that have national impact (including those that involve securities traded on national exchange).”²⁹⁸ In light of the Second Circuit's findings, the court held that CAFA did override the '33 Act's nonremoval provision “because this case involves exactly the type of case CAFA was concerned about—a large, non-local securities class action dealing with a matter of national importance, the mortgage-backed securities crisis that is currently wreaking havoc with the national and international economy.”²⁹⁹

Having held that CAFA's removal provisions overrode the '33 Act, the court then turned to CAFA's exceptions to removal under § 1332(d)(9)(C).³⁰⁰ The court looked once again to CAFA's legislative history, and found that Congress intended for CAFA's provisions to be

294. *Id.* at 586–87 (citing *WorldCom*, 368 F.3d 86); *see also* *City of Ann Arbor Employees' Ret. Sys. v. Citigroup Mortgage Loan Trust, Inc.*, 572 F. Supp. 2d 314 (E.D.N.Y. 2008) (class action suit involving mortgage pass-through certificates alleging claims under the '33 Act, citing *WorldCom* for the proposition that the Bankruptcy Code's sweeping removal provisions override the '33 Act's antiremoval provision).

295. *N.J. Carpenters*, 581 F. Supp. 2d at 587 (citing *WorldCom*, 368 F.3d at 106).

296. *Id.* The court also suggested that if Congress wanted to treat CAFA like the general removal statute rather than the sweeping bankruptcy statute, it could have done so by adding similar limiting language. *Id.*; *see also* Joseph M. McLaughlin, *Directors' and Officers' Liability: Resolving Tension Between CAFA and SLUSA*, N.Y. L.J., Aug. 14, 2008, at 5. Joseph McLaughlin argues that *WorldCom*'s reasoning applies equally to CAFA removal and draws a parallel from the Bankruptcy Code to CAFA. *Id.* (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1976), for the proposition that section 22 of the '33 Act could potentially interfere with the operation of the Bankruptcy Code and, therefore, it should not control).

297. *N.J. Carpenters*, 581 F. Supp. 2d at 587 (citing *Estate of Pew v. Caradelli*, 527 F.3d 25 (2d Cir. 2008)).

298. *Id.* (quoting *Pew*, 527 F.3d at 32).

299. *Id.* at 587–88; *see also* McLaughlin, *supra* note 296 (arguing that a “putative class action alleging violations of the federal securities law is exactly the type of case Congress intended federal courts to decide”). McLaughlin argues that the Ninth Circuit's decision in *Luther* “frustrated congressional intent” to authorize federal jurisdiction over class actions alleging '33 Act claims concerning noncovered securities. *Id.*

300. *N.J. Carpenters*, 581 F. Supp. 2d at 588.

interpreted broadly and for its exceptions to be construed narrowly.³⁰¹ The court also looked again to *Pew*, in which the Second Circuit held that CAFA's securities exception in § 1332(d)(9)(C) should "not be read broadly to cover *all* securities related claims" because that would render meaningless the terms of the other securities exceptions, such as the § 1332(d)(9)(A) exception for covered securities.³⁰² Joseph McLaughlin has posited that since Congress declined to incorporate into CAFA an exception preserving the nonremovability of '33 Act claims involving noncovered securities, such as the ones at issue in *New Jersey Carpenters*, it is proper to infer "a clear intent to make such claims removable if they meet CAFA's jurisdictional criteria."³⁰³ The *New Jersey Carpenters* court held that since, under *Pew*, the exception did not apply to "securities fraud claims like the ones alleged here," and since the claims did not implicate the terms or meaning of the pass-through certificates, no exceptions to CAFA applied in this case.³⁰⁴ Thus, since the court found that CAFA trumped the nonremoval provision of section 22(a) of the '33 Act, and no exceptions to CAFA's provisions applied, the case could be heard in federal court.³⁰⁵ Because this pretrial decision involved a matter of first impression, Judge Baer authorized the plaintiffs to ask the Second Circuit for an immediate appeal, but the parties subsequently stipulated to dismiss the appeal with prejudice.³⁰⁶

