

# Class Dismissed? Addressing and Resolving the SLUSA Circuit Split

DAVID N. SUTTON\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	98
II. HISTORICAL CONTEXT OF SLUSA.....	99
III. THE SPLIT .....	100
A. <i>The Literalist/Majority Approach</i> .....	101
B. <i>The Incidental Approach</i> .....	102
C. <i>Assessing the Approaches</i> .....	103
IV. RESOLVING THE SPLIT .....	104
A. <i>The Supreme Court Should Adopt the Literalist Approach</i> ....	105
B. <i>Effective Resolution Requires Congressional Action</i> .....	105
V. CONCLUSION.....	108

## I. INTRODUCTION

In October, the Supreme Court will hear oral arguments for three consolidated cases stemming from the Allen Stanford Ponzi scheme in review of a recent Fifth Circuit decision<sup>1</sup> on the correct application of the Securities Litigation Uniform Standards Act (SLUSA).<sup>2</sup> SLUSA precludes most state law class actions in which plaintiffs allege fraud “in connection with the purchase or sale of a covered security.”<sup>3</sup> In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*,<sup>4</sup> the Court addressed a previous circuit split by holding that relevant language in SLUSA should be read broadly, yet a new split has arisen as to the extent to which “in connection with” applies. While the Court will likely resolve this particular issue, it has limited its review<sup>5</sup> so that other questions will be left lingering in the wake of the Court’s decision. Particularly—may a

---

\*Technology Editor, *Ohio State Law Journal*; J.D., The Ohio State University Moritz College of Law, expected 2014; B.A., The Ohio State University, 2009; M.A., University of Arizona, 2011. I would like to thank Professor Lee and Professor Davidoff for their feedback and guidance.

<sup>1</sup> *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012), *cert. granted sub nom. Chadbourne & Parke LLP v. Troice*, 133 S. Ct. 977 (2013).

<sup>2</sup> 15 U.S.C. § 78bb(f)(1) (2012).

<sup>3</sup> *Id.* § 78bb(f)(1)(A).

<sup>4</sup> 547 U.S. 71 (2006) (holding that courts should read SLUSA broadly to meet its intended purpose of precluding state law claims).

<sup>5</sup> *Chadbourne*, 133 S. Ct. at 977 (granting the three separate petitions for writ of certiorari, but limiting the review to a single issue).

complaint originally precluded by SLUSA be amended if plaintiffs eliminate SLUSA-damning allegations? And, notwithstanding the disputed language of the statute, does the policy-centered goal of securities compliance warrant a more liberal reading of the statute?

This Note posits that because the Supreme Court has limited its review, perhaps it is not the best route for SLUSA resolution. Additionally, while the circuits' discrepancy in SLUSA application revolves around statutory interpretation, the underlying policy of securities compliance, along with the judiciary's role in ensuring public companies adhere to securities laws, rises to the surface. These are concerns that place an informed Congress in a better position to make effective change. Part II briefly discusses the historical context of SLUSA along with the intended purposes of the statute. Part III introduces and assesses the two primary approaches that the circuits have taken in applying (or not applying) SLUSA. Finally, Part IV suggests that congressional amendment, rather than Supreme Court review, is the most effective resolution to the current circuit split, and presents model language on which an amendment may be based.<sup>6</sup> What this Note offers is a solution to the split within the context of policies that respect the balance between one's right to litigation, regulatory enforcement, and proper application of statutory law.

## II. HISTORICAL CONTEXT OF SLUSA

SLUSA is a remedial statute. In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA) to address abusive litigation within the securities fraud context.<sup>7</sup> Congress believed that securities litigation had become overrun by opportunistic plaintiffs,<sup>8</sup> so the statute imposed heightened filing requirements to ensure the legitimacy of federal class action lawsuits.<sup>9</sup> However, these heightened filing requirements caused the unintended effect of encouraging plaintiffs'

---

<sup>6</sup> With the benefit of hindsight, a more tailored statute will provide clearer instruction for the courts.

<sup>7</sup> Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

<sup>8</sup> See, e.g., Michael Y. Scudder, Comment, *The Implications of Market-Based Damages Caps in Securities Class Actions*, 92 NW. U. L. REV. 435, 435-36 (1997) (in the span of two business days, ten different shareholders filed class action suits against Philip Morris, two complaints of which contained identical allegations, as if plaintiffs' lawyers had been lying in wait with "fraud form complaints" stored on the computer (quoting *In re Philip Morris Sec. Litig.*, 872 F. Supp. 97, 98 (S.D.N.Y. 1995) (internal quotation marks omitted))).

