ONE NATION, UNDER SECURITIES FRAUD? THE THIRD CIRCUIT NOTCHES A WIN FOR FEDERALISM IN IN RE LORD ABBETT MUTUAL FUNDS FEE LITIGATION

I. INTRODUCTION

In the wake of the financial crises, courts have experienced an increase in securities fraud litigation as shareholders attempt to hold financial institutions accountable.1 Given the recent 2008 stock market and credit crises, federal courts are currently experiencing a remarkably high volume of particularly complex securities fraud litigation.2 Indeed, in their zeal for redress, many plaintiffs are bringing more than one claim against defendants, pleading multiple theories of recovery—often under both state and federal law.3


2. See Sarah S. Gold & Richard L. Spinogatti, Recent Circuit Decisions Illustrate SLUSA’s Limitations, N.Y. L.J., Apr. 8, 2009, at 3 (concluding that “the volume of securities litigation [will] grow[ ] in response to the continuing tumult in our capital markets”); Mark Perry & Indraneel Sur, SLUSA Precludes ‘Actions,’ Not Claims, 7 MEALEY’S EMERGING SEC. LITIG. 9-10 (2009) (explaining that financial system “turbulence” has “already generated dozens of private class actions alleging securities fraud,” and “no doubt will continue to do so for years to come”); see also CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS 2008: A YEAR IN REVIEW 2 (2009), available at http://securities.stanford.edu/clearinghouse_research/2008_YIR/20090106_YIR08_Full_Report.pdf (concluding that class action filings in 2008 were at highest level since 2004). “This level of litigation activity against firms in a specific sector [financial services] is unprecedented since the passage of the 1995 Reform Act.” Id. But see CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS 2009: A YEAR IN REVIEW 2 (2010), available at http://securities.stanford.edu/clearinghouse_research/2009_YIR/CORNERSTONE_RESEARCH_FILINGS_2009_YIR.pdf (concluding that new filings declined in 2009 from 2008 numbers). Nevertheless, commentators explain that there has been an increase in the renewal of old filings by plaintiffs. See Aguilar, supra note 1 (reasoning that increase in filing of older claims in 2009 was caused by plaintiffs “trying to fill the litigation pipeline by bringing older lawsuits that weren’t attractive enough to file while the firms were busy pursuing financial sector claims” (quoting Joseph Grundfest, SECURITIES CLASS ACTION FILINGS 2009, supra)).

3. See, e.g., In re Lord Abbett Mut. Fund Fee Litig., 553 F.3d 248, 249 (3d Cir. 2009) (alleging four federal law claims and four state law claims); Proctor v. Vishay Intertech., Inc., 584 F.3d 1208, 1215-16 (9th Cir. 2009) (alleging state law breach of fiduciary duty, state fraud claims, and “quasi appraisal” rights claim under Delaware law); Behlen v. Merrill Lynch, 311 F.3d 1087, 1089 (11th Cir. 2002) (alleging class action securities fraud claim and additional class-wide claims); In re Blackrock Mut. Funds Fee Litig., No. 04 Civ. 164, 2006 WL 4683167, at *3 (W.D. Pa. Mar. 29, 2006) (alleging both federal law violations and state law claims); In re Dreyfus Mut. Funds Fee Litig., 428 F. Supp. 2d 342, 345-46 (W.D. Pa. 2005) (same); cf. PHILIP E.
In these circumstances, plaintiffs are confronted with the potentially fatal preemption problem that arises from language in federal legislation known as the Securities Litigation Uniform Standards Act (SLUSA).4 This language preempts, and requires a court to dismiss with prejudice, a plaintiff’s "action" brought under state law.5 Specifically, where a plaintiff’s complaint contains claims that SLUSA preempts and others that SLUSA does not, SLUSA instructs courts that the plaintiff’s “action” is preempted.6 Ambiguity in the word “action,” however, creates a dilemma for district courts (and a headache for plaintiffs): should courts dismiss only the preempted claims, or should courts dismiss the entire complaint?7 While the circuit courts of appeals have recognized this problem, they remain divided as whether to dismiss the entire complaint or retain those claims that SLUSA does not preempt.8 In addition to the crucial consequences this decision has on plaintiffs’ securities fraud claims, determining how to interpret SLUSA’s language is also significant because it implicates broader questions of statutory interpretation and the preservation of federalism.9

In two recent decisions, the Third Circuit addressed the issue of whether, when a plaintiff pleads a mixed-claim complaint, SLUSA’s directive that a court cannot maintain a plaintiff’s “action” requires dismissal of the entire complaint or only the preempted claims.10 In Rowinski v. Salo-

---

5. See id. ("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 . . . .").
6. For a discussion of the ambiguity of the term “action,” see infra note 89 and accompanying text.
7. See Proctor, 584 F.3d at 1226 (“SLUSA unquestionably requires the dismissal of the precluded claim (2), but does it require the dismissal of the other, non-precluded claims as well?”).
8. For a discussion of the split in lower courts on the issue of mixed-complaint preemption, see infra notes 47-71 and accompanying text.
10. For a discussion of Third Circuit jurisprudence on the mixed-complaint issue, see infra notes 72-80 and accompanying text.
the court stated, in dicta, that the plain language of SLUSA requires the dismissal of the entire complaint—both preempted and non-preempted claims. Yet, four years later, when squarely presented with the issue in In re Lord Abbett Mutual Funds Fee Litigation, the court expressly rejected Rowinski’s dicta and held that SLUSA’s plain language, legislative history, and purpose supports a court’s ability to dismiss only preempted claims, and retain non-preempted claims for adjudication on the merits. The court seemed to limit this holding, however, to non-preempted federal law claims.

This Casebrief examines Third Circuit jurisprudence regarding SLUSA preemption of mixed-claim complaints and serves as a guide to practitioners bringing or defending motions for dismissal on SLUSA preemption grounds. Part II provides a brief history of securities fraud regulation under federal law. Part III explains how various circuit and district courts have dealt with the important practical problem of mixed-complaint dismissal. Part IV details the Third Circuit’s decision in Lord Abbett. Part V provides insight into the Third Circuit’s reasoning and develops arguments that practitioners on both sides may use to apply Lord Abbett in future cases. Finally, Part VI argues that the Third Circuit’s treatment of mixed-claim securities fraud complaints will allow more plaintiffs the opportunity to find judicial redress for losses incurred as a result of the recent financial turbulence.

11. 398 F.3d 295 (3d Cir. 2005).
12. See id. at 305 (stating in dicta that entire complaint is preempted and should be dismissed).
13. 553 F.3d 248 (3d Cir. 2009).
14. See id. at 249 (concluding that SLUSA does not require dismissal of entire complaint). For a complete discussion of the Third Circuit’s holding and reasoning in Lord Abbett, see infra notes 77-112 and accompanying text.
15. See Lord Abbett, 553 F.3d at 256 (“We hold simply that any valid federal claims pled in the same action—claims that, if brought independently, would clearly fall outside of SLUSA’s pre-emptive scope—need not also be dismissed.”).
16. For a discussion of recommendations and guidance for practitioners bringing or defending motions to dismiss on SLUSA preemption grounds, see infra notes 113-151 and accompanying text.
17. For a discussion of the history of securities litigation, see infra notes 22-46 and accompanying text.
18. For a discussion of the circuit split on mixed-claim preemption, see infra notes 47-71 and accompanying text.
19. For a discussion of the Lord Abbett court’s holding and rationale, see infra notes 72-112 and accompanying text.
20. For a discussion of practitioners’ use of Lord Abbett, see infra notes 113-151 and accompanying text.
21. For a discussion of the possible impact of Lord Abbett, see infra notes 152-158 and accompanying text.
II. A BRIEF HISTORY OF SECURITIES FRAUD LITIGATION

Securities fraud lawsuits have long been a part of American jurisprudence. The requirements and the forums in which litigants seek redress for these claims, however, have varied greatly over time. From its origins in common law fraud, to the birth of federal remedies under the New Deal, to two major reforms in the 1990s, the history of securities fraud is long and contentious.

A. The Birth of Securities Fraud Claims: Common Law to the New Deal

Securities fraud litigation developed as a fraud claim under state common law and, in keeping with this origin, required a plaintiff to prove the traditional elements of fraud. Under this common law framework, however, the unique factual circumstances of securities fraud made it difficult for plaintiffs to show the elements of reliance and intent. As a result, plaintiffs’ claims often fell on deaf ears.

