PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1112

IN RE: Lord Abbett Mutual Funds Fee litigation,
JOSEPH C. WHITE; JOSEPHINE LOGAN;
RICHARD CURTIS; BO BORTNER; JAMES A.
PINGITORE; PHILIP B. KATZ,

Appellants.

v.

LORD ABBETT & CO LLC; LORD ABBETT
DISTRIBUTOR LLC; TRACIE E. AHERN;
JOAN A. BINSTOCK; DANIEL E. CARPER;
ROBERT S. DOW; HOWARD E. HANSEN;
PAUL A. HILSTAD; LAWRENCE H. KAPLAN;
ROBERT G. MORRIS; A. EDWARD OBERHAUS, III;
EDWARD K. VON DER LINDE; MICHAEL BROOKS;
ZANE E. BROWN; PATRICK BROWNE;
JOHN J. DICHIARO; SHOLOM DINSKY;
LESLIE J. DIXON; KEVIN P. FERGUSON;
ROBERT P. FETCH; DARIA L. FOSTER;
DANIEL H. FRASCARELLI; ROBERT I. GERBER;
MICHAEL S. GOLDSTEIN; MICHAEL A. GRANT;

CHARLES HOFER; W. THOMAS HUDSON;
CINDA HUGHES; ELLEN G. ITSKOVITS;
MAREN LINDSTROM; ROBERT A. LEE;
GREGORY M. MACOSKO; THOMAS MALONE;
CHARLES MASSARE, JR.; STEPHEN J. MCGRUDER;
PAUL MCNAMARA; ROBERT J. NOELKE;
R. MARK PENNINGTON; WALTER PRAHL;
MICHAEL ROSE; ELI M. SALZMANN;
DOUGLAS B. SIEG; RICHARD SIELING;
MICHAEL T. SMITH; RICHARD SMOLA;
DIANE TORNEJAL; CHRISTOPHER J. TOWLE;
MARION ZAPOLIN

On Appeal from the United States District Court
for the District of New Jersey
(D. C. Nos. 04-cv-00559; 04-cv-00965; 04-cv-01055;
04-cv-01057; 04-cv-01209 and 04-cv-01365)
District Judge: Hon. William J. Martini

Argued on June 25, 2008

Before: SLOVITER, BARRY and ROTH, Circuit Judges

(Opinion filed: January 20, 2009)

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OPINION

ROTH, Circuit Judge:

Plaintiffs appeal the December 4, 2006, order of the U.S. District Court for the District of New Jersey, dismissing their action with prejudice pursuant to the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C. § 78bb(f). This appeal presents the question whether SLUSA requires the dismissal of the entire action when the action includes some state law class action claims that clearly may not be maintained under SLUSA as well as other claims that are not so prohibited. We hold that SLUSA does not require such a dismissal. Accordingly we will vacate the dismissal and remand this case for further proceedings.

I. Factual and Procedural Background

Plaintiffs are a proposed class of shareholders of mutual funds managed by Lord, Abbett & Co. LLC (Lord Abbett). On February 9, 2004, they filed this lawsuit against Lord Abbett and Lord Abbett Distributor LLC, the investment adviser and distributor of the Lord Abbett mutual funds.[1] Following the consolidation of multiple related cases, plaintiffs filed a

[1] A number of other defendants are no longer in the case.

Consolidated Amended Class Action Complaint on August 16, 2004.

In their Consolidated Amended Class Action Complaint, plaintiffs alleged (among other misdeeds) that Lord Abbett charged its existing investors excessive fees that were improperly used to pay brokers to market Lord Abbett funds to other investors. Plaintiffs claimed that Lord Abbett was motivated to charge excessive fees because its management fees were based on the amount of assets being managed – as the number of investors grew so did the assets – and so did the fees. Plaintiffs alleged violations of both federal and state law, including violations of Sections 36(b) and 48(a) of the Investment Company Act of 1940, brought on behalf of the proposed class, and four state law counts, also brought on behalf of the class.