<sup>9</sup> H.R. REP. NO. 104-369, at 41 (1995) (Conf. Rep.) (discussing the incorporation of pleading with "particularity" to reduce the number of meritless lawsuits).

attorneys to use state-counterpart blue sky laws to bring an identical suit to state court.

As a response, Congress enacted SLUSA in 1998 to preclude securities claims based on state law relying on misrepresentation or material omission of facts.<sup>10</sup> Through SLUSA, Congress sought to decrease the amount of meritless strike suits<sup>11</sup> and deter enterprising plaintiffs from filing actions in state court as a means of bypassing the PSLRA.<sup>12</sup> Under SLUSA, fifty or more class members may not bring a state-based complaint alleging (A) “a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security,” or (B) “that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.”<sup>13</sup> The Supreme Court explained in *Dabit* that because the phrase “in connection with the purchase or sale of any security” is used in Section 10(b) and Rule 10b-5 and has received a broad reading,<sup>14</sup> so also should courts apply a broad reading to SLUSA in order to meet the desired outcome of Congress.<sup>15</sup> Notwithstanding *Dabit*, circuit courts have developed two distinct approaches for interpreting the scope of SLUSA’s preclusion.

### III. THE SPLIT

If plaintiffs’ allegations are the kind that would trigger SLUSA, a defendant may remove the case to federal court and move for dismissal where that court makes a determination as to whether the statute applies.<sup>16</sup> That’s the simple part. The issue, though, is whether plaintiffs’ complaint has actually alleged the “misrepresentation or omission of a

---

<sup>10</sup>Specifically, SLUSA amended the Securities Act of 1933 and the Securities Exchange Act of 1934 as a means to address securities fraud class action suits filed under state law. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended in scattered sections of 15 U.S.C.).

<sup>11</sup>“The purpose of these strike suits is to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit, simply to avoid the potentially bankrupting expense of litigating.” H.R. REP. NO. 105-803, at 13 (1998) (Conf. Rep.).

<sup>12</sup>*Id.* at 2.

<sup>13</sup>15 U.S.C. § 78bb(f)(1) (2012). SLUSA’s definition of a “covered security,” which is taken from the 1933 Securities Act, is generally a security that is listed on a regulated national exchange. *Id.* § 77r(b)(1).

<sup>14</sup>*Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85–86 (2006) (citing *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002)).

<sup>15</sup>*Id.* at 86 (“Congress envisioned a broad construction . . . [based on] the particular concerns that culminated in SLUSA’s enactment.”).

<sup>16</sup>15 U.S.C. § 78bb(f)(2).

material fact *in connection with* the purchase or sale of a covered security.”<sup>17</sup> Two sets of circuit courts interpret that language differently, taking either the Literalist Approach or the Incidental Approach.<sup>18</sup>

#### A. *The Literalist/Majority Approach*

The Literalists utilize a plain reading of “in connection with” to determine whether SLUSA applies. A plain reading, however, does not confine courts to analyzing the specific words found in a complaint.<sup>19</sup> In *Segal v. Fifth Third Bank, N.A.*, the Sixth Circuit affirmed dismissal under SLUSA by applying a broad reading of the statute pursuant to *Dabit*.<sup>20</sup> Although the plaintiffs in *Segal* argued that the claims were immaterial with respect to SLUSA because they did not depend on allegations of misrepresentation or manipulation, the court emphasized dependence is not an element of SLUSA review.<sup>21</sup> The Sixth Circuit reaffirmed its position two years later in *Atkinson v. Morgan Asset Management*.<sup>22</sup> There, the plaintiffs attempted to dodge SLUSA by insisting the mere inclusion of fraud-based allegations did not form the crux of the complaint.<sup>23</sup>

In addition to the Sixth Circuit, several other circuits—the Second,<sup>24</sup> Eighth,<sup>25</sup> Tenth,<sup>26</sup> and Eleventh<sup>27</sup>—have applied a Literalist Approach.

---

<sup>17</sup> *Id.* § 78bb(f)(1)(A) (emphasis added).

<sup>18</sup> For a comprehensive comparison and analysis of the different approaches, see John M. Wunderlich, “Uniform” Standards for Securities Class Actions, 80 TENN. L. REV. 167, 184–96 (2012).

<sup>19</sup> “Otherwise,” as Judge Sutton asserts, “SLUSA enforcement would reduce to a formalistic search . . . for magic words—‘untrue statement,’ ‘material omission,’ ‘manipulative or deceptive device’—and nothing more.” *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 3326 (2010).