22. Cf. LOUIS LOSS & EDWARD M. COWETT, BLUE SKY LAW 5-7 (1958) (explaining that Kansas enacted first state securities law in 1911); Elaine A. Welle, Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement, 56 WASH. & LEE L. REV. 519, 533-34 (1999) (stating that securities regulation in general can be found as far back as thirteenth-century England, and that Kansas was first state to enact state securities regulations).


24. For a discussion of the history of securities fraud and the contemporaneous disagreements about how to remedy its initial problems, see infra notes 25-46 and accompanying text.

25. See WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 615 (3d ed. 2009) (identifying common law fraud elements as: (1) defendant making false statement; (2) of material fact; (3) with intent to deceive; (4) plaintiff reasonably relied on that statement; and (5) causing injury to plaintiff).

26. See id. (explaining plaintiffs’ difficulty in meeting reasonable reliance element); see also Harry Shulman, Civil Liability and the Securities Act, 43 YALE L.J. 227, 231-42 (1933) (claiming very few investors ever brought suit because they knew of inadequacy of common law); Comment, The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors, 59 YALE L.J. 1120, 1123-25 (1950) (noting “notorious inadequacy” of common law remedies in regard to both misrepresentation and non-disclosure).

27. See ALLEN, supra note 25, at 616 (stating that majority rule was that directors only owed duty to corporation and did not have duty of disclosure to “those with whom [they] traded shares”). The Supreme Court, however, also applied an “intermediate” rule: where special facts existed, directors had a “disclose or refrain” duty. See id. (citing Strong v. Repide, 213 U.S. 419 (1909)) (explaining attempt of Supreme Court to alleviate problems of common law fraud claims); see also The Prospects for Rule X-10B-5, supra note 26, at 1125-26 (noting that court waived fiduciary duty rule when “crucial facts were concealed,” but explaining that plaintiffs still rarely brought suit because it was not “financially feasible” to assemble proof of this concealment).
After the financial depression in 1929, the need for increased federal regulation of securities became pervasive, and Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934.\textsuperscript{28} Pursuant to its congressionally granted rulemaking authority under Section 10(b) of the Exchange Act, the Securities and Exchange Commission (SEC) promulgated Rule 10b-5, which made it unlawful to fraudulently purchase or sell securities.\textsuperscript{29} Once courts recognized a private right of action under Rule 10b-5, plaintiffs abandoned the often-inadequate common law and state law fraud claims in favor of private suits under federal law.\textsuperscript{30}


\textsuperscript{29} See 15 U.S.C. § 78j(b) (2006) ("It shall be unlawful . . . to use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe."). Rule 10b-5 states: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5 (2009). This rule was written and adopted in haste and yet is central to all modern securities fraud claims. \textit{See Allen, supra} note 25, at 630 (recounting rapid drafting and adoption of Rule 10b-5, "the most important rule promulgated by the SEC under §10(b)").

\textsuperscript{30} See, e.g., Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946) (inferring private right of action under Rule 10b-5); \textit{see also} Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (concluding that private cause of action under Rule 10b-5 has long been established). \textit{But see} Joseph A. Grundfest, \textit{Disimplying Private Rights of Action Under the Federal Securities Law: The Commission's Authority}, 107 HARV. L. REV. 961, 988-989 (1994) (arguing that \textit{Kardon}, if decided today in line with Supreme Court precedent, would not have implied private right of action under Rule 10b-5). Several Supreme Court cases induced plaintiffs' shift to federal law securities fraud. \textit{See Affiliated Ute Citizens v. United States}, 406 U.S. 128, 155-54 (1972) (allowing litigants to overcome main hurdle in common law fraud, reliance, by allowing presumption of reliance in cases where there is duty to disclose material information, and that duty has been breached); \textit{see also} Herman & MacLean v. Huddleston, 459 U.S. 375, 388-89 (1983) (stating that federal securities laws were enacted "to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry"). Courts now presume reliance in the more troublesome problem of proving
Nevertheless, the construction of a private right of action also created problems.31 Under this private right, plaintiffs enjoyed relaxed pleading requirements and federal case law allowed courts to presume the element of reliance in the prima facie case; combined, these standards served to minimize plaintiffs’ susceptibility to motions to dismiss.32 As plaintiffs’ ability to overcome dismissal increased, corporations became incentivized to settle rather than to fight meritless claims and bear the expense of litigation.33 In addition, these meritless claims, termed “strike suits,”34 also “deterred qualified individuals from serving on boards of directors” due to fear of being dragged into litigation.35 Thus, though federal legislation eased the burden on plaintiffs seeking redress for securities fraud claims, it also seemed to tip the scales too far in favor of plaintiffs’ rights. Congress took notice.36

when an insider has omitted to disclose information. See Basic Inc. v. Levinson, 485 U.S. 224, 246-47 (1988) (establishing presumption of reliance in omissions cases utilizing fraud-on-the-market theory).


32. See Basic Inc., 485 U.S. at 246-47 (establishing presumption of reliance in omissions cases utilizing fraud-on-the-market theory).

33. See H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.) (stating reasoning for enacting PSLRA), reprinted in 1995 U.S.C.C.A.N. 730, 730; S. REP. NO. 104-98, at 4 (“These [securities fraud] suits, which unnecessarily increase the cost of raising capital and chill corporate disclosure, are often based on nothing more than a company’s announcement of bad news, not evidence of fraud.”), reprinted in 1995 U.S.C.C.A.N. 679, 683; see also In re Lord Abbett Mut. Fund Fee Litig., 553 F.3d 248, 250 (3d Cir. 2009) (explaining Congress’s motive for enacting PSLRA was to prevent abusive class actions, known as “strike suits,” which are brought only with hope that due to litigation expense, defendants will settle rather than litigate and reach merits of claim); In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 973 (9th Cir. 1999) (“Congress enacted the PSLRA to deter opportunistic private plaintiffs from filing abusive securities fraud claims.”).

34. See BLACK’S LAW DICTIONARY 1475 (8th ed. 2004) (defining strike suit as “[a] suit (esp. a derivative action), often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement”); see also Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1341 (11th Cir. 2002) (stating that strike suits are “brought for the purpose of forcing securities defendants into large settlements in order to avoid costly discovery”).


36. For a discussion of Congress’s response to the problems of the private right of action under Rule 10b-5, see infra notes 37-46 and accompanying text.
B. Growing Pains: Securities Law Grows Up with the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act

In an effort to combat the detrimental effects of strike suits, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA). The PSLRA developed hurdles to deter strike suits, such as heightened pleading requirements and an automatic stay of discovery once a defendant filed a motion to dismiss. These requirements were intended to make it very difficult for plaintiffs to survive a motion to dismiss in federal court.

Nonetheless, plaintiffs found that they could avoid the PSLRA by filing securities fraud suits in state courts raising state law claims, because such claims were not bound by PSLRA requirements. To combat this


38. See Michael A. Perino, Securities Litigation After the Reform Act 1023 (2006) (“Congress’s predominant approach to address the problems that it identified in securities litigation practices was to craft a set of procedural hurdles designed to make it more difficult to bring and maintain class action litigation in federal court.”). The heightened pleading standards required the plaintiff to both “state with particularity all facts which that belief is formed,” and to “state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind.” See 15 U.S.C. § 78u-4(b)(1)(B) (2006) (detailing pleading standards under PSLRA). The mandatory discovery stay was a direct attempt at curbing the high costs associated with strike suits because as soon as the defendant filed a motion to dismiss, no discovery could occur until the court ruled on the motion. See id. § 78u-4(b)(3)(B) (mandating discovery stay). Other limitations provided under the PSLRA were proportional liability and contribution, damages limitations, sanctions, safe-harbors for forward-looking statements, and class action settlement procedures. See id. § 78u-4 (stating limitations on securities fraud suits).

