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How Can It Be Wrong When It Feels So Right - Appellate Review of Remand Orders under the Securities Litigation Uniform Standards Act

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HOW CAN IT BE WRONG WHEN IT FEELS SO RIGHT? APPELLATE REVIEW OF REMAND ORDERS UNDER THE SECURITIES LITIGATION UNIFORM STANDARDS ACT

I. INTRODUCTION

There is widespread judicial confusion regarding reviewability of remand orders. The addition of the specialized removal and remand provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") created an inevitable circuit split. It took only a year for the core securities litigation circuits to form a sharp divide over whether an appellate court may review a district court's remand order under SLUSA. The controversy over the issue reflects the dynamic nature of securities litigation, an area in which strong opinions exist and Congress is often pressured to act.

In 1995, Congress passed the Private Securities Litigation Reform Act ("PSLRA") to prevent abuses in private securities fraud lawsuits. The PSLRA attempted to filter out meritless securities class actions, known as "strike suits," through stringent pleading requirements and discovery

1. See In re Amoco Petroleum Additives Co., 964 F.2d 706, 708 (7th Cir. 1992) ("'Straightforward' is about the last word judges attach to § 1447(d) these days . . ."). For a discussion of the bar on appellate review in 28 U.S.C. § 1447(d), see infra notes 48–52 and accompanying text.
4. See Richard W. Painter, Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action, 84 CORNELL L. REV. 1, 32 (1998) (describing nature of debate in securities litigation). "In the securities arena, this debate often escalates into a 'battle,' as plaintiff's lawyers accuse issuers, underwriters, and accountants of pervasive fraud, and they, in turn, charge plaintiffs' lawyers with greed and opportunism." Id. These strong interest groups influence the legislative process through large amounts of money. See id. (describing how Congress is influenced).

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remand removing §§ certain 2001) comments whereby

In an effort to close the federal flight loophole, Congress preempted certain types of state securities class actions by making federal court the exclusive venue. To effectuate this purpose, SLUSA permits a defendant to remove a state action to federal court and assert preemption. Now, district courts determine if a state action is preempted by applying a four-part test derived from SLUSA’s preemption provision. If SLUSA preemption is inapplicable, the district judge is required to remand the action to state court.

There are arguments to support appellate review of remand orders. Decisions regarding SLUSA preemption have been “all over the map.” Despite Congress’s efforts to end strike suits, securities class actions are

6. See H.R. Conf. Rep. No. 105-803, at 13 (1998) (explaining problem of strike suits in securities litigation). These “strike suits” were designed to “extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits” to avoid expensive litigation. Id. Many of the procedural reforms of the PSLRA were designed to curb the abuses inherent in strike suits. See H.R. Conf. Rep. No. 104-369, at 41 (setting forth intent for heightened pleading standard); id. at 47 (discussing stay of discovery provision).

7. See H.R. Conf. Rep. No. 105-803, at 14 (recognizing “‘substitution effect’ whereby plaintiffs resort to state court to avoid the new, more stringent requirements of federal cases”).

8. See id. at 13 (stating purpose of SLUSA is to prevent plaintiffs from seeking to evade” reforms of PSLRA).


13. See Kircher v. Putnam Funds Trust, 373 F.3d 847, 850 (7th Cir. 2004) (expressing need for appellate review of remand orders).

being filed at a continuous rate in both federal and state courts.\textsuperscript{15} Thus, judicial interpretation of SLUSA's preemption provision will grow in importance as securities litigation continues to expand.\textsuperscript{16}

Although appellate review of remand orders makes practical sense, the strongly worded 28 U.S.C. § 1447(d) bars appellate review.\textsuperscript{17} Congress enacted § 1447(d) to prevent delays in securities litigation.\textsuperscript{18} Nevertheless, a number of exceptions have been created to permit review.\textsuperscript{19} The best approach is to respect the limitations established in § 1447(d) and bar review of remand orders under SLUSA.\textsuperscript{20}

The purpose of this Note is to reconcile the need for consistent and accurate application of SLUSA preemption with the strong statutory bar on review of remand orders.\textsuperscript{21} Part II of this Note first details the proce-

\begin{footnotesize}
\begin{enumerate}
\item See Kircher, 373 F.3d at 850 (commenting that SLUSA preemption is major issue in course of litigation).
\item For a discussion of the exceptions to § 1447(d), see infra notes 53–96 and accompanying text.
\item See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 128 (2d Cir. 2003) (stating appellate review would contravene "strong" congressional policy). But see Kircher, 373 F.3d at 850 (noting that appellate review of remand orders "makes practical sense too").
\item For a conclusion on how to permit appellate review without eviscerating § 1447(d), see infra notes 208–27 and accompanying text.
\end{enumerate}
\end{footnotesize}
dural framework for removal and remand;\textsuperscript{22} it then highlights the history of the bar on appellate review and its exceptions.\textsuperscript{23} Part III presents the federal securities structure, with particular focus on SLUSA’s removal and remand provisions.\textsuperscript{24} Part IV discusses the circuit split regarding appellate review of remand orders under SLUSA.\textsuperscript{25} Part V analyzes that issue and concludes that appellate review is barred by §1447(d).\textsuperscript{26} Part V also discusses the need for review of SLUSA preemption to ensure consistency and accuracy, but finds this need is satisfied by cases that reach appellate courts following dismissal based on SLUSA preemption.\textsuperscript{27} Finally, Part VI sets out brief conclusions on the reviewability of remand orders under SLUSA.\textsuperscript{28}

\section{Federal Procedural Framework}

Jurisdiction refers to the “classes of cases (subject matter jurisdiction) and persons (personal jurisdiction) falling within a court’s adjudicatory authority.”\textsuperscript{29} Federal courts are limited in their subject matter jurisdiction

\begin{itemize}
\item \textsuperscript{22} For an outline of the procedural history with a focus on removal and remand, see infra notes 29–47 and accompanying text.
\item \textsuperscript{23} For a discussion of the bar on appellate review and the judicially created exceptions, see infra notes 48–96 and accompanying text.
\item \textsuperscript{24} For a discussion of the securities framework relevant to this Note, see infra note 97–122 and accompanying text.
\item \textsuperscript{25} For a discussion of the courts’ holdings and the resulting circuit split, see infra notes 123–62 and accompanying text.
\item \textsuperscript{26} For an analysis of the appellate review issue, see infra notes 163–207 and accompanying text.
\item \textsuperscript{27} For recognition of the need for review of SLUSA preemption and a finding that the need is satisfied, see infra notes 208–27 and accompanying text.
\item \textsuperscript{28} For brief conclusions on the analysis in this Note, see infra notes 228–35 and accompanying text.
\item \textsuperscript{29} See Kontrick v. Ryan, 540 U.S. 443, 455 (2004) (noting term “jurisdiction” is often misused and clarifying use of term). In Kontrick, the Supreme Court rejected a debtor’s defense that the creditor untimely filed an amended complaint because the debtor failed to raise the defense until after the complaint was adjudicated on the merits. See id. at 446–47 (noting procedural history and affirming circuit court’s holding). The debtor claimed that the time limit defense was jurisdictional and not subject to waiver. See id. at 455–56 (discussing debtor’s jurisdictional arguments). The Court, however, held that complaint-filing time instructions were not jurisdictional. See id. at 447 (finding debtor’s jurisdiction argument invalid). Therefore, the debtor waived the defense of untimeliness by not timely raising it before adjudication on the merits. See id. at 456 (holding “claim-processing rule . . . can nonetheless be forfeited if the party asserting the rule waits too long to raise the point”); see also Scarborough v. Principi, 124 S. Ct. 1856, 1864–65 (2004) (reiterating Kontrick emphasis that claim processing rules are not jurisdictional). “Courts, including this Court, . . . have more than occasionally [mis]used the term ‘jurisdictional’ to describe emphatic time prescriptions in [claim processing] rules . . . .” Id. at 1865 (quoting Kontrick, 540 U.S. at 454) (alterations in original). In Scarborough, the Court held that a thirty-day time limitation rule does not define the subject-matter jurisdiction of the Court of Appeals for Veteran Claims. See id. (stating time limit rule applies only to “postjudgment proceedings auxiliary to cases already within the court’s adjudicatory authority”).
\end{itemize}
by the United States Constitution and federal statutes, whereas state courts have general subject matter jurisdiction and can hear nearly any cognizable claim. 30 In the event of concurrent jurisdiction between federal and state courts, the plaintiff may choose the forum based on practical and strategic considerations. 31

A. Removal in General

Despite the ability of the plaintiff to choose the forum, removal statutes provide the defendant with some control over forum selection. 32 For the defendant to remove the action, the federal court must have original jurisdiction over the matter. 33 Federal courts often narrowly construe the defendant's removal rights for two reasons. 34 First, federal courts are hesitant to overstep their limited jurisdiction and infringe on powers the Constitution leaves to state courts. 35 Second, federal courts want to avoid the potential inexpediency and unfairness to the plaintiff if removal jurisdiction is found improper. 36


31. See Chemerinsky, supra note 30, at 262 (explaining notion of "concurrent jurisdiction" between state and federal courts and plaintiffs' power to choose forum); see also Richard D. Freer & Wendy Collins Perdue, Civil Procedure 191 (3d ed. 2001) (discussing plaintiffs' power to choose forum when concurrent jurisdiction exists).


33. See 28 U.S.C. § 1441(a) (2004) (detailing jurisdictional grounds for removal). "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants . . . ." Id. (emphasis added).

34. See Haiber, supra note 32, at 636 ("[M]ost federal courts agree about the overall philosophy that applies to removal: a defendant's right to remove must be limited wherever and whenever possible.").

35. See id. at 638 (presenting federalism as ground for "restricting the defendant's right to remove to federal court"); see also shamrock oil & gas corp. v. sheets, 313 U.S. 100, 109 (1941) ("Due regard for the rightful independence of state governments, which should actuate federal court, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934))).