<sup>20</sup> *Id.* at 309.

<sup>21</sup> *Id.* at 311 (“[SLUSA] does not ask whether the complaint makes ‘material’ or ‘dependent’ allegations . . . . It asks whether the complaint *includes* these types of allegations, pure and simple.” (emphasis added)).

<sup>22</sup> 658 F.3d 549, 555 (6th Cir. 2011).

<sup>23</sup> *Id.* (“The district court rightly analyzed ‘the allegations contained in the complaint,’ and ‘not the state-law label placed on the claim,’ in concluding that ‘allegations of omissions or other deceitful activity’ pervaded each of Plaintiffs’ claims. That the claims did not ‘depend’ on these allegations is inapposite . . . .” (citation omitted)).

<sup>24</sup> See *Romano v. Kazacos*, 609 F.3d 512, 523 (2d Cir. 2010) (“SLUSA requires our attention to both the pleadings and the realities underlying the claims.”).

<sup>25</sup> See *Kutten v. Bank of Am., N.A.*, 530 F.3d 669, 670 (8th Cir. 2008) (“[W]e look at the substance of the allegations, based on a fair reading.” (citation omitted)).

<sup>26</sup> See *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1287 (10th Cir. 2008) (Despite wordplay, “[a]ll of the substantive counts listed in Plaintiffs’ Complaint incorporate [fraud-based] allegations by reference.”).

### B. *The Incidental Approach*

Where the Literalists would dismiss a state law securities fraud claim through a “pure and simple” approach,<sup>28</sup> the Incidentals read SLUSA more narrowly. The Third Circuit asks whether an allegation of securities fraud is a factual predicate to the legal claim.<sup>29</sup> Similarly, the Ninth Circuit held that an allegation of misrepresentation is “in connection with” the purchase or sale of securities when the two are “more than tangentially related.”<sup>30</sup> In *Madden v. Cowen*, the alleged misrepresentations led to shareholder approval of a corporate merger, and the court of appeals found that misrepresentation to be more than tangentially related to the purchase of the securities in question.<sup>31</sup>

Based upon the Ninth Circuit’s test for “more than tangentially related,” the Fifth Circuit in *Roland v. Green* held that SLUSA did not preclude plaintiffs’ state law class action because the misrepresentations were not at the “heart, crux, or gravamen” of the defendant’s fraud.<sup>32</sup> Additionally, plaintiffs alleged they relied on the false advertisement that a certain security was highly marketable and stable, yet the court found this was “but one of a host of (mis)representations,” so the complaint did not trigger SLUSA preclusion.<sup>33</sup>

---

<sup>27</sup> See *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1094 (11th Cir. 2002) (“To the extent that the defendants misrepresented which shares would be sold to the class, those misrepresentations were made ‘in connection with’ the sale of the shares.”).

<sup>28</sup> *Supra* notes 19–21 and accompanying text.

<sup>29</sup> *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008) (A factual predicate requires a causal link between the misrepresentation and liability; “merely an extraneous detail,” pursuant to this approach, would be insufficient to trigger SLUSA preclusion.); see also *White v. Lord Abbett & Co. (In re Lord Abbett Mut. Funds Fee Litig.)*, 553 F.3d 248, 256 (3d Cir. 2009).

<sup>30</sup> *Madden v. Cowen & Co.*, 576 F.3d 957, 966 (9th Cir. 2009).

<sup>31</sup> *Id.* While the court initially mentions in its test “coincide,” a term denoting broad interpretation used by the Supreme Court in *Dabit*, it curiously drops that word but keeps its own phrase “more than tangentially related” in its analysis of the facts two paragraphs later. This omission is significant because “more than tangentially related” is the test on which *Roland* relied.

<sup>32</sup> 675 F.3d 503, 521 (5th Cir. 2012) (footnotes omitted) (internal quotation marks omitted), *cert. granted sub nom. Chadbourne & Parke LLP v. Troice*, 133 S. Ct. 977 (2013). On criticizing the decision, the SEC concluded a “test that requires courts to intuit the theme or main idea of the complaint, or to assess the relative importance of securities-related and other misrepresentations . . . would undermine [SLUSA’s] congressional purpose.” Brief for the United States as Amicus Curiae Supporting Petitioners at 27, *Chadbourne*, 133 S. Ct. 977 (Nos. 12-79, 12-86, 12-88), 2013 WL 1947418, at \*27.