39. See Perino, supra note 38, at 3011 (“Among the more controversial provisions of the PSLRA was a pleading requirement intended to make it harder for unwarranted allegations of fraud to survive a motion to dismiss.”). As to the discovery stay, this also had detrimental effects on the plaintiff’s ability to survive a motion to dismiss. See id. at 4015 (“The combination of the discovery stay and the Act’s higher pleading standard may present a significant challenge for plaintiffs, particularly in cases where facts supporting a federal securities law claim are solely within the defendants’ control.” (citing Elliot J. Weiss & Janet E. Moser, Enter Yossarian: How to Result the Procedural Catch-22 that the Private Securities Litigation Reform Act Creates, 76 Wash. U.L.Q. 457, 460-61 (1998))); see also Painter, supra note 9, at 35 (concluding that PSLRA deterred some frivolous suits, but “also makes litigation on behalf of defrauded investors more difficult”).

“federal flight,” Congress enacted the Securities Litigation Uniform Standards Act (SLUSA) just three years later, which gave federal courts exclusive jurisdiction, with stated exceptions, for securities fraud class actions. SLUSA provides that no court may maintain a "covered class action" claiming a violation of state law if the complaint alleges fraudulent templating a securities fraud action. See Perino, supra note 38, at 11,016 (stating that after PSLRA plaintiff's attorneys had incentives to shift litigation from federal to state court). Moreover, this shift was a direct result of the PSLRA provision of higher pleading standards, mandatory discovery stay, forward-looking statements, and lead counsel requirements. See id. (discussing reasons for shift to state court); see also Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 108 (2d Cir. 2001) (stating that "litigants were able to assert many of the same causes of action, but avoid the heightened procedural requirements instituted in federal court"); Prager v. Knight/Trimark Group, Inc., 124 F. Supp. 2d 229, 232 (D.N.J. 2000) ("PSLRA drove many would-be plaintiffs to file their claims in state court, based on state law, in order to avoid the heightened pleading requirements of PSLRA."); 2 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 7.17[2] (5th ed. 2005) (explaining that remedies at state law and federal law overlapped).


42. See H.R. Rep. No. 105-803, at 15 (Conf. Rep.) (stating best mode to protect requirements of PSLRA was to "make Federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities"). Specifically, Congress found that:

(1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;

(2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts;

(3) this shift has prevented that Act from fully achieving its objectives;

(4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and

(5) in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

purchases or sales of covered securities. SLUSA defines a “covered class action” as “a single lawsuit” or “group of lawsuits” in which “damages are sought on behalf of more than 50 persons.” The statute further provides that certain state law securities claims that were historically within the purview of state courts are not preempted. Thus, Congress's intent under

43. The requirements of SLUSA state that:
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—
(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

44. The full text of this definition reads:
The term "covered class action" means—
(i) any single lawsuit in which—
(1) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or
(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—
(1) damages are sought on behalf of more than 50 persons; and
(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

45. See 15 U.S.C. § 77p(d)(2)(A) (exempting from SLUSA actions “based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party”). This exception involves breach of fiduciary duty claims “involving buy-backs, reorganizations, and rights offerings,” and also “class actions involving management positions, recommendations, or communications in connection with: (1) transactions requiring shareholder approval; (2) tender or exchange offers; or (3) the exercise of dissenters’ or appraisal rights.” See PERINO, supra note 38, at 11,035-4 (discussing SLUSA exceptions); see also 15 U.S.C. § 77p(d) (“[A] covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by the party to the agreement or a successor to such party.”); 15 U.S.C. § 77p(f)(2)(D) (excepting derivative actions from definition of “covered class action”). Finally, States themselves are free to bring class actions under the following exception:
Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.
SLUSA was to preempt only certain state law securities fraud claims when plaintiffs sue as a class. 46

III. THE PROBLEM OF SLUSA PREEMPTION

Despite clear congressional intent to preempt certain state law claims, a “recurrent practical question under SLUSA” remains: should courts dismiss an entire complaint when it contains both SLUSA-preempted claims and non-preempted claims, such as a complaint that includes a state law claim for fraud and a state law breach of contract claim or a federal law claim? 47 The importance of this problem should not be understated given the prevalence of mixed-claim complaints. 48 In order to avoid claim preclusion, pleading requirements effectively force a plaintiff to assert both SLUSA-preempted claims as well as non-preempted claims in the same complaint. 49 Therefore, many securities fraud claims involve both types of claims. 50 Yet, despite a large number of mixed-claim complaints, circuit and district courts remain divided on the question of whether SLUSA requires dismissal of the entire complaint. 51

A. Courts Dismissing Mixed-Complaints

The circuit and district courts that have addressed the mixed-complaint issue do not agree on the proper interpretation of SLUSA. 52 In


46. See H.R. Rep. No. 105-640, at 16 (1998) (explaining that removal provision and subsequent requirement of dismissal of actions was to “prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted” by SLUSA).

47. See Perry & Sur, supra note 2, at 3 (calling this preemption question one of recurrent practicality).

48. See id. (emphasizing high frequency of mixed-claim complaints).

49. See id. (stating that claim preclusion requires plaintiffs to plead multiple and alternative theories of relief, and that “suits raising multiple theories of relief based on the same set of factual allegations—some of which may be SLUSA-precluded while others are not—can be expected to be filed with some frequency” (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Herrmann v. Cencom Cable Assoc., Inc., 999 F.2d 223, 226 (7th Cir. 1993)); see also Joseph W. Glannon, Civil Procedure 545 (6th ed. 2008) (stating that res judicata bars claims arising out same factual situation not brought or joined in single law suit)).


51. For examples of cases with mixed-claim complaints containing preempted and non-preempted claims, see supra note 50. For a discussion of the circuit split on this issue, see infra notes 53-71 and accompanying text.

52. For a discussion of the split among circuit and district courts, see infra notes 53-71 and accompanying text.
Behlen v. Merrill Lynch,\textsuperscript{53} the plaintiff filed several claims, both “covered class action” claims and other state law class-wide claims.\textsuperscript{54} Despite this mixture of preempted and non-preempted claims, the Eleventh Circuit concluded, without explanation or reasoning, that a court must dismiss, in its entirety, any action that includes both preempted and non-preempted claims.\textsuperscript{55}

District courts in the Eleventh Circuit follow Behlen and, therefore, similarly maintain that SLUSA’s use of the word “action” requires dismissal of the entire suit.\textsuperscript{56} For example, in Greaves v. McAuley,\textsuperscript{57} the United States District Court for the Northern District of Georgia concluded that SLUSA required remand of the entire action, not just the preempted claims.\textsuperscript{58} Greaves involved claims preempted by SLUSA as well as claims expressly excepted from SLUSA’s preemptive sweep.\textsuperscript{59} Under SLUSA, these excepted “actions” require a federal court to remand the action to state court if the elements of the exception are met.\textsuperscript{60} Thus, the court was faced with a paradoxical situation: on the one hand, the court must remand the “action” to state court because certain claims were excepted from SLUSA’s purview; on the other hand, SLUSA also mandates that a court must dismiss the action if it is subject to SLUSA preemption.\textsuperscript{61} Recognizing that remanding the action to state court conflicted with congressional intent to prevent state law securities fraud litigation, the court

\textsuperscript{53} 311 F.3d 1087 (11th Cir. 2002).
\textsuperscript{54} See id. at 1089 (providing that plaintiff filed claims based on “breach of contract, breach of implied covenants and duties, breach of fiduciary duty, unjust enrichment, suppression, misrepresentation, and negligence and/or wantonness”).
\textsuperscript{55} See id. at 1095 n.6 (concluding that district court had to dismiss all claims, including some class-wide claims not presenting misrepresentation or individual claims “[b]ecause Behlen’s case was a ‘covered class action’ asserting state law claims that fell within the scope of the SLUSA, the district court had no choice but to dismiss the class-wide claims”).
\textsuperscript{56} For a discussion of district court opinions within the Eleventh Circuit, see infra notes 57-62 and accompanying text.
\textsuperscript{58} See id. at 1085 (holding that entire complaint be remanded, both preempted and non-preempted claims, to state court).
\textsuperscript{59} See id. at 1083 (concluding that some of plaintiffs claims fulfilled requirement for SLUSA exception that claims brought under state law of home state of securities issuer were not subject to SLUSA requirements).
\textsuperscript{60} The remand provision of SLUSA states:
In an action that has been removed from a State court pursuant to subsection (c) [requiring removal from state court to federal court if action is covered by SLUSA], if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.
\textsuperscript{61} See Greaves, 264 F. Supp. 2d at 1085 (acknowledging argument that remand to state court runs contrary to congressional intent of SLUSA).
concluded that Congress’s use of “action” instead of “claim” required complete remand of the complaint. 62