C. *The Seventh Circuit Approach: Katz v. Gerardi*

Judge Easterbrook rang in 2009 with a decision that created an official split in the circuits over the removal conflict in *Katz*.³⁰⁷ Though *Katz* did not involve MBSs, it concluded that the case was removable under CAFA, despite section 22's removal bar.³⁰⁸ The plaintiffs in *Katz*, holders of units in a real estate investment trust (REIT), filed a class action in state court invoking only '33 Act claims.³⁰⁹ The defendant removed the suit to federal court pursuant to CAFA and the U.S. District Court for the Northern District of Illinois remanded the action to state court, holding that section 22(a) is more specific than CAFA because it deals only with securities

301. *Id.* (citing S. REP. NO. 109-14, at 45 (2005), reprinted in 2005 U.S.C.C.A.N. 4, 42).

302. *Id.* at 589 (citing *Pew*, 527 F.3d at 31).

303. 2 MCLAUGHLIN, *supra* note 219, § 12:6, at 744.

304. *N.J. Carpenters*, 581 F. Supp. 2d at 590.

305. *Id.*

306. Stipulation to Dismiss Appeal with Prejudice Pursuant to Fed. R. App. P. 42(b), *N.J. Carpenters*, 581 F. Supp. 2d 581 (No. 08-4861-cv).

307. 552 F.3d 558 (7th Cir. 2009).

308. *Id.* Compare this to *N.J. Carpenters*, which, in no uncertain terms, found it significant that the case arose out of the subprime crisis. *N.J. Carpenters*, 581 F. Supp. 2d at 587-88 ("CAFA overrides the Securities Act's anti-removal provision because this case involves exactly the type of case CAFA was concerned about—a large, non-local securities class action dealing with a matter of national importance, the mortgage-backed securities crisis that is currently wreaking havoc with the national and international economy.").

309. *Katz*, 552 F.3d at 559-60.

litigation, while CAFA covers many different varieties of class actions.³¹⁰ The court found that section 22 “clearly indicates Congress’s intent to have such actions heard in state court if they were initially filed there.”³¹¹ On appeal, the court addressed whether or not the complaint involving REITs was artfully pleaded under the ’33 Act in order to take advantage of section 22’s nonremoval provision.³¹² The court decided to give the plaintiffs the benefit of the doubt and assumed that the complaint was not merely artful pleading, turning instead to “whether § 22(a) insulates all claims under the 1933 Act from removal under [CAFA].”³¹³ The court stated that section 22 and CAFA could not be reconciled, and usually the more recent law trumps the older law.³¹⁴ The court took issue with the Ninth Circuit’s rationale in *Luther*, which departed from the rule of recency and instead focused on the concept of specificity.³¹⁵ The *Katz* court pointed out that specific statutes only trump more general statutes when one is a subset of the other, and section 22 of the ’33 Act is not a subset of CAFA.³¹⁶ Although the ’33 Act applies only to securities actions, it applies to both individual investor lawsuits as well as class actions—both small and large.³¹⁷ CAFA, on the other hand, addresses only large, multistate class actions.³¹⁸ This begs the question, “Is the 1933 Act more specific because it deals only with securities law, or is [CAFA] more specific because it deals only with nationwide class actions?”³¹⁹ The court rejected the specificity rationale and looked instead to the language of CAFA.³²⁰ The court read § 1453(b) to allow removal of any class action that meets the criteria of CAFA (“100 investors, \$5 million in controversy, minimal diversity”) and does not fall under one of the exceptions under § 1453(d).³²¹ The *Katz* court reasoned that the *Luther* approach failed to consider CAFA’s exceptions, thus rendering them superfluous.³²² Given the existence of the carve-outs, *Katz* held that CAFA applies to all class actions that meet CAFA’s criteria—including securities actions—subject to the limited exceptions in

310. See *Katz v. Gerardi*, No. 08-CV-04035, 2008 WL 4376815, at *4 (N.D. Ill. Sept. 23, 2008), *vacated*, 552 F.3d 558 (7th Cir. 2009).