36. See 14B Charles Alan Wright et Al., Federal Practice and Procedure § 3721, at 351 (3d ed. 1998) (discussing plaintiff's right to choose forum and threat of "the possibility that he will win a final judgment in federal court, only to have it determined that the court lacked a proper basis for removal jurisdiction requiring him to return to state court").
There are three procedural areas that courts and Congress use to manage a defendant’s ability to remove an action to federal court. The first is the well-pleaded complaint rule, which prevents a defendant from removing a case solely on the basis of a federal defense. The rule enables the plaintiff, as “master of the complaint,” to avoid removal jurisdiction by relying only on state law. The second procedural area is an exception to the well-pleaded complaint rule known as the complete pre-emption doctrine. This doctrine permits the removal of a state action based purely on state law to federal court. Complete preemption is triggered when a district court determines that a federal statute’s preemptive force is so extraordinary that only a federal claim exists. Finally, Congress has created numerous specialized removal provisions, which allow a defendant to remove an action to federal court despite the restrictions of the well-pleaded complaint rule. These specialized provisions are rare.

37. For a discussion of the three procedural areas, see infra notes 38–44 and accompanying text.

38. See Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (discussing well-pleaded complaint rule, “which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint”) (citation omitted); id. at 393 (explaining well-pleaded complaint rule’s limitation on removal by defendant); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9–12 (1983)) (“The ‘well-pleaded complaint rule’ is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts.”).

39. See Caterpillar, 482 U.S. at 392 (describing ability of “master of claim” to avoid federal jurisdiction by reliance on state law).

40. See id. at 393 (noting “independent corollary” to the well-pleaded complaint rule).

41. See Metro. Life Ins. Co., 481 U.S. at 63–64 (noting defendant may remove state action with complete preemption doctrine); see also 14B Wright et al., supra note 36, § 3722.1, at 511 (distinguishing complete preemption from ordinary preemption). “Ordinary preemption will not, however, permit removal jurisdiction if the plaintiff chooses to frame his claim based solely on state law . . ..” Id.

42. See Metro. Life Ins. Co., 481 U.S. at 63–64 (“Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.”). It should be noted that the doctrine is rarely applied by courts because of federalism implications. See 14B Wright et al., supra note 36, § 3722.1, at 517 (discussing limited application of complete preemption doctrine). One commentator notes that only two areas of complete preemption exist: actions under the Labor Management Relations Act and actions under Employee Retirement Income Security Act of 1974. See id. (detailing limited areas of complete preemption). Recently, a third area has been subject to complete preemption, actions under the National Bank Act. See Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 11 (2003) (holding National Bank Act provides exclusive federal cause of action for usury claims against national banks and state law claims are completely preempted).

exceptions to the general bias against removal, and they exhibit Congress's strong belief that certain matters should be handled in federal court.44

B. Remand in General

Once an action is removed to federal court by the defendant, the district judge must adjudicate the matter in federal court or remand the action to the state court.45 If remanded, appellate review of the remand order creates a confusing issue.46 This issue has a long and complicated history beginning with review of remand orders by the United States Supreme Court, followed by the establishment of a general bar on appellate review and continuing today with the gradual evisceration of that bar.47

1. History of the Bar on Remand Review

From 1789 to 1875, the Supreme Court conducted appellate review of remand orders by writs of mandamus.48 The Act of March 3, 1875 expressly permitted review of remanded cases by the Supreme Court and soon the Court became overloaded with such appeals.49 As a result, appellations involving financial institution under its jurisdiction to federal court); 12 U.S.C. § 1819(b)(2)(B) (2004) (granting Federal Deposit Insurance Corporation power to remove state court actions to which it is party).

44. See 14B WRIGHT ET AL., supra note 36, § 3729, at 195 (noting areas where Congress favors federal adjudication).


47. See Hrdlick, supra note 46, at 538-45 (outlining history of statutory bar on review of remand orders); Solimine, supra note 46, at 290-94 (same); Wasserman, supra note 46, at 87-108 (same).

48. See Wasserman, supra note 46, at 90 (“Congressional silence regarding the reviewability of remand orders was not read to preclude such review.”). The Supreme Court heard these appeals because the circuit courts of appeals were not established until 1891. See Hrdlick, supra note 46, at 539 n.17 (referring to Act of March 3, 1891, which created intermediate appellate courts). Writs of mandamus were used because remands did not, at that time, represent a “final order” subject to appeal. See Solimine, supra note 46, at 290 (noting that remand decisions were “not ‘final orders’ subject to appeal, and could only be reviewed by a writ of mandamus”). A writ of mandamus has “traditionally been used in federal courts only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’” Will v. United States, 389 U.S. 90, 95 (1967) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)).

49. See Wasserman, supra note 46, at 92 (“[R]emand orders would be subject to appellate review by providing that ‘the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court . . .’” (quoting Ayers v. Chicago, 101 U.S. 184, 187 (1879))). On the heels of the
late review of remand orders was short-lived; the Act of March 3, 1887 ("Act of 1887") barred appellate review of remand orders. Following the enactment of the Act of 1887, federal circuit courts consistently held that remand orders were not subject to appellate review. The prohibition of appellate review in the Act of 1887 is presently codified in § 1447(d) of the United States Code, which states "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

2. Exceptions to the Bar on Remand Review

Despite the clear intent of § 1447(d), Congress and the courts have whittled away at its seemingly decisive language, creating exceptions to the bar on appellate review. Three major exceptions permit review of remand orders. Regardless of the logic or benefit behind these exceptions, it is undeniable they eviscerate the bar on review of remand orders established in § 1447(d).

Civil War, Congress drastically expanded the original and removal jurisdiction of the federal courts in the Act of 1875. See id. at 91–92 (discussing impact of Act of 1875 and enlarged federal jurisdiction).

50. See Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 553 (1887) (establishing bar on appellate review of remand orders). The provision stated "such shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." Id. (emphasis added). It should be noted that, prior to creation of the circuit courts of appeals, federal trial courts were referred to as circuit courts. See Hrdlick, supra note 46, at 540 n.22 (noting use of term "circuit court" for federal trial court). There is very little information regarding the congressional intent for this change, but the most common cited reasons are: (1) the Supreme Court's overcrowded docket; and (2) to prevent delay and costs by prolonged litigation of jurisdictional issues. See Solimine, supra note 46, at 291–92 (recognizing Supreme Court caseload and prevention of delay as policy reasons for review bar). "Congress, by the adoption of these provisions . . . established the policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction . . . ." United States v. Rice, 327 U.S. 742, 751 (1946). One commentator highlights the intention of Congress to prevent corporations from using the appeal process as a weapon to delay proceedings and increase their opponents' litigation costs. See Wasserman, supra note 46, at 95 (describing benefit corporations received by seeking removal "because some plaintiffs were unwilling to incur the costs of making a motion to remand").

51. See Hrdlick, supra note 46, at 543 (citing early cases immediately following passage of Act of 1887). "[W]e think, it was the intention of congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive." Id. at 543 n.35 (quoting In re Pa. Co., 137 U.S. 451, 454 (1890)).


53. See Wasserman, supra note 46, at 119 (noting use of exceptions to expand opportunities for appellate review).

54. For a discussion of the three exceptions to the § 1447(d) bar, see infra notes 56–96 and accompanying text. See also Solimine, supra note 46, at 312 (discussing other exceptions including constitutional and interlocutory exceptions).

55. See Solimine, supra note 46, at 312 (explaining that carved out exceptions permit review of remands once thought barred).
a. Statutorily Created Exceptions

There are three statutory exceptions to the prohibition of appellate review set forth in § 1447(d). First, under the express language of § 1447(d), appellate courts may review remand orders in civil rights cases. Second, Congress has authorized the Resolution Trust Corporation ("RTC") and the Federal Deposit Insurance Company ("FDIC") to remove any state court actions in which they are a party and appeal any remand orders. Finally, the United States has been granted authority to appeal remand orders in actions involving Native American tribes. The nature and intent of the statutory exceptions illustrates Congress's concern with both denying parties access to a federal forum as well as the potential for erroneous remand orders on important federal law issues.

b. Thermtron Exception

Despite the clear language of § 1447(d), the Supreme Court and courts of appeals have recognized certain exceptions to the bar on appellate review. The first major exception originates in the Supreme Court's

56. See 14B Wright et al., supra note 36, § 3740, at 519–21 (listing three statutory exceptions); Wasserman, supra note 46, at 103–08 (detailing three areas where Congress has authorized review of remand orders).

57. See 28 U.S.C. § 1447(d) ("[A]n order remanding a case to the State court from which it was removed pursuant to § 1443 of this title shall be reviewable by appeal or otherwise."). Section 1443 is the specialized removal provision for civil rights cases. See 28 U.S.C. § 1443 (2004) (permitting removal of civil rights cases to federal court). The intent of this provision was to ensure that defendants in civil rights actions "have access to a federal forum, even if the district court erroneously remanded the suit to state court, and to ensure the development of a uniform federal law regarding civil rights removal jurisdiction." Wasserman, supra note 46, at 105.

58. See 14B Wright et al., supra note 36, § 3740, at 520–21 (detailing FDIC and RTC empowerment to remove state court actions to federal court and appeal any remand orders). The Fifth Circuit described the intent of the exception to allow the "FDIC to develop and rely on a national and uniform body of law, consistent with eliminating problems identified by Congress in having less rigorous state standards coexisting with federal ones." In re Meyerland Co., 960 F.2d 512, 515 (5th Cir. 1992).

59. See Wasserman, supra note 46, at 104 (addressing Native American tribe exception to language in § 1447(d)). Congress intended this exception to legislatively overrule the Supreme Court's decision in United States v. Rice, 327 U.S. 742 (1946), which barred review of remand orders in Native American land cases. See id. (describing congressional intent for exception).

60. See id. at 108 (summarizing intent of Congress in creating three exceptions). Any costs involved with review of the remand orders—disruption of state proceeding and clogged federal docket—are outweighed by the benefits of preventing erroneous decisions. See id. (analyzing congressional intent for exceptions).