B. Courts Allowing Claim-by-Claim Dismissal

On the other side of the circuit split stands the Second Circuit, where in Dabit v. Merrill Lynch, Pierce, Fenner, & Smith, Inc. (Dabit I), 63 then-Judge Sotomayor thoroughly examined the mixed-complaint preemption issue and reasoned that SLUSA did not require dismissal of the entire complaint. 64 In Dabit I, the plaintiffs filed both preempted claims and claims that did not allege fraud. 65 Judge Sotomayor noted that though SLUSA defines “covered class action” as a “single law suit,” reading this language as requiring dismissal of an entire complaint would effectively preempt any state law claim brought together with a preempted claim. 66 This evi-

62. See id. at 1085 (explaining that “[i]f Congress had intended to preempt and preserve only specific types of claims, rather than entire lawsuits, Congress could have easily done so” by using the word “claim” rather than “action” in the statutory language); see also Superior Partners v. Chang, 471 F. Supp. 2d 750, 758 (S.D. Tex. 2007) (holding that court must dismiss entire action). The court in Superior recognized the similar factual background to Greaves, and accordingly adopted its reasoning almost verbatim. Superior Partners, 471 F. Supp. 2d at 758 (noting that the case was “nearly identical” to Greaves in that there was mixture of both SLUSA preempted claims and state law claims that met exception to SLUSA). Furthermore, the parties did not dispute that SLUSA applied to actions as a whole and not specific claims, and thus, again despite the apparent frustration of congressional intent for exclusive federal court jurisdiction of securities fraud claims, the court remanded the entire action to state court. See id. at 758-59 (concluding that remand of the entire action was appropriate, including the SLUSA preempted claims). Interestingly, the court here also relied upon the United States District Court for the District of New Jersey’s opinion in In re Lord Abbett Mut. Funds Fee Litig., 417 F. Supp. 2d 624 (D.N.J 2005), vacated, 553 F.3d 248 (3d Cir. 2009). See Superior, 471 F. Supp. 2d at 759 (citing to district court opinion from Lord Abbett as persuasive authority for remanding entire action). In addition, other district courts hold, without explanation and solely relying on the district court opinion in Lord Abbett, that SLUSA required dismissal on the entire complaint, not just the preempted claims. See Kotten v. Bank of Am., N.A., No. 06-4937, 2007 WL 2485001 (E.D. Mo. Aug. 29, 2007) (holding that SLUSA requires dismissal of entire complaint if “at least one of the class action claims is preempted”), aff’d, 530 F.3d 669 (8th Cir. 2008), cert. denied, 129 S. Ct. 598 (2008); Siepel v. Bank of Am., N.A., 239 F.R.D. 558, 569 n.11 (E.D. Mo 2006) (stating that “SLUSA preemption mandates dismissal of the entire class action—not just individual claims”); see also Schnorr v. Schubert, No. Civ-05-303-M, 2005 WL 2019878, at *7 (W.D. Okla. Aug. 18, 2005) (citing Rowinski v. Salomon Smith Barney, 398 F.3d 295, 305 (3d Cir. 2005)) (dismissing entire complaint).


64. See Dabit I, 395 F.3d at 47 (holding that SLUSA did not require dismissal of entire complaint).

65. See id. at 27, 47 (reasoning that non-preempted claim did not allege fraud that “coincided” with purchase or sale of security).

66. See id. at 47 (noting language that “might be read to suggest that where a single complaint contains claims that include allegations triggering preemption and other claims that do not, SLUSA prohibits maintenance of the entire action,” but concluding that such language without more, should not require total dismis-
eration of state law claims, Judge Sotomayor concluded, was inconsistent with the presumption against preemption rooted in respect for state police power.67

Notably, Judge Sotomayor’s reasoning gained traction beyond the Second Circuit.68 Expanding upon the holding in Dabit I, in Crimi v. Barnholt69 the United States District Court for the Northern District of California employed common sense reasoning when it stated that “it does not make sense that Congress would intend to bar legitimate claims simply because they are brought under the umbrella of a lawsuit containing some SLUSA-preempted state law claims.”70 Thus, the circuit split juxtaposes two main arguments, with the plain language of SLUSA at loggerheads with federalism and common sense.71

IV. THE THIRD CIRCUIT JOINS THE PREEMPTION PARTY IN ROWINSKI AND LORD ABBETT

Before 2005, the Third Circuit had yet to take a side in the circuit split.72 Then, in Rowinski v. Salomon Smith Barney,73 it suggested in dicta

67. See Dabit I, 395 F.3d at 47 (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981)) (invoking plain statement rule in respect for state sovereignty). Moreover, the court noted that the legislative history of SLUSA “indicate[d] no intent to preempt categories of state action that do not represent ’federal flight’ litigation.” See id. (describing congressional intent on SLUSA preemption); see also Gray v. Seaboard Sec., Inc., 126 Fed. Appx. 14, 16 (2d Cir. 2005) (concluding that SLUSA allows claim-by-claim dismissal).

68. For a discussion of courts citing to plain language of SLUSA, see supra notes 56-62 and accompanying text. For a discussion of courts citing to federalism and prudential reasoning, see supra notes 63-70 and accompanying text.


70. See id. at *5 (citing In re Am. Mut. Funds Fee Litig., No. CV-04-5593, 2007 U.S. Dist. LEXIS 8276, at *21-22 (C.D. Cal. Jan. 18, 2007)) (concluding that purpose of SLUSA would not be served by dismissing entire complaint); see also Falkowski v. Imation Corp., 309 F.3d 1123, 1128-32 (9th Cir. 2002) (assuming, without explanation, that district court had jurisdiction to hear “garden variety state law claims” that were not preempted by SLUSA).

71. For a discussion of courts citing to plain language of SLUSA, see supra notes 56-62 and accompanying text. For a discussion of courts citing to federalism and prudential reasoning, see supra notes 63-70 and accompanying text.

72. See Anderson v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 521 F.3d 1278, 1288 n.6 (10th Cir. 2008) (noting split among circuits and district courts, but declining to resolve issue as it was not squarely presented); Atkinson v. Morgan Asset Mgmt., No. 08-2694, 2009 WL 324550, at *6 (W.D. Tenn. Sept. 23, 2009) (noting, post-Lord Abbott, split among circuit and district courts, but avoiding issue). For a discussion of the circuit split, see supra notes 53-71 and accompanying text.

73. 398 F.3d 295 (3d Cir. 2005).
that SLUSA required dismissal of the entire action.\textsuperscript{74} The Rowinski court found that SLUSA preempted the plaintiff’s complaint, which alleged breach of contract, unjust enrichment, and violations of state consumer protection law, because the plaintiff incorporated allegations of fraud into every count of the complaint.\textsuperscript{75} The court opined, however, that even if the plaintiff’s claims did not each sound in fraud, it would still have dismissed the plaintiff’s entire complaint—both preempted and non-preempted state law claims—pursuant to the plain language of SLUSA.\textsuperscript{76}

Four years later, in \textit{In re Lord Abbett Mutual Funds Fee Litigation},\textsuperscript{77} the Third Circuit squarely addressed the issue of whether a court must dismiss an entire complaint when it contains SLUSA preempted and non-preempted claims.\textsuperscript{78} Although general practice dictates that courts considering a motion to dismiss review each claim individually, the court in Rowinski suggested that the language of SLUSA requires departure from such individual claim review.\textsuperscript{79} Despite this prior dicta, the Third Circuit in Lord Abbett followed a deliberate interpretive path of text, legislative history, purpose, and precedent to ultimately conclude that SLUSA does not disrupt the general practice of claim-by-claim dismissal and, in so doing, held in favor of plaintiffs’ rights under SLUSA.\textsuperscript{80}

\textbf{A. Factual and Procedural Background}

Lord, Abbett & Co. LLC (Lord Abbett) is an investment company that manages mutual funds.\textsuperscript{81} The plaintiffs, a proposed class of mutual fund shareholders managed by Lord Abbett, alleged that Lord Abbett charged its investors excessive fees in order to pay Lord Abbett’s brokers to market more of its funds to other investors.\textsuperscript{82} In response to this alleged misdeed,

\textsuperscript{74} See id. at 305 (questioning whether claim-by-claim dismissal is consistent with SLUSA and reasoning that “[t]he statute does not preempt particular ‘claims’ or ‘counts’ but rather preempts ‘actions,’ 15 U.S.C. § 78bb(f)(1), suggesting that if any claims alleged in a covered class action are preempted, the entire action must be dismissed”); see also \textit{In re Franklin Mut. Funds Fee Litig.}, 478 F. Supp. 2d 677, 682 (D.N.J. 2007) (concluding that SLUSA mandates dismissal of mixed-complaint in its entirety). \textit{But see In re Blackrock Mut. Funds Fee Litig.}, No. 04 Civ. 164, 2006 WL 4683167, at *13-15 (W.D. Pa. Mar. 29, 2006) (ignoring Rowinski dicta and allowing non-preempted claims to survive dismissal).