311. *Id.* The district court relied on the U.S. Court of Appeals for the Ninth Circuit’s reasoning in *Luther* to hold that ’33 Act violations are not removable under CAFA. *Id.*

312. *Katz*, 552 F.3d at 560–61.

313. *Id.* at 561.

314. *Id.* (“[O]ne or the other must yield.”).

315. *Id.* at 561–62; see also 2 MCLAUGHLIN, *supra* note 219, § 12:6, at 741–42 (rejecting the specificity argument put forth in *Luther* and arguing that CAFA is more specific than the ’33 Act because the nonremoval provision of the ’33 Act deals with all “cases” arising under the ’33 Act, while CAFA only deals with a subset of those cases—securities class actions).

316. *Katz*, 552 F.3d at 561. “For example, if [CAFA] dealt with all civil suits, then a law applicable only to civil securities actions would be more specific.” *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 562 (“[Section 1332(d)(9)] tells us all we need to know.”).

321. *Id.*

322. *Id.*

§ 1453(d).³²³ Moreover, McLaughlin maintains that the Ninth Circuit's approach in *Luther* "prunes CAFA in a manner that frustrates clearly expressed congressional intent, which the Second Circuit recognized in [*Pew*] was to confer 'federal courts jurisdiction over all class actions (with regard to securities and otherwise) over \$5 million in the aggregate if the class members are largely out of state.'"³²⁴

In *Public Employees' Retirement System of Mississippi v. Morgan Stanley*,³²⁵ Judge Pfaelzer of the Central District of California—the judge who allowed for remand in *Luther*—had occasion to comment on the continuing validity of *Luther* after *Katz*.³²⁶ In a class action arising out of the mortgage-backed securities crisis, the plaintiffs took the somewhat unorthodox step³²⁷ of filing in California state court.³²⁸ When defendants removed the action to federal court, the plaintiffs moved to remand under *Luther*.³²⁹ This, coupled with the fact that the action alleged only '33 Act violations, lends itself to the suggestion that the plaintiffs engaged in forum shopping solely to take advantage of *Luther*'s view of removal, a view which is unavailable in the Southern District of New York.³³⁰ As a result, Judge Pfaelzer granted the defendant's motion to transfer to the Southern District of New York.³³¹ While Judge Pfaelzer declined to rule on the remand issue, she did acknowledge in dicta that the defendants questioned *Luther*'s continued validity, pointing to *Katz*, which addressed arguments that the *Luther* court did not expressly consider.³³² The Seventh Circuit in *Katz* rejected *Luther*'s holding without dissent and circulated the opinion before it was released to all judges in active service; none favored a hearing en banc.³³³ Judge Pfaelzer did not rule on whether removal under CAFA was improper in light of *Katz* but, notably, she did state that the "[d]efendants appear[ed] to have nonfrivolous arguments for a change in the law due to post-*Luther* developments."³³⁴ This case is evidence that the time is ripe for such a change in the law to come, perhaps from the Supreme Court.³³⁵ Indeed, this case is emblematic of the need for resolution, first, because of the need for unitary federal law, particularly with respect to the

323. *Id.* at 562–63.

324. 2 MCLAUGHLIN, *supra* note 219, § 12:6, at 750–51 (quoting *Estate of Pew v. Caradelli*, 527 F.3d 25, 32 (2d Cir. 2008)).

325. 605 F. Supp. 2d 1073 (C.D. Cal. 2009).

326. *See generally id.*

327. *See supra* note 216 and accompanying text (discussing the concentration of credit crisis filings in the Second Circuit).

328. *Pub. Employees*, 605 F. Supp. 2d at 1074.

329. *Id.*

330. *Id.* at 1075.