<sup>33</sup> *Roland*, 675 F.3d at 521 (footnote omitted) (listing other misrepresentations that would not trigger SLUSA preclusion, including the fact that the bank was insured, professionally staffed, and carefully audited).

### C. Assessing the Approaches

There are conflicting elements to be gleaned from these cases: a court's sense of obligation in enforcing a statute as Congress intended versus a court's desire to hear a case in order to enforce securities compliance, and, consequently, these cases affect whether redress via litigation is permissible. The Literalists apply the plain meaning of SLUSA, which is to preclude allegations *in connection with* specified state securities fraud claims. Courts have a duty to apply the plain meaning of a statute when that meaning is clear.<sup>34</sup> Since the Supreme Court has clarified that Congress intended for SLUSA to be read broadly,<sup>35</sup> the Literalists see their duty as simply interpreting and applying the law.

But perhaps the Literalists are enforcing SLUSA overzealously.<sup>36</sup> In reality, “[e]verything in a complaint (except the request for relief) is an allegation,” at least in the sense that a court has yet to make a determination.<sup>37</sup> If plaintiffs allege fraud as background information that may not be of consequence to the case's outcome, should the entire claim be precluded by SLUSA just because the words “in connection with” appear in the statute?<sup>38</sup> That question suggests, at minimum, that perhaps Congress did not mean for literally every allegation to doom plaintiffs' class actions.

The Incidentals find a literal application of SLUSA too severe. When proof of a misrepresentation or fraud has no bearing on plaintiffs' success, it might make sense simply to dismiss any allegations precluded by SLUSA while permitting plaintiffs to go forward without SLUSA-damning allegations. For example, a class could allege breach of contract but include a “tangentially related” allegation of fraud. These extraneous allegations may not have any bearing on the success of a breach of contract complaint, so it follows that the entire complaint should not be dismissed.<sup>39</sup>

---

<sup>34</sup> *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.”).

<sup>35</sup> *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006).

<sup>36</sup> In fact, an overly broad reading is one of the concerns the Fifth Circuit expressed. *Roland*, 675 F.3d at 512.

<sup>37</sup> *Brown v. Calamos*, 664 F.3d 123, 128 (7th Cir. 2011).

<sup>38</sup> *Id.* (“If an allegation of fraud is . . . unlikely to become an issue . . . why should it doom the suit?”).

<sup>39</sup> Example structured around the language in *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008) (“[T]he inclusion of such extraneous allegations does not operate to require that the complaint must be dismissed under SLUSA.”).

Yet the Incidentals substitute a narrow analysis that presupposes congressional intent despite *Dabit's* guidance to read broadly the preclusion provision. Phrases like “factual predicate” or “tangentially related” substantially change the meaning of the statute, as if Congress equivocally said, *some, but not all, allegations of misrepresentation or omission of a material fact with a strong nexus to the inducement of a purchase or sale of a covered security are probably precluded*. Of course, this is not what Congress said.

It is likely the Supreme Court will not resolve all of these issues—a determination whether “in connection with” must be read literally does not address whether a more liberal reading advances a policy-centered goal of securities compliance. As the Literalists apply SLUSA, ever devout to procedure, perhaps they are missing one of the most significant goals of securities litigation: ensuring public companies comply with the rules. Compliance is certainly a desired end, but to what extent may a court stretch the language of a statute to meet that aim? Would litigation that survives SLUSA preclusion under an Incidental approach prevent future fraud? Are we ensuring wronged plaintiffs have their day in court? These questions are best left to Congress.

#### IV. RESOLVING THE SPLIT

One remedy for the circuit split—indeed the most lasting form of resolution—is to change the statute itself.<sup>40</sup> A review by the Supreme Court is not enough. This is true when SLUSA has a history of misinterpretation and because the Court has narrowed its review to the question of SLUSA's scope.<sup>41</sup> In fact, the circuits are split as to whether a complaint may be amended.<sup>42</sup> By not addressing this issue, the Court misses an opportunity to say when plaintiffs have redress and when they do not—a question critical to the very existence of litigation. Thus, an

---

<sup>40</sup> See *A Bill to Establish an Intercircuit Panel, and for Other Purposes: Hearing on S. 704 Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 99th Cong. 115 (1985) (statement of J. Ruth Bader Ginsburg) (“There is, of course, an ideal intercircuit conflict resolver. . . . Congress itself. On the correct interpretation of federal statutes, no assemblage is better equipped to say which circuit got it right.”).

<sup>41</sup> See *supra* note 5.