\textsuperscript{75} See \textit{Rowinski}, 398 F.3d at 305 (concluding that court need not rule on issue of mixed-complaint preemption because plaintiffs incorporated preempted claims by reference into each claim in complaint).

\textsuperscript{76} See id. (suggesting that SLUSA requires dismissal of entire suit).

\textsuperscript{77} 553 F.3d 248 (3d Cir. 2009).

\textsuperscript{78} See id. (stating that question presented is whether SLUSA requires complete complaint dismissal or allows claim-by-claim dismissal).


\textsuperscript{80} For a discussion of reasoning in \textit{Lord Abbett}, see infra, notes 81-112 and accompanying text.

\textsuperscript{81} See \textit{Lord Abbett}, 553 F.3d at 249 (stating nature of defendant’s company).

\textsuperscript{82} See id. (detailing alleged “misdeeds” of Lord Abbett). Because Lord Abbett’s compensation was directly proportional to the amount of assets it managed,
the plaintiffs brought a class action suit, claiming violations of the Investment Company Act of 1940 and alleging state law fraud claims. 83 After both parties submitted full briefing on the mixed-complaint issue, the district court, relying, *inter alia*, on *Rowinski*, dismissed the plaintiffs’ amended complaint with prejudice. 84 The plaintiffs subsequently filed a timely appeal to the Third Circuit, arguing that even if SLUSA preempted their state law claims, the court should still have entertained the federal claims and erred in dismissing the entire complaint. 85

B. Lord Abbett: “Textbook” Statutory Interpretation

In a unanimous decision, the Third Circuit held in *Lord Abbett* that SLUSA does not require a court to dismiss an entire complaint when it includes a mixture of both preempted state law claims and non-preempted federal law claims. 86 The court concluded that the statutory language of SLUSA, its legislative history, the purpose of SLUSA, and relevant case law did not support complete dismissal. 87 Thus, the court aligned itself with the Second Circuit in finding that Congress did not intend to require wholesale dismissal of complaints with otherwise valid claims. 88


84. *See Lord Abbett*, 553 F.3d at 249 (quoting district court’s reasoning that *Rowinski* “provided strong support, albeit in dicta, for the proposition that SLUSA preempts entire class actions rather than individual claims”) (internal quotations omitted). The district court also relied upon the plain language of SLUSA that Congress’s use of claim or claims elsewhere in securities law and its non-use of such language under SLUSA was persuasive authority that SLUSA required dismissal of the entire action. *See id.* at 252 (providing summary of textual analysis). Moreover, the district court found that the Supreme Court’s ruling in *Dabit II* undercut the Second Circuit’s reasoning in *Dabit I*, despite the Court not directly ruling on the mixed-complaint preemption issue. *See id.* at 253 (distinguishing *Dabit I*).

85. *See id.* (stating procedural posture).

86. *See id.* (holding SLUSA does not require dismissal of entire action).

87. *See id.* at 255 (summarizing reasoning for holding). For a complete discussion of each of the methods of reasoning provided by the Third Circuit, see *infra*, notes 89-112 and accompanying text.

88. For a discussion of the Second Circuit’s view on SLUSA preemption of mixed-complaint suits, see *supra* notes 63-67 and accompanying text.
1. Interpretation of the Plain Language of SLUSA

The court first looked to the plain language of SLUSA to decipher Congress’s intent vis-à-vis mixed-complaint preemption and concluded that the plain language “does not clearly indicate whether Congress intended SLUSA to pre-empt entire actions that include an offending state-law claim.”

Examining this plain language, the court explained that SLUSA defined “no covered class action” as a “single lawsuit” or a “group of lawsuits.” Though this seemed to suggest that a court must dismiss a mixed-complaint—indeed this was the dicta in Rowinski—the court countered by explaining that SLUSA’s phrase “based upon the statutory or common law of any State” modified the word “action.” Thus, the court concluded that SLUSA does not require dismissal of actions that are only based “in part on state law,” such as the complaint in the instant case, and which assert both non-preempted federal claims and SLUSA-preempted state claims.

2. Inquiry into History and Purpose of SLUSA

After finding that the plain language of SLUSA did not clearly indicate Congress’s intent, the Third Circuit next looked to its legislative history and statutory purpose. The court concluded that the legislative history was silent as to whether Congress intended complete dismissal of SLUSA actions. Importantly, however, the court found this silence persuasive. Because nothing in the legislative history compelled dismissal of the entire action, and because the dismissal of preempted claims with the retention of non-preempted claims, would not frustrate the stated purpose of SLUSA—to curb abusive litigation and ensure application of national legal standards—the court concluded that the legislative history did not

---

89. See Lord Abbett, 553 F.3d at 255 (concluding that plain language did not conclusively determine issue because it did not clearly indicate congressional intent). Before examining the plain language, the court described its mode of statutory interpretation. See id. (“[T]he role of the courts interpreting a statute is to give effect to Congress’s intent.” (quoting Rosenberg v. EX Ventures, 274 F.3d 137, 141 (3d Cir. 2001))). The court explained that the first step in giving effect to Congress’s intent is to consider the plain language of the statute to determine whether, within this language, Congress expressed its intent “with sufficient precision.” See id. at 253 (quoting United States v. Gregg, 226 F.3d 253, 257 (3d Cir. 2000)) (describing first step of statutory interpretation).

90. See id. at 253 (interpreting language of SLUSA preemption clause). For the full statutory text of SLUSA, see supra notes 43-45.

91. See id. at 255 (discussing why Rowinski’s dicta reached wrong conclusion).

92. See id. (concluding that plain language of SLUSA is unclear if it requires dismissal of actions based only on state law).

93. For a discussion of the Third Circuit’s reasoning with respect to the legislative history and purpose of SLUSA, see infra notes 94-97 and accompanying text.

94. See Lord Abbett, 553 F.3d at 253 (noting absence of legislative history discussing dismissal of mixed-complaints).

95. See id. (reasoning that because of congressional silence on issue at bar, its holding was consistent with overall purposes of SLUSA).
support dismissal of the entire complaint. Any alternative holding, the court reasoned, could penalize those plaintiffs who are unsure if SLUSA preempts some of their claims and assert those tenuous claims along with other, non-preempted claims.

3. Effects of Relevant Precedent

Finally, the court justified its interpretation of SLUSA by considering relevant precedent. First, the court considered the Second Circuit's decision in *Dabit I*, which held that SLUSA does not require dismissal of the entire complaint. Although the Supreme Court reversed the Second Circuit in *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Dabit (Dabit II)*, the Third Circuit explained that because the Supreme Court was not squarely presented with the mixed-complaint preemption issue, the Court's holding in *Dabit II* did not abrogate the Second Circuit's conclusion that a court should retain non-preempted claims.

96. See id. at 254 (quoting H.R. Rep. No. 105-803, at 15 (1998) (Conf. Rep.)) (stating congressional purposes of SLUSA); see also id. at 255 (explaining that it “struggle[d] to see” how allowing non-preempted claims to survive motion to dismiss would run afoul of stated congressional motives for SLUSA).

97. See id. at 254 (countering arguments that SLUSA's intent was to dissuade plaintiffs from all attempts to litigate in state courts). Because the “language of the statute and the legislative history do not counsel that SLUSA is to have such a punitive effect,” the court found that it would be contrary to SLUSA's purposes to dismiss the entire complaint. See id. (concluding that congressional intent lacking for SLUSA to have punitive effect).