61. See Hrdlick, supra note 46, at 545–61 (discussing Thermtron exception); Solimine, supra note 46, at 312–22 (same); Wasserman, supra note 46, at 109–30 (outlining judicially created exceptions to statutory bar on review of remand orders).
decision in *Thermtron Products, Inc. v. Hermansdorfer*.\(^{62}\) In that case, two
Kentucky citizens filed an action for damages against Thermtron Products,
Inc. ("Thermtron"), an Indiana corporation, and one of its employees.\(^ {63}\)
Thermtron removed the action to federal court on diversity grounds, but
the district judge remanded the case *sua sponte* because of an overcrowded
docket.\(^ {64}\) Thermtron filed a writ of mandamus with the Sixth Circuit
Court of Appeals.\(^ {65}\) The appellate court denied the petition because of
the bar on review of remand orders in § 1447(d).\(^ {66}\)

Upon granting certiorari and hearing the case, the Court framed the
issue as "whether § 1447(d) also bars review where a case has been properly
removed and the remand order is issued on grounds not authorized
by § 1447(c)."\(^ {67}\) The Court concluded that § 1447(d) only bars appellate
review of remand orders issued under § 1447(c)—lack of jurisdiction or
improvident removal—because the two sections are *in pari materia* and
should be read together.\(^ {68}\) The decision was heavily criticized for being
blind to the congressional intent of the bar on review.\(^ {69}\) In addition, the


\(^ {63}\) See id. at 337 (describing action arising out of automobile accident be-
tween plaintiff's automobile and truck driven by Thermtron employee).

\(^ {64}\) See id. at 338 (explaining removal by Thermtron to United States District
Court for Eastern District of Kentucky pursuant to 28 U.S.C. §§ 1441 and 1446).
The district judge remanded eight months after removal stating "that there is no
available time in which to try the above-styled action in the foreseeable future and
that an adjudication of the merits would be expedited in the state court." Id. at
339 (quoting district court order).

\(^ {65}\) See id. at 341–42 (discussing writ of mandamus petition filed in Sixth Cir-
cuit Court of Appeals).

\(^ {66}\) See id. (discussing denial of writ by court of appeals). The Sixth Circuit
concluded: (1) the district court had jurisdiction to enter remand; and (2) it had
no jurisdiction to review because of § 1447(d). See id. (describing grounds for de-

\(^ {67}\) Id. at 343. The Court concluded that, by remanding for an overcrowded
docket, the "District Court exceeded its authority in remanding on grounds not
permitted by the controlling statute." See id. at 345 (stating district court exceeded
power under § 1447(c)). At the time of Thermtron, § 1447(c) referenced remand
for lack of jurisdiction or improvident removal. See id. at 343 (citing grounds for
remand in § 1447(c)); see also Hrdlick, supra note 46, at 548 (noting appellate re-
view of remand orders had been denied for ninety years before certiorari granted in
Thermtron).

\(^ {68}\) See Thermtron, 423 U.S. at 345–46 (concluding that §§ 1447(c) and
1447(d) are *in pari materia*). "It is a canon of construction that statutes that are *in
pari materia* may be construed together, so that inconsistencies in one statute may
be resolved by looking at another on the same subject." Black's Law Dictionary
807 (8th ed. 2004).

\(^ {69}\) See Thermtron, 423 U.S. at 354 (Rehnquist, J., dissenting) ("Congress's pur-
pose in barring review of all remand orders has always been very clear—to prevent
the additional delay which a removing party may achieve by seeking appellate re-
consideration of an order of remand.").
The Supreme Court affirmed its holding in *Thermtron* with its decision in *Things Remembered, Inc. v. Petraca*. In that case, a bankruptcy proceeding was removed to federal court under both the specialized bankruptcy removal provision and the general removal provision. The District Court of Ohio remanded the case to state court because the removal was untimely. The defendant appealed, and the Sixth Circuit dismissed the appeal concluding that §§ 1447(d) and 1452(d) barred appellate review of the remand order. The Supreme Court granted certiorari and affirmed. The Court rejected the argument that the § 1447(d) bar did not apply to a specialized removal provision like § 1452. The Court stated, "[s]ection 1447(d) applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under any other statutes, as well.'"  

70. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 354–55 (1988) (holding that district courts have discretion to remand cases within their jurisdiction for reasons not stated in § 1447(c)). In *Carnegie-Mellon*, the district court remanded a pendent state law claim after all federal law claims were eliminated. See id. at 346 (stating procedural history). The Court found it was within the district court’s discretion to remand “upon a proper determination that retaining jurisdiction over the case would be inappropriate.” See id. at 357 (relying on discretion granted to district courts in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), over pendent jurisdiction); see also Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 731 (1996) (permitting review of remand order based on abstention principles only where relief being sought is equitable or discretionary).  


72. See id. at 126 (noting defendant removed under bankruptcy provision); see also 28 U.S.C. § 1452(a) (2004) (stating procedure for appeal of bankruptcy actions). Section 1452(a) provides that: “A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court . . . to the district court for the district where such civil action is pending . . . .”) Id. Section 1452(b) contains similar language to that in § 1447(d): “An order entered under this section remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals . . . or by the Supreme Court.” Id.  

73. See *Things Remembered*, 516 U.S. at 126 (discussing defendant’s removal under general removal provision). For a discussion of the general removal provision, see supra notes 32–33 and accompanying text.  

74. See *Things Remembered*, 516 U.S. at 126–27 (noting district court overturned bankruptcy court and remanded to state court).  

75. See id. at 127 (discussing Sixth Circuit’s unpublished disposition holding review was barred).  

76. See id. (granting certiorari and affirming Sixth Circuit’s dismissal of appeal).  

77. See Hrdlick, supra note 46, at 560 (“Justice Thomas reasoned that § 1447(d) is *in pari materia* with all removal statutes, not just § 1447(c), and thus has a broad application to any remand order issued under a removal statute.”).  

78. See *Things Remembered*, 516 U.S. at 128 (holding review is barred regardless of whether action was removed under bankruptcy or general removal provision (quoting United States v. Rice, 327 U.S. 742, 752 (1946))). The untimely removal
c. Substantive Issue Exception

Another exception to the appellate bar is found in a line of cases beginning with the Supreme Court decision in Waco v. United States Fidelity & Guaranty Co. In Waco, a Texas citizen brought a personal injury action in state court against the City of Waco, Texas ("Waco"). Waco filed a cross-action against Fidelity & Guaranty Co. ("Fidelity"), which removed the action to federal court. The district court dismissed Fidelity as an improper party, concluded there were no longer grounds for diversity jurisdiction between Waco and the Texas citizen, and remanded the action to state court. Waco appealed the dismissal of the cross-action but not the remand order.

The Fifth Circuit dismissed the appeal, holding that the remand order was not reviewable. The Supreme Court granted certiorari and acknowledged the statutory bar on appellate review. Nevertheless, the Court stated that "in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the case." The Supreme Court permitted review of the dismissal. Consequently, the Waco doctrine has been found to permit review when a district court makes a substantive decision on the merits in remanding a case.

Fifty years after Waco, the Ninth Circuit held that a remand decision was reviewable in Pelleport Investors, Inc. v. Budco Quality Theaters, Inc. In Pelleport, the case was removed on the basis of diversity jurisdiction, but was remanded because of a forum selection clause in a contract between the parties that required all disputes to be litigated in state court. The Thermtron exception could have applied because the remand order was not

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was found to be a defect clearly within the scope of § 1447(c). See id. (concluding district court remand decision was not reviewable).
79. 293 U.S. 140 (1934).
80. See id. at 141 (discussing basis for action arising from collision with street obstruction).
81. See id. (noting Fidelity was surety on bond that Waco sought to recover upon).
82. See id. at 142 (stating contents of district court order).
83. See id. (identifying grounds for Waco's appeal).
84. See id. at 142-43 (stating Fifth Circuit holding).
85. See id. at 143 (noting "no appeal lies from the order of remand").
86. Id.
87. See id. at 144 (holding Fifth Circuit can hear appeal of dismissal of third-party claim).
88. See Hrdlick, supra note 46, at 545 n.40 (discussing Waco doctrine and expansion by Ninth Circuit in Pelleport); Solimine, supra note 46, at 315 n.147 (explaining Waco doctrine and its use in permitting review of remand orders); Wasserman, supra note 46, at 119 (noting that courts of appeals have expanded opportunities for appellate review).
89. 741 F.2d 273 (9th Cir. 1984).
90. See id. at 275 (recounting procedural history of case and district court finding that clause was valid and enforceable).
on a ground specified in § 1447(c).\textsuperscript{91} The Ninth Circuit, however, utilized \textit{Waco} to conclude that the district judge "reached a substantive decision on the merits \textit{apart from any jurisdictional decision}."\textsuperscript{92} Therefore, the enforceability of the forum selection clause could be reviewed because "to hold otherwise would deprive Budco [Quality Theaters, Inc.] of its right to appeal a substantive determination of contract law."\textsuperscript{93}

Since 1984, other courts of appeals have relied on \textit{Pelleport} and \textit{Waco} to justify appellate review of decisions that form the basis for remand orders.\textsuperscript{94} The substantive issue exception, however, is routinely found not to apply when the substantive issue is intrinsic to a jurisdictional remand order.\textsuperscript{95} The creation of these complicated exception doctrines highlights the judicial frustration with limitations on appellate review.\textsuperscript{96}

III. Federal Securities Framework

Securities laws are intended to protect investors and ensure confidence in the capital markets.\textsuperscript{97} Securities regulation has long been an

\textsuperscript{91} See id. at 276 (relying on \textit{Waco} rather than \textit{Thermtron} to hold district court decision was substantive decision subject to review); Solimine, supra note 46, at 312 (noting that remand in \textit{Pelleport} was not predicated on "ground specified in Section 1447(c)").