<sup>42</sup> Compare *Proctor v. Vishay Intertech. Inc.*, 584 F.3d 1208, 1228 (9th Cir. 2009) (“SLUSA requires remand once the federal court dismisses precluded claims.”), with *Atkinson v. Morgan Asset Mgmt.*, 658 F.3d 549, 556 (6th Cir. 2011) (rejecting plaintiffs' arguments for remand and affirming the district court's dismissal with prejudice), and *Brown*, 664 F.3d at 131 (affirming dismissal with prejudice). If the decision seems inequitable, “a lawyer who files a securities suit should know about SLUSA and ought to be able to control the impulse to embellish his securities suit with a charge of fraud.” *Id.* at 128.

informed Congress, rather than the Supreme Court, is better equipped to change the statute in such a way that frivolous suits remain precluded while legitimate suits advance.

*A. The Supreme Court Should Adopt the Literalist Approach*

The Court must work with what it has, and the Literalist Approach causes the least damage to a plain reading of SLUSA. The statute essentially provides a checklist for courts to determine whether SLUSA applies. Is there a “covered class action” based on state law? Is the party alleging (A) misrepresentation or omission of a material fact *in connection with* the purchase or sale of a covered security, or was (B) the defendant fraudulent *in connection with* the purchase or sale of a covered security?<sup>43</sup> Quite simply, an answer of “yes” to these questions results in SLUSA preclusion. Neither the statutory text nor legislative history suggests an Incidental reading.<sup>44</sup> The text clearly precludes specific instances of misrepresentation or fraud allegations. Further, if Congress desired for some class actions to slip through the preclusive net of SLUSA, it would have indicated such intent.<sup>45</sup>

*B. Effective Resolution Requires Congressional Action*

When courts have difficulty interpreting a statute, Congress can provide clarification by making an amendment, and this case warrants such action. This Note offers model language on which Congress might base its amendment. The proposed statutory language below<sup>46</sup> clarifies the scope of SLUSA and addresses whether a complaint may be amended. There are five paragraphs under Subsection (f) Limitations on remedies, with the fifth being a definition section, so the proposed language would most appropriately fit just after Paragraph (1) Class action limitations.<sup>47</sup>

The proposed statutory language would appear as follows:

- (f) Limitations on remedies
- (1) Class action limitations

---

<sup>43</sup> 15 U.S.C. § 78bb(f)(1) (2012).

<sup>44</sup> See S. REP. NO. 105-182, at 3–4 (1998).

<sup>45</sup> See, e.g., *Regan v. Wald*, 468 U.S. 222, 255 (1984) (noting that if Congress intended an alternative definition of a statutory term other than the plain meaning, “it would have said so explicitly”).

<sup>46</sup> Proposed language is set in italics to show how it fits with the existing language.

<sup>47</sup> The new provisions would be found at 15 U.S.C. § 78bb(f)(1-1) and (1-2).

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

- (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
- (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

*(1-1) Scope of limitations*

*For the purposes of this subsection, the scope of limitations includes, as applied to a covered class action, a party's action in its entirety. Nothing in this subsection shall be construed so as to create separate individual claims.*

In addition, Congress should include a provision that addresses whether or not plaintiffs may amend a complaint, an issue not on review by the Court. Plaintiffs would not frustrate the purpose of SLUSA by amending the original complaint if done in good faith. It will be, of course, under the discretion of the federal court whether plaintiffs can do so successfully without falling subject to SLUSA preclusion. The following paragraph addresses that concern:

*(1-2) Amendment of complaint*

*If an action that has been removed from a State court pursuant to paragraph (2), may in good faith be amended so as to no longer apply to the scope of this subsection, then the party bringing the action may, in a timely manner and under the discretion of the Federal court, amend its complaint.*

The proposed statutory language successfully addresses the current circuit split. First, the new language provides clarification. Since the circuits have divergent approaches to SLUSA's application, the best method is to tell courts how and when the statute precludes a complaint. Proposed paragraph 78bb(f)(1-1), "Scope of limitations," which instructs courts not to divide plaintiffs' complaint into multiple mini-allegations where some claims are screened by SLUSA while other claims pass, will provide the courts with the clear guidance necessary to avoid future confusion. Additionally, in proposed paragraph 78bb(f)(1-2), "Amendment of complaint," Congress has the opportunity to clarify whether plaintiffs may amend a complaint after initial preclusion by SLUSA.