331. *Id.*

332. *Id.* at 1074.

333. *Id.*

334. *Id.* at 1075 n.1.

335. McLaughlin points out that in recent years the Supreme Court has answered several questions on jurisdiction, "on each occasion in favor of broader federal jurisdiction." 2 MCLAUGHLIN, *supra* note 219, § 12:6, at 751.

nationwide credit crisis,³³⁶ and, second, because it is now apparent³³⁷ that the very thing that the PSLRA, SLUSA, and CAFA sought to prevent—forum shopping—is being perpetuated by this split in the circuits.³³⁷ Part III argues that the Seventh Circuit approach is superior in light of the historical purposes behind both CAFA and the '33 Act, and in light of the current nationwide credit crisis.

III. KATZ: THE KEY TO CLARITY AND CONSISTENCY

Part III analyzes the divergent approaches to the removal conflict between the '33 Act and CAFA in light of the credit crisis and argues that the Seventh Circuit's approach is superior because it gives full effect to the statutory text, satisfies the historical purposes of CAFA, the '33 Act, the PSLRA, and SLUSA, and creates consistency by removing these cases into federal court. Part III.A argues that the Seventh Circuit approach gives full effect to the provisions of both CAFA and the '33 Act. Part III.B argues that this approach is true to the historical purposes of both CAFA and the '33 Act, as well as the PSLRA and SLUSA. Part III.C argues that comporting with the Seventh Circuit approach allows for the most consistent result in light of the current credit crisis: federal court should be the primary venue for class actions that implicate securities of national importance.

A. *Unlocking CAFA and Concurrent Jurisdiction: Understanding the False Dichotomy*

At first blush, CAFA and the '33 Act present a false dichotomy—examining the two in the context of class actions, Judge Easterbrook is correct in that “one or the other must yield,”³³⁸ but the two are not mutually exclusive.³³⁹ To say that CAFA “trumps” or overrides the '33 Act, or vice versa,³⁴⁰ is to overstate the case.³⁴¹ CAFA overrides the '33 Act in the

336. *Pub. Employees*, 605 F. Supp. 2d at 1075 (“[A]lthough federal courts sometimes arrive at different constructions of federal law, federal law . . . is supposed to be unitary.” (alteration in original) (quoting *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993))).

337. Judge Mariana R. Pfaelzer stated that the only reason the plaintiffs sued in California state court was to avoid the precedent set by *New Jersey Carpenters* in the U.S. District Court for the Southern District of New York. *Id.* She asserted in dicta that “no litigant has a right to have the interpretation of one federal court rather than that of another’ ‘[F]ederal law . . . is supposed to be unitary.’” *Id.* (second omission in original) (quoting *Menowitz*, 991 F.2d at 40).

338. *See supra* note 314 and accompanying text.

339. *See supra* text accompanying note 246 (quoting from *Luther* the viewpoint that the nonremoval provision of the '33 Act and the removal provision of CAFA “cannot mutually coexist”); *cf. supra* text accompanying note 285 (describing the standpoint of the Southern District of New York, that—on their faces—section 22(a) of the '33 Act and CAFA are in direct conflict with one another).

340. *See, e.g., Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1033 (9th Cir. 2008).

341. *See supra* notes 316–20 and accompanying text.

context of large, nationwide class actions.³⁴² But CAFA does not have any effect on smaller securities actions brought by individual investors.³⁴³ In *Katz*, Judge Easterbrook acknowledged this critical result and admonished *Luther's* specificity argument.³⁴⁴ The '33 Act is not more specific than CAFA because of the narrower set of cases to which it applies—only securities cases. Indeed, under this construction, CAFA may even be said to be the more specific statute, since it deals only with certain procedural categories.³⁴⁵ Reading one statute to trump the other creates a false dichotomy between broadly providing for removal³⁴⁶ and broadly providing for investor protections.³⁴⁷ The key to clarity is to read CAFA to apply to all class actions—but for its specific exceptions—and only to class actions.