\textsuperscript{92} See Wasserman, supra note 46, at 120 ("Rather than invoking the \textit{Thermtron} exception, which would have permitted appellate review of a remand order issued on grounds not specified in section 1447(c), the Ninth Circuit relied on \textit{Waco} . . . .").

\textsuperscript{93} See id. ("We cannot believe Congress intended to immunize such decisions from review." (quoting \textit{Pelleport}, 741 F.2d at 277)).

\textsuperscript{94} See, e.g., Clorox Co. v. United States Dist. Court for the N. Dist. of Cal., 779 F.2d 517, 520 (9th Cir. 1985) (permitting appellate review of remand order). In \textit{Clorox}, the Ninth Circuit heard an appeal of a remand order based on the district court's finding that content of an employee handbook estopped Clorox from removing the case. See id. at 520 (citing \textit{Pelleport}, 741 F.2d at 276–78) ("As in \textit{Pelleport}, the remand order in this case is appealable . . . ."); see also Wasserman, supra note 46, at 121–26 (discussing cases where \textit{Pelleport} was applied).

\textsuperscript{95} See \textit{Clorox}, 779 F.2d at 520 (noting \textit{Pelleport} exception is not applicable when substantive issue is not apart from jurisdictional decision); see also Lyons v. Alaska Teamsters Employer Serv. Corp., 188 F.3d 1170, 1173 (9th Cir. 1999) (holding \textit{Pelleport} exception does not allow review of substantive legal question necessary to determine whether subject matter jurisdiction existed); Baldridge v. Ky.-Ohio Transp., Inc., 983 F.2d 1341, 1349 (6th Cir. 1993) (rejecting defendant's argument that \textit{Pelleport}/\textit{Clorox} exception applies because "heart of this decision was jurisdictional") (citation omitted); Harris v. Blue Cross/Blue Shield of Ala., Inc., 951 F.2d 325, 329 (11th Cir. 1992); Solimine, supra note 46, at 312–13 (citing Caledron v. Aerovias Nacionales de Colom., 929 F.2d 599, 602 (11th Cir. 1991)) (noting Eleventh Circuit's refusal to review remand order on lack of complete preemption and substantial federal question).

\textsuperscript{96} See Wasserman, supra note 46, at 108–09 (noting that judicially created exceptions exhibit courts' attempts to get around § 1447(d) bar).

area of concurrent control between the federal government and the states. Congress has recently paid special attention to this dual system by enacting the PSLRA and SLUSA to ensure the integrity of private securities litigation.

A. Private Securities Litigation Reform Act of 1995

In 1995, Congress passed the PSLRA in response to the widely held belief that the anti-fraud provisions of the federal securities laws were being abused by plaintiffs. The primary concern of legislators was strike suits—in which plaintiffs filed meritless class actions that alleged fraud in the sale of securities. Deep-pocketed defendants often settled these suits regardless of the merits because the settlement amount was often less than the potential litigation expenses. The PSLRA addressed the issue

98. See Painter, supra note 4, at 24 (noting that “the 1933 Act and the 1934 Act explicitly allowed for concurrent securities regulation by the states”). For a full discussion of the dual system of securities regulation, see id. at 20–31.

99. See H.R. CONF. REP. No. 104-369, at 31 (expressing concern over securities markets). Private securities litigation has always been considered a key enforcement element enabling defrauded investors to recover their losses without government involvement. See id. (describing need for protection of integral area).

100. See id. at 31 (providing Statement of Managers for PSLRA). The PSLRA was enacted to “protect investors, issuers, and all who are associated with our capital markets from abusive securities litigation.” Id. at 32. Congress passed the legislation over President Clinton’s veto. See Message to the House of Representatives Returning Without Approval the Private Securities Litigation Reform Act of 1995, PUB. PAPERS 1912 (Dec. 19, 1995) (refusing to sign current legislation). President Clinton later noted that “[w]hen the bill returned to the House and Senate floors after my veto, the bill’s supporters made clear that they did intend to codify the Second Circuit standard. After this important assurance, the bill passed over my veto.” Statement on Signing the Securities Litigation Uniform Standards Act of 1998, PUB. PAPERS 1974–75 (Nov. 3, 1998).

101. See H.R. CONF. REP. No. 105-803, at 13 (1998) (defining purpose of strike suits). “The purpose of these strike suits is to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit, simply to avoid the potentially bankrupting expense of litigating.” Id. Congress heard testimony on many of the abusive practices including:

(1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.

102. See Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1341 (11th Cir. 2002) (noting strike suits are “brought for the purpose of forcing securities defendants into large settlements in order to avoid costly discovery”); In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 263 (2d Cir. 1993) (explaining tension in pre-PSLRA securities litigation). There is a need to deter fraud in the securities markets; however, there is also a need to deter “use of the litigation process as a
of strike suits by instituting a heightened pleading standard and a mandatory stay of discovery.\textsuperscript{103} The PSLRA, however, proved to be largely ineffective because of its federal flight loophole.\textsuperscript{104} This loophole enabled plaintiffs to evade the PSLRA provisions by filing in state court under state securities laws.\textsuperscript{105}

B. \textit{Securities Litigation Uniform Standards Act of 1998}

Congress passed SLUSA to prevent plaintiffs from evading the PSLRA provisions.\textsuperscript{106} SLUSA makes federal courts the exclusive venue for most
device for extracting undeserved settlements as the price of avoiding the extensive discovery costs." \textit{Id.}


104. \textit{See} Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 107–08 (2d Cir. 2001) (discussing "federal flight"). "By suing in state court under state statutory or common law, these litigants were able to assert many of the same causes of action, but avoid the heightened procedural requirements instituted in federal court." \textit{Id.}

105. \textit{See} 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."). The PSLRA reforms were procedural in nature and would apply only if the action was filed in federal court. \textit{See}, e.g., Diamond Multimedia Sys., Inc. v. Superior Court, 968 P.2d 599, 542–43 (Cal. 1999) (stating plaintiffs brought action for misrepresentation and fraud based on California Corporations Code sections in state court); \textit{see also} Michael G. Dailey, \textit{Preemption of State Court Class Claims for Securities Fraud: Should Federal Law Trump?}, 67 U. Cin. L. Rev. 587, 589-90 (1999) (detailing number of suits filed in state court following enactment of PSLRA) (citation omitted). "Professor Michael Perino reported that between 1992 and 1994 no more than four securities cases alleging fraud were brought in state court in any one year. In the first eighteen months after the passage of the PSLRA, ninety-four companies were sued in state court for securities fraud." \textit{Id.} at 611 (footnote omitted).


Congress finds 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
securities fraud class actions by preempting state actions based on misrepresentations or omissions made "in connection with" the purchase or sale of a covered security.\textsuperscript{107} Congress incorporated a specialized removal provision into SLUSA to augment the preemption mandate.\textsuperscript{108} Defendants can apply this removal provision to any "covered class action" defined by SLUSA’s preemption provision.\textsuperscript{109}

SLUSA’s preemption provision applies to state actions that meet a four-part test: (1) the suit is a covered class action,\textsuperscript{110} (2) the plaintiff’s claims are based on state law, (3) there has been a purchase of a "covered security"\textsuperscript{111} and (4) the plaintiff alleged a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.\textsuperscript{112} Because SLUSA’s specialized removal provision is connected

\begin{itemize}
  \item (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.
\end{itemize}

\textit{Id.}


No covered class action based upon the statutory or common law of any State or subdivision therefore 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.

(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.


\textsuperscript{108} See H.R. Rep. No. 105-640, at 16 (1998) (detailing intent for removal provision). "This provision is designed to prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted . . . ." \textit{Id.}


\textsuperscript{112} See Behlen v. Merrill Lynch, 311 F.3d 1087, 1092 (11th Cir. 2002) (setting forth four-part preemption test); Green v. Ameritrade, Inc., 279 F.3d 590, 596 (8th Cir. 2002) (same); Cape Ann Investors, LLC v. Lepone, 296 F. Supp. 2d 4, 9
to the preemption provision in the statute, the specialized removal provision is also subject to the four-part test.\textsuperscript{113}

SLUSA also contains a remand provision that requires the district court to remand a removed action if SLUSA preemption is not applicable.\textsuperscript{114} Once remanded, the litigation is maintained in state court.\textsuperscript{115} The purpose of the remand provision is to preserve state actions that were improperly removed.\textsuperscript{116} Significantly, SLUSA's remand provision does not include an express exception to the § 1447(d) bar on appellate review of remand orders.\textsuperscript{117}

SLUSA's preemption, removal and remand provisions work in concert to achieve the goals of the statute.\textsuperscript{118} First, a defendant removes a state action to federal court under the removal provision.\textsuperscript{119} Second, the district judge applies the four-part test from the preemption provision to

\begin{itemize}
\item[115. See Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1342 (11th Cir. 2002) (stating four-part test as applied to removal). Thus, in order to remove an action to federal court under SLUSA, the removing party must show that (1) the suit is a covered class action, (2) the plaintiffs' claims are based on state law, (3) one or more "covered securities" has been purchased or sold, and (4) the defendant misrepresented or omitted a material fact "in connection with the purchase or sale of such security." Id.; see also Shaw v. Charles Schwab & Co., 128 F. Supp. 2d 1270, 1272 (C.D. Cal. 2001) ("SLUSA requires that the removing party demonstrate [the four-part test] . . ."); Prager v. Knight/Trimark Group, Inc., 124 F. Supp. 2d 229, 231 (D.N.J. 2000) (same). "SLUSA's removal provision makes removable any class action preempted by [SLUSA]." Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 123 (2d Cir. 2003).
\item[115. See H.R. Rep. No. 105-640, at 17 (1998) (noting action is maintained in state court upon being remanded).
\item[116. See id. (stating congressional intent for remand provision). "This is intended as a savings clause, so that in the event of improper removal of the limited universe of cases over which State court jurisdiction has been preserved . . ., the Federal court would remand such action back to State court." Id.
\item[117. See Spielman, 332 F.3d at 126 (recognizing that SLUSA does not contain statutory exception to § 1447(d)).
\item[119. See, e.g., Magyery v. Transamerica Fin. Advisors, Inc., 315 F. Supp. 2d 954, 956 (N.D. Ind. 2004) (detailing procedure of SLUSA). Plaintiff filed a class action in Indiana state court alleging four state law causes of action: breach of contract, conversion, breach of fiduciary duty and negligent supervision. See id. (describing plaintiff's action). Defendants removed to federal court alleging the plaintiff's state law claims were completely preempted by SLUSA. See id. at 955 (discussing removal).]}
\end{itemize}
determine if removal is proper and preemption applicable.120 If the four-part test is met, removal is proper, SLUSA preempts the state action and the district judge will dismiss it.121 If the four-part test is not met, removal is improper, preemption does not apply and the federal judge must remand.122

IV. CIRCUIT SPLIT

Controversy has developed in the circuit courts as to whether a remand order under SLUSA can be reviewed by an appellate court.123 The

120. See id. (describing procedure following removal). The court noted that “[o]nce removed, however, the district court must examine the complaint to determine whether substantive requirements necessary to sustain removal under SLUSA’s preemption provision have been satisfied as these requirements determine whether the district court has subject matter jurisdiction to entertain the action.” Id. at 958.