98. See Lord Abbett, 553 F.3d at 256 (“Our understanding of SLUSA's requirements with respect to dismissal is not inconsistent with relevant case law.”). For a discussion of the Third Circuit's reasoning from precedent, see infra notes 99-112 and accompanying text.

99. See *Lord Abbett*, 553 F.3d at 256 (considering whether the Supreme Court's holding in *Dabit II* “implicitly rejected” Second's Circuit's interpretation of SLUSA preemption in *Dabit I*). In *Lord Abbett*, the district court had reasoned that “the Supreme Court's holding in *Dabit II* 'implicitly rejected the Second Circuit's view' of the issue presented in this case.” See id. (explaining district court's reasoning).

100. 547 U.S. 71 (2006).

101. See *Lord Abbett*, 553 F.3d at 256 (distinguishing *Dabit II* on grounds that Supreme Court did not address SLUSA preemption issue that *Lord Abbett* and *Dabit I* both involved). Specifically, *Dabit II* overruled the Second Circuit's interpretation of the purchase or sale requirement from SLUSA and found that a holder of a security was still subject to SLUSA's requirements. See *Dabit II*, 547 U.S. at 88-89 (finding holder of securities distinction irrelevant for SLUSA preemption). Further distinguishing *Dabit II*, the Third Circuit explained that the same claims will still be pre-empted by SLUSA, but any federal claims pled in the same complaint will fall outside SLUSA’s scope and, therefore, should not be dismissed. See *Lord Abbett*, 553 U.S. at 256 (holding that federal claims need not be dismissed). In support of this reading of *Dabit II*, the Third Circuit noted that the United States District Court for the Southern District of New York had relied upon a similar reading of *Dabit II* and held that, on the mixed-complaint pre-emption issue, *Dabit I* is still good law. See id. at 257 (citing LaSala v. Bank of Cyprus Pub. Co., 510 F. Supp. 2d 246, 274-75 (S.D.N.Y. 2007) (reporting that courts in Second Circuit still
Distinguishing another Supreme Court case, *Kircher v. Putnam Fund Trust*,102 the Third Circuit explained that *Kircher’s* potentially contradictory language was not controlling.103 In *Kircher*, the Supreme Court stated, in the context of remand appealability, that SLUSA allows a defendant to remove a preempted action from state to federal court for termination of the whole action.104 Despite this language, the Third Circuit distinguished *Kircher* because it did not “confront the issue at hand.”105 Accordingly, the language in *Kircher* relating to “action” and “proceedings” had no bearing on the holding in *Lord Abbett*.106

Finally, the Third Circuit turned to the Supreme Court’s interpretation of the Prison Litigation Reform Act (PLRA)107 in *Jones v. Bock* to support its reasoning that the use of “action” in SLUSA does not prohibit claim-by-claim dismissal.108 The PLRA provides: “No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted.”109 The Supreme Court held that Congress’s use of “no action” was “boilerplate,” and without an express congressional statement to the contrary, courts must follow the “general practice” of claim-by-claim dismissal.110 Analogizing the Court’s reasoning rely on *Dabit I* despite Supreme Court’s overruling it on other grounds); see also *Gray v. Seaboard Sec., Inc.*, 126 Fed. Appx. 14, 16 (2d Cir. 2005) (holding that SLUSA only requires claim-by-claim dismissal).


103. See *Lord Abbett*, 553 F.3d at 256 (stating that *Kircher* does not “compel us to hold that SLUSA requires dismissal of an action in its entirety”).

104. See id. at 256 n.10 (“If the action is precluded, neither the District Court nor the state court may entertain it, and the proper course is to dismiss . . . . ‘SLUSA avails a defendant of a federal forum in contemplation not of further litigation over the merits of a claim brought in state court, but of termination of the proceedings altogether’” (quoting *Kircher*, 547 U.S. at 644, 644 n.12)) (second emphasis added).

105. See *Lord Abbett*, 553 F.3d at 256 (distinguishing reasoning of Supreme Court on grounds that issue presented there was different from issue at bar).

106. See id. at 256 n.10 (“Given that the Supreme Court [in *Kircher*] did not have to confront the issue at hand, we do not believe that the use of the words ‘action’ and ‘proceedings’ reflects a holding as to this issue.”); see also *Proctor v. Vishay Intertech., Inc.*, 584 F.3d 1208, 1228 (9th Cir. 2009) (distinguishing *Kircher* on grounds that district court did not have jurisdiction over SLUSA from outset, but further noting that nothing in *Kircher* suggests or requires that courts must dismiss removed case when district court did properly have jurisdiction).


108. See *Lord Abbett*, 553 F.3d at 257 (analogizing Supreme Court’s interpretation of “no action” in context of PLRA to facts of current case (citing *Jones v. Bock*, 549 U.S. 199, 218 (2007))).


110. See *Jones*, 549 U.S. at 220-21 (reasoning that Congress’s use of phrase “no action” does not indicate that it intended to require courts to dismiss entire action where plaintiff fails to exhaust remedies on only some, but not all, of his or her claims). The Supreme Court reasoned in *Jones* that the phrase “no action shall be brought” is “boilerplate language,” and that “as a general matter,” without express language to the contrary, if a “complaint contains both good and bad claims, the court proceeds with the good and leaves the bad.” See id. at 221 (explaining pre-
ing in Jones to its interpretation of SLUSA, the Third Circuit explained that the reasoning in Jones was equally applicable in Lord Abbett because of SLUSA’s similar phrase “no covered class action” and the lack of clear congressional intent to change the “general practice” of claim-by-claim dismissal.111 Thus, the Third Circuit concluded that SLUSA did not require complete dismissal of the plaintiffs’ complaint and remanded the case to the district court for reconsideration of the plaintiffs’ federal law claims.112

V. BEYOND LORD ABBETT: THE SCOPE OF LORD ABBETT AND INSIGHTS FOR FUTURE SLUSA PREEMPTION CASES

While the Lord Abbett opinion leaves certain SLUSA preemption issues unsettled, it offers important insights for practitioners handling future preemption cases.113 By its facts, Lord Abbett controls in Third Circuit mixed-complaint cases where the non-preempted claims are federal, but leaves open the question of whether its holding also applies when the plaintiff alleges non-preempted state law claims, rather than federal law claims.114 This issue is especially important in the Third Circuit, as it is home to Delaware and, therefore, potentially host to a significant amount of corporate litigation under state law.115

When litigating this novel issue, practitioners in the Third Circuit can utilize the uncertainty in Lord Abbett’s holding to argue that SLUSA does or

111. See Lord Abbett, 553 F.3d at 257 (analogizing Jones to instant case because of similar “no action” language and Congress’s lack of plain statement to overcome presumption of piecemeal dismissal); accord Proctor, 584 F.3d at 1227 (citing to Jones for reasoning that use of “action” does not foreclose claim-by-claim dismissal); LaSala v. UBS, AG, 510 F.Supp.2d 213, 242 (S.D.N.Y. 2007) (providing that Jones illustrates the “norms for interpreting statutory language concerning dismissal of a complaint”); see also Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Dabit I), 395 F.3d 25, 40 (2d Cir. 2005) (stating that express congressional intent is needed to interfere with state police power), rev’d on other grounds by Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit (Dabit II), 547 U.S. 71 (2006).

112. See Lord Abbett, 553 F.3d at 258 (remanding case to district court).

113. For a discussion of the unsettled issues from Lord Abbett, see infra notes 114-151 and accompanying text.

114. Compare Lord Abbett, 553 F.3d at 256 (“We hold simply that any valid federal claims pled in the same action—claims that, if brought independently, would clearly fall outside of SLUSA’s pre-emptive scope—need not also be dismissed.”), with id. at 255-56 (“We hold therefore that SLUSA does not mandate dismissal of an action in its entirety where the action includes only some pre-empted claims.”).