Second, the proposed statutory language complements the current statutory language. Paragraph (1-1), "Scope of limitations," works as a sister provision with paragraph (1), "Class action limitations," by offering a more detailed instruction on what it means when a private party is "alleging" misrepresentation or fraud—that an allegation, as the

Literalists assert, means a party's allegation in its entirety. Neither proposed paragraph conflicts with the text of SLUSA. Paragraph (1-2), "Amendment of complaint," actually enhances the statute by making evident SLUSA's preclusive power—to screen certain state law securities fraud allegations while preserving a party's right to redress.

Third, the proposed statutory language is consistent with congressional intent.<sup>48</sup> As a reaction to the PSLRA, SLUSA was meant to reduce the number of meritless class action lawsuits while preserving a party's right to action when appropriate.<sup>49</sup> Congress would bolster the protective purpose of SLUSA by clarifying when SLUSA applies and when it does not; proposed paragraph (1-1), "Scope of limitations," explains that an allegation means one in its entirety. Further, when a party is able to show it can still make a legitimate case under (1-2), "Amendment of complaint," Congress would not counteract SLUSA's purpose of screening meritless claims.

The proposed statutory language is not so narrow as to take any real interpretative power from the judiciary. There might be a concern that by enacting provisions similar to those proposed here Congress would function like Big Brother to the courts.<sup>50</sup> However, the proposed statutory language is not so narrow as to suggest Congress might overstep its legislative bounds to unduly influence the courts.<sup>51</sup> In fact, Congress gives the courts discretionary power in paragraph (1-2), "Amendment of complaint": "*Under the discretion of the Federal court,*" a party may only amend its complaint when, in good faith, it can still maintain a legitimate action without the allegations of misrepresentation or fraud.

Any potential issues that may arise from the proposed language are negligible compared to the confusion caused by the current circuit split. As shown, the proposed statutory language offers substantially more benefits—by enhancing and clarifying SLUSA—than any harm that may result. The proposed statutory language respects the balance of power between the legislative and judiciary branches, advances the purpose of SLUSA, and provides a way for courts to enforce regulatory compliance.

---

<sup>48</sup>That is, if plaintiffs bring a covered class action including allegations that SLUSA forbids, then the action must be dismissed under paragraph (f)(2).

<sup>49</sup>In this context, an action is appropriate when it does not include the type of allegations precluded by SLUSA.

<sup>50</sup>Congress should, of course, provide statutory interpretive direction to courts through plain text and history if the statute is ambiguous, *United States v. Great N. Ry. Co.*, 287 U.S. 144, 154–55 (1932), but the separation of powers under the Constitution mandates that Congress should not hold the judiciary's hand through the process.

<sup>51</sup>Likewise, it would be inappropriate if the Court provided an interpretation so drastic that it would essentially change the statute.

Through congressional amendment, it is likely that fewer class action securities claims would be filed, but that does not mean plaintiffs are completely precluded from redress.<sup>52</sup>

## V. CONCLUSION

The high number of securities class actions continues to saturate state and federal courts.<sup>53</sup> A large majority of lawsuits are still being settled at considerable costs.<sup>54</sup> The statistics suggest that the PSLRA and SLUSA are not meeting their intended goals. Further, since the fate of a class action securities lawsuit may vary—e.g., depending not necessarily on the merits but rather on the geographic jurisdiction of a particular federal court of appeals—the need for statutory amendment is increasingly important.

Here, the Supreme Court's decision would function like a bandage to a broken arm rather than as a substantive healing agent for the interpretation and application of SLUSA. The problem with SLUSA exists in the text and in questions not on review by the Court, so Congress needs to set the bone in order to fix the statute. This Note offers clarifying language that Congress might incorporate into SLUSA in order to address the circuit split. As demonstrated, the language provides courts clear instructions as to whether SLUSA precludes a claim and whether plaintiffs may have their day in court. That way, courts may focus their energies toward more appropriate and efficient adjudication of securities laws.

---

<sup>52</sup> *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 312 (6th Cir. 2009) (although SLUSA is seemingly unforgiving, plaintiffs can simply file an identical complaint with fifty or fewer members in the class to avoid SLUSA preclusion), *cert. denied*, 130 S. Ct. 3326 (2010).

<sup>53</sup> *See, e.g.*, JORDAN MILEV ET AL., NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2011 MID-YEAR REVIEW 1–2 (2011), available at [http://www.nera.com/nera-files/PUB\\_Mid-Year\\_Trends\\_0711\(3\).pdf](http://www.nera.com/nera-files/PUB_Mid-Year_Trends_0711(3).pdf).

<sup>54</sup> *Id.* at 14.