121. See, e.g., Winne v. Equitable Life Assurance Soc’y of United States, 315 F. Supp. 2d 404, 407 (S.D.N.Y. 2003) (holding preemption applies). Plaintiff filed a class action alleging state law claims, which was removed by defendant based on SLUSA. See id. (noting history of action). The court found “SLUSA’s removal provision applies here because the relevant criteria under the statute are met.” Id. at 413. The court dismissed the action after concluding that the removal and preemption provisions were satisfied. See id. at 416 (dismissing action).

122. See, e.g., Magery, 315 F. Supp. 2d at 963 (stating preemption is not applicable). The Magery court noted that the plaintiff did not “allege a misrepresentation or omission of a material fact in connection with the purchase or sale of securities.” Id. (concluding four-part test is not met). The defendant failed to satisfy the requirements for preemption; therefore, the action had to be remanded to the state court for further adjudication. See id. (denying defendant’s motion to dismiss and remanding).


During the publication process for this Note, the Eleventh Circuit addressed the review of remand orders under SLUSA. See Williams v. AFC Enters., Inc., No. 04-10104, 2004 WL 2480743, at *1 (11th Cir. Nov. 5, 2004) (stating issue on appeal). The plaintiff filed a class action in state court under the Securities Act of 1933. See id. (detailing cause of action). The defendants removed the action to federal court under the SLUSA removal provision and the plaintiff filed a motion to remand. See id. (discussing procedure of action). In granting the remand, “[t]he district court struggled with what it described as the ‘murky’ language of SLUSA’s removal provisions.” Id. As a result, the district court stayed its remand order sua sponte and certified the order for interlocutory appeal. Id. The Eleventh Circuit had to first determine if it had jurisdiction to review the remand order. See id. (stating jurisdictional issue). The Eleventh Circuit noted that a remand order by a district court based on a lack of subject matter jurisdiction is barred from review by § 1447(d). See id. at *1–2 (discussing bar on appellate review of remand orders). In evaluating the district court’s order, the Eleventh Circuit commented on the unusual analysis. See id. at *3 (reviewing grounds for district court’s remand order). The district court concluded that SLUSA intended for federal courts to be the exclusive venue for securities class actions. See id. (stating how district court interpreted SLUSA). “Despite this analysis, the court granted the plaintiff’s motion to remand the case.” Id. Notwithstanding the district court’s confusion with SLUSA, the Eleventh Circuit concluded it remanded for lack of subject matter jurisdiction and § 1447(d) barred review of that order. See id. (concluding
jurisdictions where the split has occurred are the centers of securities litigation. The Second and Ninth Circuits do not permit review of remand orders, whereas the Seventh Circuit permits such reviews.

A. No Appellate Review: Second and Ninth Circuits

The Second Circuit decided the first major case on reviewability of remand orders in 2003 in Spielman v. Merrill Lynch, Pierce, Fenner, & Smith, Inc. In Spielman, the plaintiff alleged six causes of action under New York law for misleading statements about the imposition of securities transaction fees. Merrill Lynch, Pierce, Fenner, & Smith, Inc. ("Merrill Lynch") removed the case to federal court under the SLUSA removal provision and the general removal provision. The district court determined the four-part preemption test was not met by concluding the alleged misrepresentations were not made in connection with the purchase or sale of a covered security. The district judge granted Spielman’s motion for remand and Merrill Lynch appealed the remand order alleging that the district court misapplied the four-part preemption

"§ 1447(d) proscribes appellate review of th[e] remand order"). The Eleventh Circuit’s opinion “does not mention any other appellate rulings on the issue, but appears to be consistent with the decisions of the Second and Ninth Circuits, and possibly in tension with a Seventh Circuit ruling. Order Remanding 1933 Securities Act Claims to State Court Not Reviewable Even if Wrong, 73 U.S.L.W. 1286–87 (Nov. 16, 2004). Also, in the course of its analysis, the Eleventh Circuit recognized that the SLUSA removal provision “makes reference to subsection (b), SLUSA’s preemption provision.” See AFC Enters., 2004 WL 2480743, at *3 (stating SLUSA’s removal provision incorporates SLUSA’s preemption provision). For a discussion of why this is the correct reading of SLUSA’s removal provision, see infra notes 177–91 and accompanying text.

124. See Cornerstone Research, supra note 15, at 13 (providing statistics that majority of class action filings occurred in Second, Seventh and Ninth Circuits); PricewaterhouseCoopers, supra note 3, at 7 (same).

125. See Kircher v. Putnam Funds Trust, 373 F.3d 847, 850 (7th Cir. 2004) (noting circuit split).

126. 332 F.3d 116 (2d Cir. 2003).

127. See id. at 121 (noting plaintiff’s actions: “breach of contract; breach of implied covenant of good faith and fair dealing; fraud; negligent misrepresentation; breach of fiduciary duty; and violation of New York Consumer Protection Law"). Spielman alleged Merrill Lynch made statements that he could make transactions on his Cash Management Account without a transaction fee, but he was actually charged a two percent fee. See id. (discussing basis for plaintiff’s action).

128. See id. (noting removal under SLUSA and general provision).

129. See id. (providing district court basis for remand); Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 01 Civ 3013 (DLC), 2001 WL 1182927, at *5 (S.D.N.Y. Oct. 9, 2001) (concluding misrepresentations about transactions fees were not integral to purchase or sale of securities). The other three components of the test were met and the “in connection with” requirement was the only element in dispute. See id. at *2 ("The parties do not dispute . . . that the first three of the four requirements for removal exist.").

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test.\textsuperscript{130} The issue on appeal was whether the Second Circuit may review the district court's remand order.\textsuperscript{131}

The Second Circuit noted that SLUSA did not contain a statutory exception to the bar on appellate review of remand orders.\textsuperscript{132} The Second Circuit also recognized that SLUSA's application is the only way for subject matter jurisdiction to exist.\textsuperscript{133} Finally, the Second Circuit concluded that SLUSA's four-part preemption test had to be satisfied for the district court to proceed.\textsuperscript{134} Otherwise, subject matter jurisdiction was lacking and the case had to be remanded to state court.\textsuperscript{135} The Second Circuit stated that the district court found the four-part test was not met and remanded the state action because of a lack of subject matter jurisdiction.\textsuperscript{136} The Second Circuit reiterated that such remand orders are barred from review by § 1447(d) and this is true even when a district court grossly misapplies the four-part preemption test.\textsuperscript{137}

Similarly, the Ninth Circuit recently addressed the reviewability of remand orders under SLUSA in United Investors Life Insurance Co. v. Waddell

\textsuperscript{130} See Spielman, 332 F.3d at 122 (noting district court remand order). "Merrill Lynch appeals the remand order as erroneously granted." \textit{Id.}

\textsuperscript{131} See id. (stating issue).

\textsuperscript{132} See id. at 126 (citing three statutory exceptions to § 1447(d)'s bar). "SLUSA does not constitute a fourth exception." \textit{Id.}

\textsuperscript{133} See id. at 126–27 ("To state the obvious, federal question jurisdiction to proceed under SLUSA is dependent on SLUSA's applicability."). The case only involved state law claims, so supplemental jurisdiction was not available. See id. at 121 ("Spielman’s complaint alleged no federal cause of action."). In addition, diversity did not exist because Spielman was a citizen of New York and Merrill Lynch has its principal place of business in New York. See id. (providing background of parties).

In evaluating SLUSA's preemption provision, the Second Circuit stated that SLUSA was intended to completely preempt specific types of state securities fraud claims. See id. at 123 ("The clear and unambiguous language convinces us that SLUSA was intended to completely preempt the field of certain types of securities class actions . . . ."). Further, the Second Circuit stated that the four-part preemption test determines which state court actions are completely preempted and converted into federal actions. See id. at 124 (stating only claims that fall within SLUSA's preemptive scope are completely preempted and become federal claims). For a discussion of the complete preemption doctrine, see supra notes 40–42 and accompanying text.

\textsuperscript{134} See id. at 126–27 (concluding that if SLUSA is not applicable district court has no jurisdiction to proceed).

\textsuperscript{135} See id. at 127 (listing conclusions produced when SLUSA is not applicable). Failing the four-part preemption test "produces three indisputable conclusions: [1] the claim does not fall within SLUSA's preemptive scope, [2] SLUSA does not apply, and most importantly, [3] federal question jurisdiction to proceed under SLUSA is lacking." \textit{Id.}

\textsuperscript{136} See id. (acknowledging district court's conclusion "in connection with" requirement was not met). "Our reading of the remand order convinces us that the remand could not have been predicated on anything other than the district court's determination that it lacked subject matter jurisdiction under SLUSA." \textit{Id.} at 129.