115. For a discussion of the exceptions to SLUSA, see supra note 45. These exceptions are termed the “Delaware carve-out” in recognition of the fact that most of these state law claims will be under Delaware law. See Malone v. Brincat, 722 A.2d 5, 13 (Del. 1998) (explaining origins of “Delaware carve-out”).
does not require complete dismissal of the suit. To support dismissal of the entire complaint, defense counsel should emphasize that Lord Abbett’s holding is narrow and only relates to a mixed complaint when the non-preempted claims fall under federal law. On the other hand, plaintiffs’ attorneys can argue that the Third Circuit’s reasoning in Lord Abbett did not completely ignore non-preempted state law claims. In particular, the Third Circuit stated in Lord Abbett that “failing to dismiss the entire complaint [because some claims were preempted] would simply allow class action federal claims, and state law claims that do not trigger the SLUSA preemption, to proceed.” In support of interpreting Lord Abbett’s holding narrowly or broadly, practitioners on both sides can develop arguments grounded in SLUSA’s text, legislative history, and purpose, in addition to raising prudential concerns such as abusive litigation and judicial economy.

A. Textualist Arguments

In support of interpreting Lord Abbett’s holding broadly—such that it is improper to dismiss the entire complaint regardless of whether plaintiffs base their non-preempted claims on state or federal law—plaintiffs’ attorneys can cite SLUSA’s plain language, which makes no distinction between whether the non-preempted claim is state or federal. Indeed, the Ninth Circuit, in Proctor v. Vishay Intertechnology, Inc., recently used similar reasoning, citing to Lord Abbett, when it addressed the exact issue of non-preempted state law claims. The Ninth Circuit focused in particular on the word “maintained” in SLUSA’s instruction that “no covered-class action” can be “maintained” in state or federal court. It explained

116. See Lord Abbett, 553 F.3d at 256 (seeming to limit holding to only federal claims that are not preempted by SLUSA).
117. See id. (“We hold simply that any valid federal claims pled in the same action—claims that, if brought independently, would clearly fall outside of SLUSA’s pre-emptive scope—need not also be dismissed.”).
118. See id. (omitting federal claim limitation, suggesting that all non-preempted claims are reserved).
119. See id. at 255 (emphasis added) (providing reasoning from legislative intent and purpose).
120. For a discussion of practitioners’ arguments utilizing various statutory interpretive methods, see infra notes 122-145 and accompanying text.
121. See Lord Abbett, 553 F.3d at 255 (examining plain language of SLUSA and concluding that it did not require dismissal of non-preempted claims).
122. 584 F.3d 1208 (9th Cir. 2009).
123. See id. at 1227 (concluding that plain meaning of SLUSA did not mandate dismissal of non-preempted state law claims). The underlying claims in Proctor, in addition to SLUSA preempted claims, were a state law derivative claim for breach of fiduciary duty and a class action claim for a class of minority shareholders for “quasi appraisal” under Delaware law. See id. at 1221 (classifying claims in complaint as either those which were preempted by SLUSA or those that were decidedly not preempted).
124. See id. at 1227 (reasoning that “maintained” modifies meaning of statute in that only those claims that are preempted may not go forward).
that the use of “maintained” illustrated that courts should focus on the “content of the action as it goes forward.” Thus, a court must dismiss a preempted SLUSA claim, but may retain a non-preempted claim, without regard to whether the non-preempted claim is under state or federal law.

Despite this language in SLUSA, defense counsel is not without argument that courts should dismiss the entire complaint. Specifically, even if the language of SLUSA does not distinguish between non-preempted claims brought under federal or state law, defense counsel can directly challenge the Third Circuit’s reasoning in Lord Abbett by arguing that Congress intended dismissal of the entire complaint. For example, some commentators point to Congress’s explicit definition of “covered class action” as “a single lawsuit.” This definition arguably overcomes the Third Circuit’s analogy to the Supreme Court’s reasoning in Jones that, without express congressional intent, courts will always keep the good claims and dismiss the bad claims. In addition, several textualist arguments support dismissal of the entire complaint. For example, com-

125. See id. (“By using the word ‘maintained’ rather than ‘filed,’ the language focuses on the content of the action as it goes forward, not as it began, and so does not require that a federal court dismiss an entire action where only some claims are precluded by SLUSA.”).

126. See id. (holding that court could dismiss preempted claims, but reserve non-preempted claims).

127. For a discussion of defense counsel’s arguments, see infra notes 129-137 and accompanying text.

128. For a discussion of arguments that defendants can employ to undermine Lord Abbett, see infra notes 129-137 and accompanying text.

129. See Perry & Sur, supra note 2, at 5 (arguing that statute’s language is plain and lawsuit is not synonymous with claims). But see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 87 (2006) (describing SLUSA’s preclusive sweep as “[i]t simply denies plaintiffs the right to use the class-action device to vindicate certain claims”) (emphasis added).

130. See Perry & Sur, supra note 2, at 5 (“The statutory definition of covered class action makes it crystal clear that the unit of analysis for SLUSA purposes is lawsuits, not claims.”) (internal quotations omitted); see also Joan Steinman, Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes, 65 Wash. & Lee L. Rev. 1593, 1594 (2008) (finding that Congress’s definition in SLUSA evidences express purpose to change general dismissal practice). But see Fed. R. Civ. P. 23(a)(1) (defining class action as “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable”). Thus, plaintiffs’ attorneys could argue that Congress provided a definition for “covered class action” because “class action,” as defined under SLUSA, is not actually a “class action” as defined under the Federal Rules of Civil Procedure. See Jennifer O’Hare, Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?, 56 Ala. L. Rev. 325, 340 n.87 (2004) (concluding that SLUSA’s definition of class action is much broader than Federal Rule of Civil Procedure 23).

131. For a discussion of some additional textualist arguments that defense counsel can make, see infra notes 132-137 and accompanying text.
mentators explain that under the Federal Rules of Civil Procedure, “there is but one form of action—the civil action.”132 This use of “action,” well known to Congress, defines “action” not as a single claim but rather as the entire suit.133 Therefore, the use of “action” under SLUSA arguably refers to the entire complaint.134

Further, defense counsel can argue that courts should interpret SLUSA in light of the PSLRA, which contains such language as “the propensity of the action, the claims asserted therein, and the purported class period.”135 Thus, given the PSLRA’s use of the words action and claim, Congress is aware of the distinction between actions and claims.136


133. See id. ("[N]umerous courts of appeals have relied on Rule 2 and concluded that the cap on compensatory damages set forth in the Civil Rights Act of 1991 applies to entire suits—not to individual claims within those suits—because the relevant statute limits the relief obtainable ‘in an action.’"). But see Steinman, supra note 130, at 1594 (stating that, in context of diversity jurisdiction, federal court practice is to only dismiss those claims lacking jurisdiction). The diversity jurisdiction statute also uses the word “action” and states that “the district courts shall have original jurisdiction of all civil actions . . . .” See 28 U.S.C. 1332(a) (2006) (defining requirements for diversity jurisdiction) (emphasis added). Thus, despite the use of “action” here, courts still dismiss on a claim-by-claim basis. Cf. Jones v. Bock, 549 U.S. 199, 220-21 (2007) (reasoning that despite use of word action in statute, general practice is to dismiss claim-by-claim).

134. See Steinman, supra note 130, at 1604-05 (“When persons knowledgeable of federal civil procedure think of a civil action, we normally conceive of the collection of claims and defenses that plaintiffs, defendants, intervenors, third-party defendants, and the like, are permitted by the Rules to assert against one another . . . .”).

135. See Perry & Sur, supra note 2, at 6 (noting use of claims and actions under PSLRA and lack of use of claims, but arguing that use of actions under SLUSA must be noted as deliberate); see also Jacob Scott, Codified Canons and the Common Law of Interpretation, 98 Geo. L.J. 341, 365 (2010) (explaining use of “holistic” statutory interpretation as appropriate “where a phrase is used in other statutes and has a settled meaning,” such that “interpreters should extract the same meaning from that phrase in other contexts”). But see In re Lord Abbett Mut. Fund Fee Litig., 553 F.3d 248, 249-50 (2009) (citing LaSala v. Bordier et Cie, 519 F.3d 121, 127-28 (3d Cir. 2008)) (concluding that Congress enacted SLUSA as companion to PSLRA); William B. Snyder, Jr., Comment, The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court, 85 N.C. L. Rev. 669, 696 (2007) (noting that SLUSA and PSLRA are “inextricably intertwined”). Thus, it is difficult to understand how non-preempted claims not subject to the pleading requirements of the PSLRA, should also be subject to dismissal under SLUSA. See 15 U.S.C. § 77p(b)(1) (2006) (requiring only those claims sounding in fraud to be subject to its requirements); id. § 77z-1(a)(1) (governing only claims alleging violations of Rule 10b-5).