Defendants filed a motion to dismiss, based in part on the ground that plaintiffs' action was pre-empted by SLUSA, 15 U.S.C. § 78bb(f). As we recently explained in *LaSala v. Border et Cie.*, 519 F.3d 121, 127-28 (3d Cir. 2008), SLUSA was enacted as a supplement to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1, 78u-4 (PSLRA or Reform Act). Congress enacted the PSLRA to prevent the filing of "strike suits" – abusive class actions which are brought with the hope that the expense of litigation may force defendants to settle despite the actions' lack of merit. In Congress's view, such actions "unnecessarily increase the cost of raising capital and chill corporate disclosure . . .. " S. Rep. 104-98 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683. The PSLRA imposed

a number of requirements on federal securities litigation plaintiffs, designed to deter such frivolous suits.[2]

In reaction to the rigors of the PSLRA, plaintiffs began filing cases in state courts under less strict state securities laws. Congress then enacted SLUSA, stating that

> [I]n 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

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[2]In particular, the PSLRA imposed heightened pleading requirements in fraud cases brought under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j, and SEC Rule 10b-5. The PSLRA requires that plaintiffs plead misleading statements "with particularity," 15 U.S.C. § 78u-4(b)(1), plead facts creating a "strong inference" of scienter, 15 U.S.C. § 78u-4(b)(2), and prove loss causation, 15 U.S.C. § 78u-4(b)(4). The PSLRA also "limit[s] recoverable damages and attorney's fees, provide[s] a 'safe harbor' for forward-looking statements, impose[s] new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate[s] imposition of sanctions for frivolous litigation, and authorize[s] a stay of discovery pending resolution of any motion to dismiss." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (*Dabit II*) (citing 15 U.S.C. § 78u-4); *see also* 15 U.S.C. § 78u-5.

> nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

SLUSA, S. 1260, 105th Cong. § 2(5), 112 Stat. 3227. The SLUSA Conference Report explains that

> [S]ince passage of the Reform Act, plaintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available. . . . [A] single state can impose the risks and costs of its peculiar litigation system on all national issues. The solution to this problem is to make Federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities.

H.R. Rep. No. 105-803, at 14-15 (1998) (Conf. Rep.) (internal quotation omitted).

Accordingly, SLUSA barred certain class actions and mass actions from state courts, providing in relevant part:

> 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.

15 U.S.C. § 78bb(f)(1). Under SLUSA, a "covered class action" brought in state court may be removed to federal court and is subject to the above limitations. 15 U.S.C. § 78bb(f)(2).

SLUSA defines the term "covered class action" as:

> (i) any single lawsuit in which –
>
> > (I) 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 –

(I) damages are sought on behalf of more than 50 persons; and

> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B).

SLUSA is frequently described as "pre-empting" state-law claims. However, as the Supreme Court has explained, SLUSA does not actually "pre-empt" such claims; it merely "denies plaintiffs the right to use the class-action device to vindicate certain claims." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87 (2006) (*Dabit II*). Plaintiffs retain the right to bring such a claim as an individual state-law claim or federal securities fraud class action claim. *LaSala*, 519 F.3d at 129.

On August 30, 2005, the District Court dismissed the four state claims pled in plaintiffs' Consolidated Amended Class Action Complaint as pre-empted by SLUSA.[3] The District Court also dismissed the remaining federal claims for failure to state a claim. With respect to plaintiffs' claims for violations of Sections 36(b) and 48(a) of the Investment Company Act of 1940, the District Court determined that there is no direct cause of action under Section 36(b), which was a predicate for the

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[3]The District Court issued an amended order and opinion on December 28, 2005. *In re Lord Abbett Mut. Funds Fee Litig.*, 407 F. Supp. 2d 616 (D.N.J. 2005).

Section 48(a) claim, and dismissed those claims without prejudice.

Plaintiffs filed a Second Amended Complaint on September 29, 2005, asserting only two derivative claims alleging violations of Sections 36(b) and 48(a) of the Investment Company Act. In general, plaintiffs alleged that Lord Abbett had received excessive management fees from its investors, primarily because it had failed to pass along the benefits of the economies of scale achieved as the funds grew.

Meanwhile, on September 14, 2005, defendants moved for reconsideration of the District Court's decision to dismiss the claims without prejudice, in part on the grounds that SLUSA requires dismissal of the entire action not merely dismissal of the improper state law securities claims. Without reaching the issue, the District Court denied the motion as lacking sufficient grounds for reconsideration but subsequently granted the defendants leave to brief the issue for *de novo* consideration. Accordingly, on May 3, 2006, defendants filed a motion to dismiss the Second Amended Complaint pursuant to SLUSA.[4]

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[4]On February 21, 2006, defendants filed a motion to dismiss on the grounds that (1) plaintiffs' claims were time barred under the one-year look back period of Section 36(b)(3), and they contain no relevant allegations addressing the relevant time frame; (2) section 17 of the Investment Company Act prohibits plaintiffs from bringing a common action on behalf of multiple Lord Abbett funds; (3) plaintiffs failed to state a claim under Section 36(b) of the Investment Advisers Act; and (4) section

The District Court granted the motion and dismissed the Second Amended Complaint with prejudice on December 4, 2006. The District Court referred to our opinion in *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005), where, in response to the plaintiffs' argument that the court should examine each count separately to determine whether it should be pre-empted, we noted in *dictum*:

> [W]e question whether preemption of certain counts and remand of others is consistent with the plain meaning of SLUSA. The 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.