\textsuperscript{137} See id. (recognizing "[t]his is true even if the district court's determination regarding subject matter jurisdiction is ill-founded or poorly reasoned").
& Reed, Inc. United Investors Life Insurance Co. ("United Investors") brought suit in state court against Waddell & Reed, Inc. ("Waddell"), a broker, for unfair competition under California law. Waddell removed the action to federal court under SLUSA's removal provision and filed a motion to dismiss based on SLUSA preemption. The Ninth Circuit determined that the district court found SLUSA inapplicable because the covered class action requirement of the SLUSA four-part test was not satisfied. The district court remanded pursuant to the SLUSA remand provision, and Waddell sought review of its motion to dismiss based on the misapplication of the covered class action requirement.

The Ninth Circuit stated that in order for the district court to possess subject matter jurisdiction over the action, the four-part preemption test needed to be satisfied. According to the Ninth Circuit, the district court concluded that the four-part preemption test was not satisfied, and

138. 360 F.3d 960 (9th Cir. 2004).
139. See id. at 962 (identifying basis for action). United Investors contends Waddell "threatened to cause United Investors policy holders to switch to a rival company unless United Investors consented to increase its commission compensation beyond the original contract price." Id. at 962. United Investors terminated the relationship with Waddell for the variable annuity contracts and brought suit in Los Angeles County Superior Court under California's Unfair Competition Law. See id. (describing action).

140. See id. at 962-63 (noting Waddell removed solely under SLUSA's specialized removal provision). In addition, Waddell filed a timely motion to dismiss asserting "United Investors's state-law securities action falls squarely within SLUSA's preemption provision . . ." Id. at 963.

141. See id. at 963 (examining remand order). The district court remand order stated, "[i]t is further Ordered, sua sponte, that the case be, and hereby is, Remanded." Id. The Ninth Circuit relied on precedent to "examine the full record before the district court to ascertain the court's 'actual reason' for remanding." Id. at 964 (citation omitted). The parties agreed that three parts of the test were satisfied and Waddell only needed to show the action was a covered class action for SLUSA preemption to apply. See id. at 964-65 (presenting dispute on preemption). United Investors filed the action "[o]n behalf of its past and present policyholders," seeking "injunctive relief to prevent Waddell & Reed from continuing its allegedly false and misleading sales practices, as well as restitution of commissions and other income derived from these practices to be paid to United Investors's policyholders." Id. at 962. If United Investors's action satisfied the covered class action requirement, SLUSA preemption would apply. See id. at 964 (explaining what Waddell needed to prove for preemption). The court noted that a covered class action is "any single lawsuit in which . . . damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons . . . predominate over any questions affecting individual persons or members." Id. at 965 (quoting Securities Act of 1933 § 16(f)(2), 15 U.S.C. § 77p(f)(2)(A) (2004)). The Ninth Circuit concluded that the district court rejected Waddell's SLUSA preemption argument that this was a covered class action. See id. at 966 ("[D]istrict court clearly did not accept Waddell & Reed's SLUSA-preemption argument on the merits.").

142. See id. (noting Waddell's appeal of motion to dismiss).
143. See id. (finding "district court's subject matter jurisdiction depended entirely on SLUSA's preemptive scope"). "[I]n order to establish jurisdiction over Waddell & Reed's motion to dismiss, the district court would have had to decide Waddell & Reed's SLUSA preemption claim in its favor." Id.
therefore, the district court lacked subject matter jurisdiction and remanded as required.\textsuperscript{144} Therefore, § 1447(d) controlled the remand decision for lack of subject matter jurisdiction and barred appellate review of the remand order.\textsuperscript{145}

B. Appellate Review Permitted: The Seventh Circuit

In contrast to the Second and Ninth Circuits, the Seventh Circuit concluded in 2004 that appellate review of remand orders under SLUSA is permitted in \textit{Kircher v. Putnam Funds Trust}.\textsuperscript{146} The plaintiffs, shareholders in Putnam Funds Trust ("Putnam"), asserted a state law claim for breach of fiduciary duty.\textsuperscript{147} Putnam removed the action to federal court under SLUSA's removal provision.\textsuperscript{148} The district court remanded because it found that the plaintiff did not allege a loss in connection with the purchase or sale of securities and the defendants appealed that order.\textsuperscript{149} Judge Easterbrook, writing for the Seventh Circuit, addressed the issue of reviewability of remand orders.\textsuperscript{150}

The Seventh Circuit initially evaluated whether removal of the state action was proper.\textsuperscript{151} Judge Easterbrook stated that for an action to be

\begin{itemize}
  \item \textsuperscript{144} See id. (commenting that Waddell needed to prove covered class action requirement).
  \item \textsuperscript{145} See id. at 967 (stating § 1447(d) "precludes appellate review of the district court's remand order"). The Ninth Circuit noted appellate review is barred "even if the district court clearly misapplied SLUSA's preemption provisions." \textit{Id.}
  \item \textsuperscript{146} 373 F.3d 847 (7th Cir. 2004).
  \item \textsuperscript{147} See id. 847-48 (describing basis for action); see also \textit{Kircher v. Putnam Funds Trust}, No. 03-CV-0691-DRH, 2004 U.S. Dist. LEXIS 10327, at *3 (S.D. Ill. Jan. 27, 2004) ("Plaintiff's complaint contains four-counts alleging alternate theories based on state law claims of breach of fiduciary duty."). The Seventh Circuit recognized that "[b]y forewarning reliance on federal law plaintiffs hope to avoid the strictures of federal statutes such as the Private Securities Litigation Reform Act of 1995." \textit{Kircher}, 373 F.3d at 848.
  \item \textsuperscript{148} See \textit{Kircher}, 373 F.3d at 848 (citing 15 U.S.C. §§ 77p(c), 78bb(f)(2) as only grounds for removal).
  \item \textsuperscript{149} See id. (addressing finding that SLUSA did not apply). "[The plaintiffs] have held throughout the class period and claim to be injured by events that diminished the value realized by all investors." \textit{Id.} The district court remand order states, "[b]ecause the court lacks subject matter jurisdiction, the Court remands this action to the Madison County, Illinois Circuit Court." \textit{Id.} (quoting district court order) (emphasis omitted).
  \item \textsuperscript{150} See id. (acknowledging "dispute that requires our resolution").
  \item \textsuperscript{151} See id. at 849 (noting cases where removal was improper); see also \textit{Gravitt v. Southwestern Bell Tel.}, 430 U.S. 723, 723 (1977) (noting removal was improper because complete diversity was lacking); Rubel v. Pfizer, Inc., 361 F.3d 1016, 1019-20 (7th Cir. 2004) (describing improper removal because defendant did not comply with local district court removal rule); Adkins v. Ill. Cent. R.R., 326 F.3d 828, 829 (7th Cir. 2004) (referring to improper removal because court lacked subject matter jurisdiction over state law claims); Phoenix Container, L.P. v. Sokoloff, 235 F.3d 352, 355 (7th Cir. 2000) (stating removal was improper because notice of removal was not timely filed). "In \textit{Gravitt, Rubel, Adkins, and Phoenix Container} the district judges held that removal was improper . . . ." \textit{Kircher}, 373 F.3d at 848.
\end{itemize}
removed properly, it only needs to be a covered class action. Judge Easterbrook continued by stating that if an action is not a covered class action, removal is improper and an ensuing remand would come within § 1447(d). According to the Seventh Circuit, the district court found that the suit was properly removed because “this is a ‘covered class action.’”

The Seventh Circuit then emphasized that the determination of SLUSA preemption is a substantive decision the district judge is required to make, and thus, the district court must have jurisdiction to make that decision. The Seventh Circuit stated that the district court remanded only after deciding that SLUSA preemption did not apply. Therefore, the Seventh Circuit classified the remand order as “bow[ing] out” once the district judge’s job was done, and not a remand for lack of subject matter jurisdiction. Finally, Judge Easterbrook concluded with the fol-


153. See Kircher, 373 F.3d at 849 (“A conclusion that a suit is not a ‘covered class action’... would imply that removal had been improper, and such a decision would come within § 1447(d).”).

154. See id. (stating district court found removal proper because covered class action requirement was met). But see Kircher v. Putnam Funds Trust, No. 03-CV-0691-DRH, 2004 U.S. Dist. LEXIS 10327, *3 (S.D. Ill. Jan. 27, 2004) (“Removal is appropriate only if the Court has federal question jurisdiction over Plaintiff’s claims.”). The district court found “SLUSA does not permit removal of Plaintiff’s claims” and the court remanded “[b]ecause the Court lacks subject matter jurisdiction.” Id. at *8–9.

155. See Kircher, 373 F.3d at 850 (stating determination of SLUSA preemption is requirement for district judge). “SLUSA means, however, that one specific substantive decision in securities litigation must be made by the federal judiciary rather than the state judiciary.” Id. (emphasis added).

156. See id. at 849 (“Only after making the substantive decision that Congress authorized it to make did the district court remand.”).