136. Cf. William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 833-35 (3d ed. 2001) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993))).
B. Structural and Legislative Purpose Arguments

To ascertain congressional intent on the preemption issue, practitioners can employ unique arguments stemming from other SLUSA provisions. Defense counsel arguing in favor of entire complaint dismissal can point to SLUSA’s removal provision, which allows defendants to remove all actions that involve claims rooted in fraud to federal court and illustrates that courts are not to “split a case into constituent claims and send some of those claims piecemeal to federal court . . . .” Moreover, Congress’s decision to provide explicit exceptions to SLUSA illustrates that its preemptive sweep is only limited by these specific exceptions.140

On the other hand, SLUSA’s remand provision, when interpreted similarly to the removal provision, arguably provides a significant counterbalance to these arguments. SLUSA requires remand of any action that meets one of the statutory exceptions. Due to this requirement, if courts are to view an action as the entire suit, then SLUSA directs courts to remand, in its entirety, a complaint containing a mix of preempted and excepted claims. This result is inapposite of SLUSA’s express intent to not allow states jurisdiction over these preempted claims. Therefore, because of the express remand requirement, plaintiffs’ attorneys can argue that to retain internal statutory consistency, courts should interpret SLUSA to allow claim-by-claim dismissal.145

---

137. See Perry & Sur, supra note 2, at 6 (concluding that absence of word “claim” but inclusion of “action” in SLUSA must be given its due).
138. For a discussion of structural arguments from SLUSA, see infra notes 139-140 and accompanying text.
139. See Perry & Sur, supra note 2, at 7 (arguing from structural point of view).
140. See id. at 7-8 (stating that exceptions to SLUSA preemption are evidence that Congress knew how not to preempt state claims). Arguing, again from Dabit II, that the “statute carefully exempts form its operation certain class actions,” that such carve-outs “both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions.” See id. (arguing that exceptions provide enough protection of state interests as Congress thought necessary).
141. For a discussion of the remand provision, see infra notes 142-145 and accompanying text.
142. See 15 U.S.C. 77p(d)(4) (2006) (“In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.”).
144. See Greaves, 264 F. Supp. 2d at 1085 (stating that such remands seemed contrary to congressional intent).
From a prudential viewpoint, defense counsel arguing that a court must dismiss the entire complaint can articulate that allowing courts to dismiss, piecemeal, these mixed-complaints goes against the congressional purpose of SLUSA to prevent abusive litigation. Commentators argue, and practitioners can take note, that such mixed-complaints have an in terrorem effect on defendants because the addition of known preempted claims to a complaint will have a “strength in numbers” effect on the defendant. Because of the perceived strength this lends to a complaint, opposing counsel might settle unmeritorious claims—contrary to Congress’s express reasoning for enacting SLUSA.

Finally, plaintiffs’ attorneys can take advantage of a judicial economy argument. By allowing plaintiffs to include multiple claims in one suit, SLUSA forecloses the possibility of plaintiffs filing multiple suits separating the claims. The filing of these suits, combined with the burdensome procedural hurdle that restrains courts’ ability to join suits because of factual similarities, arguably wastes time and money.

the same general subject matter should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy . . . .

146. See Perry & Sur, supra note 2, at 8 (arguing that piecemeal dismissal frustrates congressional intent).

147. See id. (arguing that adding claims not only puts up façade of strength, but also provides “safety in numbers” that assists plaintiffs in overcoming motion to dismiss).

148. See id. (stating that effect of piecemeal complaint dismissal runs counter to congressional worry that that pre-SLUSA “nuisance filings of securities fraud class actions—and the associated targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers—led issuers to pay out extortionate settlements”) (internal quotations omitted); cf. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557-58 (2007) (stating that problem of liberal pleading in antitrust suits results in plaintiffs presenting meritless claims, creating in terrorem effect). But see 15 U.S.C. § 77p(b)(1) (2006) (explaining that no action may be maintained in state or federal court). Thus, this “strength in numbers” logic ignores the fact that by allowing this piecemeal dismissal, defendants could also be confident that courts would dismiss those SLUSA preempted claims at the motion-to-dismiss stage. For a discussion of Congress’s intent in enacting SLUSA, see infra notes 149-50 and accompanying text.

149. See Proctor v. Vishay Intertech., Inc., 584 F.3d 1208, 1228 (9th Cir. 2009) (reasoning that legislative history is devoid of intent to preempt claims not barred under SLUSA). “Nothing . . . suggests that Congress intended to place roadblocks in the way of federal claims or non-precluded state law claims.” Id. (second emphasis added).

150. See id. (providing additional prudential reasoning of judicial economy and conservation of resources); see also Don Zupanec, In re Lord Abbett Mutual Funds Fee Litigation, Fed. LITIGATOR, Mar. 2009 (agreeing with holding of Lord Abbett because alternative reading would seem nonsensical).

151. See Fed. R. Civ. P. 42(a) (“If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”); see also 15 U.S.C. §77p(f)(2)(A)(ii) (2006) (defining “covered class action” under SLUSA to include groups of lawsuits
Shareholders in this troubled economy are looking to hold financial institutions accountable for the alleged misdeeds that caused our economic collapse.152 Before the Third Circuit’s ruling in *Lord Abbett*, plaintiffs in the Third Circuit had to forgo possibly legitimate claims under state law for fear that one misstatement in their complaint could eviscerate all possible redress.153 Now, following the Third Circuit’s decision in *Lord Abbett*, plaintiffs are no longer required to make this choice, but are allowed full access to the available laws.154 Despite Congress’s known intent to preempt certain state law class actions, *Lord Abbett* illustrates an interpretation of congressional silence and statutory ambiguity that, in practice, preserves the federalism values that are a foundation of American democracy.155 These federalism values encompass claims, such as breach of contract, which have been recognized within the state police power since America’s founding.156 Indeed, the federal government possesses the power to regulate securities, but courts must keep our nation’s founding principles in mind when construing such regulations.157 Federal interests need not trump the legitimate interests of states or of the litigants who

“filed in or pending in the same court and involving common questions of law or fact”).

152. For a discussion of the increase in securities litigation, see supra notes 1-2.


154. See *In re Lord Abbett Mut. Funds Fee Litig.*, 553 F.3d 248, 249 (3d Cir. 2009) (holding that courts need not dismiss plaintiffs non-preempted claims).

155. See Painter, supra note 9, at 89-94 (arguing that Congress should have tailored SLUSA with more respect for state police power); cf. O’Hare, supra note 130, at 343-44 (arguing that courts should read SLUSA’s removal provision narrowly in respect for federalism). “Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.” Healy v. Ratta, 292 U.S. 263, 270 (1934).

156. See Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979) (stating that contract claims are traditionally within purview of state law); James G. Kreissman, Note, *Administrative Preemption in Consumer Banking*, 73 VA. L. REV. 911, 944 (1987) (concluding that both contract and property law were historically state police powers).

157. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (explaining that there exists an “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”). Despite *Dabit II’s* proclamation that the presumption against preemption is not as strong under SLUSA, due to Congress’s known intent to preempt certain state securities law claims, such a diminishment of this presumption has less force with no intent from Congress to preempt other claims normally reserved to states. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 87 (2006) (stating that presumption against preemption not as strong because Congress did not act “cavalierly” when enacting SLUSA).
avail themselves of state laws; both federal interests and state interests can coexist—neither losing any of its applicability or punch.\textsuperscript{158}

\begin{quote}
Ethan H. Townsend
\end{quote}

\footnotesize

\textsuperscript{158} Cf. \textit{In re WorldCom, Inc. Sec. Litig.}, 293 B.R. 308, 326 (S.D.N.Y. 2003) (stating that both 1933 Act and 1934 Exchange Act were “drafted to protect, rather than to preempt, the state blue sky laws”); Ribstein, \textit{supra} note 9, at 167-68 (arguing for changes to SLUSA that would allow states more control over securities regulation and not only preserve federalism, but not unduly constrict SLUSA).