The former piece of the equation—broadly providing for removal of countrywide class actions and giving full effect to each of CAFA's specific exceptions—is critical to clarifying CAFA. First of all, CAFA's legislative history repeatedly emphasizes its broad purpose of federalizing all nationwide class actions.³⁴⁸ As Judge Easterbrook observed in *Katz*, the *Luther* decision is problematic because it failed to acknowledge the existence of CAFA's exceptions, rendering them superfluous.³⁴⁹ Indeed, Judge Pfaelzer, the district judge who decided *Luther*, admitted as much in *Public Employees'*.³⁵⁰ The superior reading of CAFA is the one that gives effect to the whole statute—including its limited exceptions—as opposed to the interpretation that would sooner not examine the limited nature of these exceptions.³⁵¹ The fact that Congress was inclined to carve out three specific exceptions to CAFA, but declined to include such an exception for section 22 of the '33 Act, is informative.³⁵² This omission tells us that,

342. See *supra* notes 28, 145, 147–48, 166, 286–87, 303, 318, 321 and accompanying text.

343. See *supra* text accompanying notes 317–18.

344. See *supra* notes 315–20 and accompanying text.

345. See *supra* note 315.

346. See *supra* text accompanying note 182.

347. See *supra* text accompanying note 54.

348. See *supra* notes 28, 145, 147–48, 166, 182, 286–87, 318, 321 and accompanying text.

349. See *supra* text accompanying notes 321–23.

350. See *supra* text accompanying notes 326, 333.

351. See *supra* notes 300, 302–05 and accompanying text (*N.J. Carpenters* examining CAFA's exceptions); *supra* notes 322–23 and accompanying text (*Katz* noting *Luther's* failure to examine CAFA's exceptions); *supra* note 332 (*Public Employees'* noting that *Luther* failed to address certain arguments examined by the *Katz* court).

352. Congressional reports evince the intent to exclude only certain securities actions from CAFA's reaches. See *supra* notes 169–74 and accompanying text; *supra* notes 178–79 and accompanying text (noting that SLUSA and corporate governance cases were carved out because there was already a specific law applying to them); *supra* note 183 and accompanying text (stating that the securities exceptions are to be narrowly construed); *supra* text accompanying note 287 (recognizing federal court as the proper forum for all cases not falling under one of CAFA's exceptions); *supra* note 296 and accompanying text (discussing CAFA's exclusively defined exceptions); *supra* text accompanying note 301 (noting the narrow limitations under CAFA); *supra* note 302 and accompanying text (noting that *Pew* interpreted CAFA's exceptions narrowly, holding that CAFA's securities exception

even in light of Congress's acute awareness of the financial scandals surrounding Enron, Congress did not deem it necessary to single out '33 Act class actions for continued protection under section 22.³⁵³ This was so in spite of the fact that investor protections typically increase during times of financial scandal.³⁵⁴

The latter piece of the equation is crucial to understand the false dichotomy: CAFA does not supplant the '33 Act and its pro-plaintiff protections; it strikes in a "narrow and appropriate way"³⁵⁵ by only affecting class actions of national importance,³⁵⁶ and not smaller cases by investors who are still afforded the choice of state or federal court.³⁵⁷ Congress failed to carve out of CAFA the concurrent jurisdiction of '33 Act class actions during a time in recent financial history when investor protection was of heightened priority.³⁵⁸ From this we can infer that Congress did not view the removal of '33 Act class actions as overriding the measure of protection offered by section 22 because it left untouched individual claims under the '33 Act, which are still afforded the protection of concurrent jurisdiction.³⁵⁹ CAFA sought to strike a balance between protecting investors' access to private rights of action³⁶⁰ by leaving individual actions untouched and maintaining confidence in the markets by removing abuses of the class action tool.³⁶¹ The two interests are not dichotomous, but rather they are inextricably intertwined with the concept of confidence.³⁶² After all, history reminds us that the purpose of investor protection under the federal securities laws is indeed the need for confidence in the markets.³⁶³

"should not be read broadly to cover all securities related claims," because doing so would render the other exceptions meaningless); *supra* text accompanying note 303 (describing McLaughlin's conclusion that since Congress declined to incorporate into CAFA an exception preserving the nonremovability of '33 Act claims involving noncovered securities, it is proper to infer "a clear intent to make such claims removable if they meet CAFA's jurisdictional criteria"); *supra* text accompanying note 323.