157. See id. (“After making the decision required by [SLUSA], the district court had nothing else to do...”). In conducting this analysis, the Seventh Circuit made a distinction between subject matter jurisdiction and bowing out: “We must distinguish between a decision that ‘this court lacks adjudicatory competence’ and a decision that ‘the court has been authorized to do X and having done so should bow out.’ The former implies lack of subject matter jurisdiction...; the latter implies the presence of jurisdiction.” Id. at 850. Judge Easterbrook referenced the recent Supreme Court cases of Kontrick v. Ryan and Scarborough v. Principi to support the notion that the district court’s use of the term “lack of jurisdiction” is not conclusive. See id. at 849 (citing Scarborough v. Principi, 124 S. Ct. 1856, 1864–65 (2004); Kontrick v. Ryan, 540 U.S. 443, 452–56 (2004)) (explaining that “judges sometimes use the word ‘jurisdiction’ when they mean some-
following analysis: "The suit was properly removed. The district judge made a substantive decision under authority granted by a federal statute. It follows that the remand is unaffected by § 1447(d)."\(^{158}\)

Judge Easterbrook also addressed the practical reasons for permitting appellate review of remand orders under SLUSA.\(^{159}\) He emphasized that the need for accurate and consistent SLUSA application outweighs the small cost caused by the delay of appellate review.\(^{160}\) Recognizing that SLUSA preemption is only determined by the federal judiciary, Judge Easterbrook was fearful of the prospect that a "major substantive issue in the case will escape review."\(^{161}\) While the Seventh Circuit noted its decision would cause a circuit split, it nevertheless disagreed with the Second and Ninth Circuits' holdings that appellate review is barred by § 1447(d).\(^{162}\)

V. Analysis

A. Appellate Review Is Barred

The § 1447(d) bar on review of remand orders is applicable to SLUSA's specialized removal and remand provisions.\(^{163}\) This follows from the holding in Things Remembered, in which the Supreme Court held § 1447(d) applies to all statutory removal and remand provisions.\(^{164}\) Having determined § 1447(d) applies, the next step in determining whether § 1447(d) bars appellate review of SLUSA remand orders is to evaluate if

\(^{158}\) See id. at 850 (holding remand order was reviewable).

\(^{159}\) See id. (commenting that holding also "makes practical sense too").

\(^{160}\) See id. (focusing on need for correct decisions). The court noted that, if necessary, an appeal's disposition can be expedited. See id. (detailing way to accelerate process).

\(^{161}\) Id. (noting that appellate review of SLUSA preemption is "now or never").

\(^{162}\) See id. at 850–51 (criticizing two courts of appeals decisions on reviewability of remand orders). "Both the second and ninth circuits were mesmerized by the word 'jurisdiction' and did not see the difference between a case that never should have been removed and a case properly removed and remanded only when the federal job was done." Id. at 851. Judge Easterbrook emphasized that the courts in Spielman and United Investors did not discuss the holdings in Kontrick or Scarborough. See id. at 850–51 ("All of these decisions precede Scarborough, and although United Investors came a month after Kontrick the court did not discuss it.").

\(^{163}\) For a discussion of SLUSA's specialized provisions, see supra notes 108–22 and accompanying text.

\(^{164}\) See Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 128 (1995) ("Section 1447(d) applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under any other statutes, as well.'" (quoting United States v. Rice, 327 U.S. 742, 752 (1946))) (alteration in original).
these orders are reviewable under one of the previously discussed exceptions: statutory, Thermtron or substantive issue.\textsuperscript{165} This analysis focuses on reviewability in suits based exclusively on state law that are remanded because at least one element of the four-part SLUSA preemption test is not satisfied.\textsuperscript{166}

1. \textbf{No Statutory Exception Exists}

Actions remanded under SLUSA do not fit into one of the three statutory exceptions to the § 1447(d) bar on appellate review.\textsuperscript{167} Moreover, Congress did not include an express statutory exception to the § 1447(d) bar in SLUSA's specialized remand provision.\textsuperscript{168} Congress has expressly provided only three statutory exceptions.\textsuperscript{169} The absence of such an exception in SLUSA can be interpreted as a result of the congressional bias against review of remand orders.\textsuperscript{170}

2. \textbf{Thermtron Exception Is Not Applicable}

The Second, Ninth and Seventh Circuits all attempted to reconcile the § 1447(d) bar with the Thermtron line of cases.\textsuperscript{171} Under the Thermtron exception, if a remand is made on § 1447(c) grounds—lack of subject matter jurisdiction or procedural defect—the appellate bar of § 1447(d) applies.

165. For a discussion of the statutory, Thermtron and substantive issue exceptions, see supra notes 53–96 and accompanying text.

166. See Kircher, 373 F.3d at 848 (noting suit based solely on state causes of action and SLUSA preemption test not satisfied); United Investors Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960, 962 (9th Cir. 2004) (same); Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 121–22 (2d Cir. 2003) (same); Abada v. Charles Schwab & Co., Inc., 300 F.3d 1112, 1116 (9th Cir. 2002) (same).

167. See Abada, 300 F.3d at 1119 (stating that "none of the relevant exceptions to the statutory prohibition of appellate review of district court orders remanding . . . applies").

168. See Spielman, 332 F.3d at 126 ("Ultimately we are aware of only three statutory exceptions to Section 1447(d)'s bar . . . SLSUA does not constitute a fourth exception."). For a discussion of the SLUSA remand provision and the absence of a statutory exception to the § 1447(d) bar, see supra notes 114–17 and accompanying text.

169. For a discussion of the three statutorily created exceptions to the bar on appellate review—civil rights cases, RTC and FDIC actions and Native American tribe cases—see supra notes 56–60 and accompanying text.

170. See Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 128 (1995) ("Absent a clear statutory command to the contrary, we assume that Congress is 'aware of the universality of [the] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." (quoting United State v. Rice, 327 U.S. 742, 752 (1946)) (alteration in original); see also id. at 136 (Ginsburg, J., concurring) (emphasizing "a 'strong congressional policy against remand orders,' underlies . . . § 1447(d)" (quoting Sykes v. Tex. Air Corp., 834 F.2d 488, 492 (5th Cir. 1987))).

171. Compare Kircher, 373 F.3d at 848–49 (presenting issue of reconciling § 1447(d) with Thermtron lines of cases), with United Investors, 360 F.3d at 963 (same), with Spielman, 332 F.3d at 125 (same).
applies. If a remand is not based upon these grounds, § 1447(d) does not apply. The Seventh Circuit attempted to invoke the Thermtron exception by claiming that because removal was proper, any subsequent remand could not be for lack of subject matter jurisdiction and § 1447(d) did not apply. In contrast, the Second and Ninth Circuits found Thermtron not applicable because the district court remanded for lack of subject matter jurisdiction. Therefore, it is important to clarify two issues: (1) when removal is proper under SLUSA; and (2) how a district court obtains subject matter jurisdiction over a state action under SLUSA.

a. Removal Is Only Proper When the Four-Part Preemption Test Is Met

SLUSA's specialized removal provision makes it difficult for courts to determine whether a case is properly removed. Fortunately, Judge Easterbrook provided a clear example of when an action is improperly removed and subject to the § 1447(d) bar on appellate review: "A conclusion that a suit is not a 'covered class action' . . . would imply that removal had been improper, and such a decision would come within § 1447(d)." Thus, Judge Easterbrook appears to maintain that the covered class action requirement is the threshold factor for determining if removal is proper.

In United Investors, the Ninth Circuit addressed an illustration of Judge Easterbrook's improper removal example. The parties in that case agreed that the covered class action requirement was the only part of the

173. See id. (holding § 1447(d) does not apply if outside § 1447(c)'s scope); see also Quackenbush v. Allstate, Ins. Co., 517 U.S. 706, 715 (1996) (permitting review of remand on abstention principles); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 354–55 (1988) (holding discretionary remand of pendent jurisdiction claim outside § 1447(c) is not subject to § 1447(d)).
174. See Kircher, 373 F.3d at 850 (concluding remand not for lack of jurisdiction and not subject to § 1447(d)).
175. See United Investors, 360 F.3d at 967 (concluding remand order under SLUSA governed by § 1447(d); Spielman, 332 F.3d at 127 (same).
176. For a discussion of when removal is proper under SLUSA, see infra notes 177–91 and accompanying text. For a discussion of how SLUSA preemption creates subject matter jurisdiction, see infra notes 192–203 and accompanying text.
177. For a discussion of SLUSA's removal provision and its intricacies, see supra notes 108–13 and accompanying text.
178. Kircher, 373 F.3d at 849 (illustrating example of improper removal when number requirement of fifty class members for covered class action is not met).
179. See id. (discussing improper removal example). Judge Easterbrook concluded removal was proper even though the district court concluded the action was not in connection with the purchase or sale of a covered security. See id. ("Removal of this suit was proper . . . .").
180. See United Investors, 360 F.3d at 965 (stating defendant "only needed to show that United Investors's action qualifies as a 'covered class action'.")
preemption test at issue.\textsuperscript{181} The Ninth Circuit concluded that the district court remanded the action because it was not a covered class action.\textsuperscript{182} Although this removal mirrors Judge Easterbrook’s example of improper removal, he criticized the Ninth Circuit’s holding that § 1447(d) bars review.\textsuperscript{183} Judge Easterbrook stated that the Ninth Circuit was “mesmerized by the word ‘jurisdiction’ and did not see the difference between a case that never should have been removed and a case properly removed and remanded only when the federal job is done.”\textsuperscript{184} This criticism is inconsistent with Judge Easterbrook’s own example of improper removal, and weakens his basis for using the “covered class action” requirement as the sole factor for determining proper removal.\textsuperscript{185}

A correct reading of SLUSA’s removal provision links proper removal to satisfying SLUSA’s four-part preemption test.\textsuperscript{186} First, SLUSA’s removal provision is inextricably tied to its preemption test.\textsuperscript{187} Therefore, an action is removable under SLUSA only if the action satisfies the four-part preemption test discussed earlier.\textsuperscript{188} Proper removal is not determined by being a covered class action as Judge Easterbrook recommends.\textsuperscript{189}

\textsuperscript{181} See id. at 964–65 (noting that parties agree on three parts of preemption test and covered class action requirement is at issue).

\textsuperscript{182} See id. at 966 (noting district court rejected defendant’s SLUSA preemption argument and remanded case).

\textsuperscript{183} See Kircher, 373 F.3d at 849 (noting that Seventh Circuit’s decision is creating split between Ninth and Second Circuits).


\textsuperscript{185} Compare Kircher, 373 F.3d at 850 (linking proper removal to covered class action requirement), with Spielman v. Merrill Lynch, Pierce, Fenner & Smith, 332 F.3d 116, 125 (2d Cir. 2003) (stating removal is improper when four-part preemption test is not met).

\textsuperscript{186} For a discussion of SLUSA’s removal provision and its connection to the four-part preemption test, see supra notes 108–13 and accompanying text.