Id. at 305. As the District Court acknowledged, we did not reach this issue in *Rowinski* because in that case the plaintiff had incorporated pre-empted state-law allegations into every count of his complaint. *Id.*[5] However, the District Court found

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36(b) does not apply to 12b-1 fees. This motion was briefed by the parties, but the District Court never ruled on it.

[5]Citing *Rowinski* and the District Court's opinion in this case, the Tenth Circuit recently dismissed an entire complaint as pre-empted under SLUSA where the plaintiffs had incorporated their general class allegations into each of their claims, each of which was based on state law. *Anderson v. Merrill Lynch,*

Rowinski "helpful" in that it "provide[d] strong support, albeit in *dicta*, for the proposition that SLUSA preempts entire class actions rather than individual claims."[6]

The District Court then turned to the statutory language. The District Court noted that, by its own terms, SLUSA preemption applies to any "covered class action," which is in turn defined as "any single lawsuit" or "group of lawsuits," and concluded that this language reflects Congress's intent to regulate entire lawsuits. The District Court reasoned further that Congress has used the word "claim" or "claims" elsewhere in the securities laws, including in the PSLRA, and that Congress

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Pierce, Fenner & Smith, Inc., 521 F.3d 1278, 1287 n.6 (10th Cir. 2008). As such, the Tenth Circuit did not have to decide "whether, in another action, SLUSA would permit the preclusion of certain claims and the remand of others." *Id.*

[6]The District Court similarly cited the U.S. District Court for the District of New Jersey's holding in *LaSala v. Bordier et Cie.*, 452 F. Supp. 2d 575 (D.N.J. 2006), in which the district court dismissed Swiss law claims that incorporated by reference and were clearly tied to the allegations supporting the state law securities claims. We reversed, noting that "by its terms [SLUSA] only affects claims based upon the laws of a state or territory of the United States." *LaSala v. Bordier et Cie.*, 519 F.3d 121, 143 (3d Cir. 2008). We did not have to reach the question presented here, however, namely "[w]hether a single offending claim requires dismissal of the entire action . . .." *Id.* at 129 n.6.

presumably would have used a narrower term than "action" if it intended otherwise.

The District Court acknowledged that the Court of Appeals for the Second Circuit had addressed the present issue in *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005) (*Dabit I*), holding that SLUSA does not require the dismissal of an entire case where only some of the claims are improper state law claims under SLUSA.[7] In *Dabit I*, the court acknowledged that SLUSA's provisions might be read as prohibiting maintenance of an entire action that includes pre-empted state-law allegations. 395 F.3d at 47. The court, however, declined to hold that SLUSA operated in this manner, reasoning that,

> On this reading, SLUSA would effectively preempt any state law claim conjoined in a given case with a securities fraud claim, whatever its nature. We assume, however, that the historic police powers of the states are not preempted unless it was Congress's 'clear and manifest purpose' to do so.

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[7]The Second Circuit subsequently reiterated its holding that SLUSA does not require dismissal of an entire action that includes only some pre-empted claims in a non-precedential opinion. *Gray v. Seaboard Secs., Inc.*, 126 Fed. Appx. 14, 16 (2d Cir. Mar. 9, 2005).

Id. (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981)).

The Supreme Court reversed the Court of Appeal's holding on other grounds, ruling that SLUSA pre-empts state law claims alleging fraud brought by investors who held securities, as well as by those who purchased or sold securities. *Dabit II*, 547 U.S. at 71. The Supreme Court explained,

> In concluding that SLUSA pre-empts state-law holder class-action claims of the kind alleged in Dabit's complaint, we do not lose sight of the general 'presum[ption] that Congress does not cavalierly pre-empt state-law causes of action.' *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). But that presumption carries less force here than in other contexts because SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims. The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist.
>
> Moreover, the tailored exceptions to SLUSA's preemptive command demonstrate that Congress did not by any means act 'cavalierly' here. The statute carefully exempts from its operation certain class actions based on the law of the State