353. See *supra* notes 174–76, 184 and accompanying text.

354. See *supra* notes 16–23 and accompanying text.

355. See *supra* notes 179–81 and accompanying text.

356. See *supra* notes 145, 147, 148, 157–63, 286, 288, 298–99, 324 and accompanying text.

357. See *supra* notes 130, 317–18 and accompanying text.

358. See *supra* notes 174–76, 184 and accompanying text.

359. See *supra* notes 130, 317–18 and accompanying text.

360. See *supra* notes 10–12, 20, 54, 63–68, 74, 79, 81, 111–12, 141, 258–60, 273 and accompanying text.

361. See *supra* notes 4, 15, 75–77, 83, 85, 87–90 and accompanying text.

362. See *supra* notes 16, 18–19, 36, 39, 80–81, 110–11, 174–75, 258 and accompanying text.

363. See *supra* notes 6, 19–20, 22, 50, 54, 80–81, 84–85 and accompanying text.

B. *Reconciling the Past-Present Paradox: The Flow of Investor Protection in the Current Crisis*

Confidence in the markets and investor protection go hand in hand.³⁶⁴ Recognizing the false dichotomy between protection of investor plaintiffs and economic growth is key to unscrambling the ostensible incongruity between the historical purposes of the '33 Act and the current desire to hear class actions implicating the subprime crisis in federal court.³⁶⁵ Indeed, the '33 Act is a consumer protection Act at heart.³⁶⁶ It was carefully crafted³⁶⁷ to take the unusual step of providing for concurrent jurisdiction³⁶⁸ so that plaintiffs with viable claims would not be deterred from seeking recourse because they could not afford federal court.³⁶⁹ However, the '33 Act must not be read in a vacuum; it must be read in conjunction with the securities framework as a whole, including the PSLRA and SLUSA. At the time of the '33 Act's passage, viable individual claims were conspicuously absent from courts, a concern that led to conferring concurrent jurisdiction under section 22; this stands in marked contrast to the litigious nature of investors in recent history and the concomitant abuses of the class action system that undermined the securities framework.³⁷⁰ Both extremes are damaging to confidence, and thus legislation from both distant past ('33 Act) and recent history (PSLRA, SLUSA, CAFA) needs to be remembered when interpreting historical purposes.³⁷¹ Furthermore, while it is instructive to look to the past, the concerns of the present should not be drowned in those of the past.³⁷² This point figures prominently in the unpacking of the

364. The purpose of providing sturdy protections for investors is to maintain confidence in the integrity of the markets, so that investors will be encouraged to invest, knowing that they will be provided with meaningful recourse if they are defrauded. History, however, has also taught us that overly broad access to private rights of action enable abusive lawsuits, and undermine the very confidence that private rights of action were created to maintain. See *supra* notes 19–20, 22, 50, 54, 80–81, 84–85 and accompanying text.

365. “The brewing legislative battle recalls the industry’s reluctance to accept reforms after the 1929 stock-market crash.” Bradley Keoun & Jonathan D. Salant, *Obama Plan Gets Wary Reception from Banks, Lawmakers (Update1)*, BLOOMBERG.COM, June 18, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=ae85nCexFOv0> (paraphrasing Charles Geisst, Professor, Manhattan College). “‘I don’t think anyone can buy the argument that by regulating too tightly, we’ll choke off capitalism That argument is as shallow now as it was then.’” *Id.* (quoting Charles Geisst).

366. See *supra* notes 10–12, 20, 54, 63–68, 74, 77, 79, 81, 111–12, 141, 258–60, 273 and accompanying text.

367. See *supra* notes 56–60, 76 and accompanying text.

368. See *supra* notes 11–15, 72 and accompanying text.

369. See *supra* notes 65, 67, 77, 112, 259–60 and accompanying text.

370. See *supra* notes 65, 86–88 and accompanying text.

371. See GEISST, *supra* note 16, at 9 (“[B]eing ignorant of the distant past is understandable. Being ignorant of recent history is unforgivable.”).

372. It is important to realize that, despite the many parallels to the Great Depression, the credit crisis is its own crisis. While history is certainly instructive, relying upon historical lessons is not a panacea for the problems of the present. See SOBEL, *supra* note 258, at 502 (“Worse than failing to understand history is to believe that it contains specific messages that, if applied, can resolve current problems favorably. Alas, there are no such magic formulas.”).

current credit crisis because of the many disturbing parallels that can be drawn to the egregious abuses of the 1920s and the Great Depression.³⁷³ However, Justice William O. Douglas's prescient words of wisdom caution against "turn[ing] our steps to the past, forgetful of the realities of the present."³⁷⁴ It is crucial to apply a resolution to the current conflict "consistently with the other integral parts of the total programme rather than to resist the relentless tide of events and to seek a return to conditions which have been wiped out in the forward sweep of our economic and social life."³⁷⁵ In this case, the other parts of the investor protection program must be read to include the PSLRA, SLUSA, and CAFA. To read the '33 Act any other way would merely delay resolution of this conflict and restoration of confidence.

C. Opening the Federal Court Door for Countrywide Class Actions

While on the surface *Luther* appears to be the most protective of investors because it allows for cases to stay in state courts, upon deeper inspection it is not necessarily better for investors. It is actually problematic for investors who may benefit from protection in the form of consistency. Consistency and fairness would be achieved on two levels: first, hearing cases involving nationally important securities in federal court will bring uniformity to national policy; and, second, by following the Seventh Circuit approach, federal court decisions will be uniform resulting in fairness to parties regardless of the court they file in.

Although SLUSA only provided for the removal of "covered securities,"³⁷⁶ the exotic nature of MBSs underscores that not all securities that are of national importance are nationally traded and predictable in advance of legislation.³⁷⁷ Given SLUSA's purposes of sweeping certain nationwide securities class actions into federal court,³⁷⁸ the result under *Luther* is anomalous.³⁷⁹ Mortgage-backed securities are currently of national importance and wreaking havoc on the global economy.³⁸⁰ The focus on the current problem compels us to keep the unique nature of the credit crisis in mind, despite its many parallels to the Great Depression. Courts, including the Southern District of New York, have found this rationale compelling.³⁸¹ *New Jersey Carpenters*, though it is a district court

373. This ominous sense of parallel to the 1929 crash is not a new phenomenon; Geisst observed that in the late 1990s "anecdotal evidence was beginning to show disturbing parallels with the years preceding the 1929 Crash. . . . The pressing question [was] . . . whether the past was bound to repeat itself." GEISST, *supra* note 4, at 374.

374. See Douglas, *Protecting the Investor*, *supra* note 9, at 533.

375. *Id.*

376. See *supra* notes 132–33, 137 and accompanying text.

377. See *supra* note 225 and accompanying text (describing Geisst's observation that existing regulations sometimes prove too general for innovative financial products).

378. See *supra* Part I.C; *supra* notes 136, 139, 157, 286, 298 and accompanying text.

379. See *supra* notes 263, 324 and accompanying text.

380. See *supra* Part I.E; *supra* notes 289–90, 299 and accompanying text.

381. See *supra* Part I.E; *supra* notes 289–90, 299 and accompanying text.

decision, is persuasive because of its proximity to the issues implicated in the current crisis.³⁸² The Southern District of New York is located in the Second Circuit, where the mortgage-backed securities class actions are most heavily concentrated.³⁸³ The fact that the Second Circuit has not had occasion to weigh in on the conflict has led parties to argue for interpretations under the Ninth or Seventh Circuit. While the Seventh Circuit directly addresses the interplay of the '33 Act and CAFA, *Katz* itself does not involve the type of securities implicated in the current credit crisis.³⁸⁴ In fact, the '33 Act claims asserted by the plaintiffs in *Katz* involved REITs, and the court gave the plaintiffs the benefit of the doubt as to the propriety of pleading under the '33 Act altogether.³⁸⁵ However, it is precisely this type of artful pleading under the '33 Act that underscores the old arguments for securities class action reform: the forum shopping that SLUSA and CAFA were concerned with is still alive and well, calling for broad removal provisions to balance investor protection with the need to prevent abuses of the securities system. *Katz* is a prime example of cases that do not implicate the types of investors contemplated by the '33 Act: small, individual investors defrauded amidst financial crisis and in need of wide remedies.³⁸⁶ *Public Employees'*, in which the plaintiffs filed in California in order to take advantage of *Luther* and avoid the precedent of *New Jersey Carpenters*, highlights how the split in authority is actually perpetuating the problem of forum shopping.³⁸⁷

The causes and the symptoms of this conflict in authority have become circular. The same concerns behind the ostensibly irreconcilable statutes at issue—forum shopping and investor protection—are now becoming symptoms of the inconsistency with which courts have interpreted the interplay of these statutes. Thus, this Note concludes that courts should follow the Seventh Circuit's approach in the interests of consistency and clarity. A resolution of the circuit split will achieve consistency in terms of uniformity of national policy and with respect to the purposes of the past and present application of federal securities laws.

CONCLUSION: A CONFLICT RIPE FOR RESOLUTION

Amidst the surge of credit crisis class actions, this removal conflict is ripe for resolution. As the subprime crisis rolls on, the waves of securities litigation are likely to keep crashing down.³⁸⁸ The tension between CAFA and the '33 Act is likely to continue as defrauded investors seek meaningful

382. See *supra* notes 271, 289 and accompanying text.

383. See *supra* note 216 and accompanying text.

384. See *supra* note 308 and accompanying text.

385. See *supra* notes 312–13 and accompanying text.

386. See *supra* notes 54 and accompanying text.

387. See *supra* notes 328–30 and accompanying text.

388. See, e.g., Costello, *supra* note 190, at 224 (“Companies heavily invested in the subprime market will continue to face increased scrutiny by their shareholders and various regulatory entities. Any future negative announcements from these entities will likely result in the kind of stock price drop that regrettably triggers the filing of additional lawsuits.”).

recourse and defendants seek to fend off meritless lawsuits. As Judge Easterbrook noted in *Katz*, “one or the other must yield.”³⁸⁹ This time, the older statute, the ’33 Act, should yield to the newer, CAFA; the past must sometimes recede so that the present can rise.

Though the parallels to the Great Depression may call to memory some of the historical purposes of the ’33 Act in the context of the subprime crisis, a plaintiff’s absolute choice of forum in class actions is not the optimum solution. A plaintiff’s choice of forum has withstood the test of time, and it does remain important for small individual investors, but nationwide class actions implicating securities of national importance should be heard in federal court.

Looking to the past is valuable, but it is not a panacea for the present ills of the market. Perhaps the best cure for those suffering from the infirmities of today’s market is clear and consistent interpretation of the interplay between CAFA and the ’33 Act. This conflict is ripe for resolution. The Seventh Circuit approach clarifies the false dichotomy between investor protection and confidence. It honors the historical purposes and current needs of the federal securities laws. Resolution of this conflict would allow for clarity, consistency, and, finally, some class action fairness.

389. *See supra* note 314 and accompanying text.