\textsuperscript{188} See Herndon v. Equitable Variable Life Ins. Co., 325 F.3d 1252, 1253 (11th Cir. 2003) (stating four-part test required for removal); Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1342 (11th Cir. 2002) (same); O’Hare, supra note 14, at 28 n.82 (“This four part [removal] test is identical to the test used to determine whether the state action should be preempted.”).

\textsuperscript{189} See Kircher, 373 F.3d at 849 (stating “conclusion that a suit is not a ‘covered class action’ . . . would imply that removal had been improper”).
Rather, the appropriateness of removal is linked to satisfying the four-part preemption test. Therefore, when the district court in *Kircher* concluded that the plaintiff did not allege a loss in connection with the purchase or sale of securities, the district judge concluded removal was improper and § 1447(d) would bar review of the required remand order.

b. Application of SLUSA Preemption Determines Existence of Subject Matter Jurisdiction

The only way for a district court to have subject matter jurisdiction over an action like *Spielman, United Investors* or *Kircher* is if SLUSA's preemption provision applies. All of the actions in these cases were filed in state court and based on state law, and, therefore, fell outside the scope of federal jurisdiction. Congress enacted SLUSA because plaintiffs were filing in state court to evade the burdens of the PSLRA. Normally, a defendant could only remove a case to federal court if the court would

190. See Prager v. Knight/Trimark Group, Inc., 124 F. Supp. 2d 229, 231 (D.N.J. 2000) (explaining removing party must show four-part test was met). The covered class action requirement is the first prong of the four-part test; if any other parts of the test are not satisfied, removal is deemed improper. *See Spielman*, 332 F.3d at 125 (noting that if SLUSA preemption test is not met, removal is improper).

191. See *Kircher v. Putnam Funds Trust*, No. 03-CV-0691-DRH, 2004 U.S. Dist. LEXIS 10327, *7* (S.D. Ill. Jan. 27, 2004) (stating holding, "[T]he Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiff's claims are not claims 'in connection with the purchase or sale of a covered security.'" *Id.* The district court concluded removal was improper and remanded for lack of subject matter jurisdiction. *See id.* at *9* (rejecting proper removal argument and ordering remand); *see also Kircher*, 373 F.3d at 850 (stating only actions properly removed are unaffected by § 1447(d)). An action improperly removed "would come within § 1447(d)." *See id.* at 849 (stating remands following improper removal are subject to appellate bar).

192. See *Kircher*, 373 F.3d at 847–48 (noting "plaintiffs filed suit in state court, invoking state law alone"); *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 966 (9th Cir. 2004) ("[T]he district court's subject matter jurisdiction depended entirely on SLUSA's preemptive scope."); *Spielman*, 332 F.3d at 126 ("To state the obvious, federal question jurisdiction to proceed under SLUSA is dependent on SLUSA's applicability.").

193. See *United Investors*, 360 F.3d at 962 (describing action filed in California state court based on state law); *Spielman*, 332 F.3d at 120 (noting suit brought in New York state court and based solely on state law); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1115 (9th Cir. 2002) (same); *Kircher*, 2004 U.S. Dist. LEXIS 10327, at *2–3* (stating suit brought in Illinois state court and based on state law claims of breach of fiduciary duty). A plaintiff is empowered to do this because, as master of the complaint, the plaintiff can construct the complaint to avoid the federal system. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("[P]laintiff is the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.").

194. For a discussion of the congressional intent for SLUSA, see *supra* notes 106–07 and accompanying text.
have subject matter jurisdiction over the action. 195 A plaintiff structuring his complaint solely on state law, therefore, would be safe from the federal system. 196 SLUSA's preemption and removal provisions, however, provide a defendant with a way to avoid the restrictions of the well-pleaded complaint rule. 197

While the rules may be altered under SLUSA, the underlying requirement that a district court have subject matter jurisdiction to hear a removed action still exists. 198 Preemption is normally an affirmative defense.

195. See 28 U.S.C. § 1441(a) (2004) ("any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants") (emphasis added); Caterpillar, 482 U.S. at 392 ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant."). The well-pleaded complaint rule ensures that the defendant cannot use a federal defense as a ground for removal to federal court. See Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153–54 (1908) (holding defense based on federal law does not provide basis for invoking federal jurisdiction). For a discussion of the well-pleaded complaint rule and its control on federal jurisdiction, see supra notes 38–39 and accompanying text.

196. See Caterpillar, 482 U.S. at 399 (stating that "plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court").

197. See Kircher, 373 F.3d at 848 (noting SLUSA's removal provision permits defendant to remove on defense of preemption).

The complete preemption doctrine is an exception to the well-pleaded complaint rule, but it does not provide grounds for subject matter jurisdiction under SLUSA. See O'Hare, supra note 14, at 73–76 (concluding that complete preemption doctrine does not apply to SLUSA). In Spielman, the Second Circuit analyzed SLUSA in terms of the complete preemption doctrine. See Spielman, 332 F.3d at 124 (stating SLUSA completely preempts certain securities class actions). For a further discussion of the Spielman court's application of complete preemption to SLUSA, see supra note 133 and accompanying text. Although the Second Circuit used the term "complete preemption," it stated that only a subset of securities fraud actions are completely preempted. See Spielman, 332 F.3d at 123 (stating SLUSA's preemption provision determines which claims are completely preempted). Complete preemption, however, is only applicable when the federal cause of action is intended to be the exclusive cause of action. See Beneficial Nat'l Bank v. Anderson, 559 U.S. 1, 9 n.5 (2003) (stating "proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive"). All state securities class actions that fall outside the preemptive scope of SLUSA must be remanded to state court. See Securities Act of 1933 § 16(d)(4), 15 U.S.C. § 77p(d)(4) (2004) (requiring remand for actions not covered by SLUSA's preemptive scope); Securities Exchange Act of 1934 § 28(f)(3)(D), 15 U.S.C. § 78bb(f)(3)(D) (2004) (same). Therefore, despite the Second Circuit's intermingling of SLUSA and complete preemption, they should be treated separately. See O'Hare, supra note 14, at 75 (noting that "SLUSA does not trigger the complete preemption doctrine"). SLUSA's four-part preemption test is what creates subject matter jurisdiction over the state law claim in district court, and not the complete preemption doctrine. See id. (concluding that complete preemption does not affect SLUSA preemption).

198. See 28 U.S.C. § 1441(a) (stating district court is required to have original jurisdiction for removal).
that does not permit removal by the defendant.\(^{199}\) SLUSA permits a defendant to remove to federal court based on a preemption defense and have a district judge evaluate it.\(^{200}\) If the defendant cannot establish that the four-part SLUSA preemption test is met, the district judge is left with no grounds for subject matter jurisdiction and must remand.\(^{201}\) Therefore, despite SLUSA altering the well-pled complaint rule in the defendant's favor, a defendant is still bound to prove that a federal district court has subject matter jurisdiction through SLUSA preemption.\(^{202}\) In determining whether SLUSA preemption applies, the district judge is, in essence, deciding whether the court has subject matter jurisdiction to hear the action.\(^{203}\)

3. **Substantive Issue Exception Is Not Applicable**

The substantive issue exception derived from the Waco and Pelleport decisions does not apply to remand orders under SLUSA.\(^{204}\) The excep-

199. See Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) ("Federal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pled complaint, and, therefore, does not authorize removal to federal court.") (citation omitted); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 2 (1983) (stating under well-pled complaint rule action may not be removed "on the basis of a federal defense, including the defense of pre-emption"); Kircher, 373 F.3d at 848 (citing Franchise Tax Bd., 463 U.S. at 1) ("Preemption normally is an affirmative defense, to be evaluated by the court in which the plaintiff elects to sue.").

200. See Securities Act of 1933 § 16(c), 15 U.S.C. § 77p(c) (setting forth SLUSA removal provision); Securities Exchange Act of 1934 § 28(f)(2), 15 U.S.C. § 78bb(f)(2) (same); see also Kircher, 373 F.3d at 848 ("SLUSA departs from the norm by permitting defendants to remove so that a federal court may evaluate the defense in advance of any step in the state litigation.").


202. See United Investors Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960, 966 (9th Cir. 2004) ("[I]n order to establish jurisdiction over [the defendant's] motion to dismiss, the district court would have had to decide [the defendant's] SLUSA preemption claim in its favor.") (citation omitted); Spielman, 332 F.3d at 124 (noting defendants may remove state securities class actions); see also Kircher v. Putnam Funds Trust, No. 03-CV-0691-DRH, 2004 U.S. Dist. LEXIS 10327, *4 (S.D. Ill. Jan. 27, 2004) (noting removing party carries burden of proving subject matter jurisdiction exists).

203. See United Investors, 360 F.3d at 966 ("[T]he district court's subject matter jurisdiction depended entirely on SLUSA's preemptive scope . . . ."); Spielman, 332 F.3d at 126 ("To state the obvious, federal question jurisdiction to proceed under SLUSA is dependent on SLUSA's applicability. . . . If a claim falls within SLUSA's preemptive scope, by definition, it satisfies SLUSA's substantive requirements necessary to sustain removal.") (citation omitted); Adaba v. Charles Schwab & Co., Inc., 300 F.3d 1112, 1119 (9th Cir. 2002) ("construction of SLUSA was necessary for the resolution of subject matter jurisdiction"). But see Kircher, 373 F.3d at 850 (holding conclusion that SLUSA preemption does not apply is not tantamount to lack of subject matter jurisdiction).

204. See Spielman, 332 F.3d at 129 (holding that Pelleport/Clorox exception "would not create appellate jurisdiction"); Abada, 300 F.3d at 1119 ("Because con-
tion only applies to substantive issues that are independent of subject matter jurisdiction.\textsuperscript{205} While applying the SLUSA preemption test may be considered substantive, the district court's subject matter jurisdiction is tied to the four-part preemption test.\textsuperscript{206} Notably, the Ninth Circuit, which generated the substantive issue exception, has found it does not apply to permit review of remand orders under SLUSA.\textsuperscript{207}

\section*{B. The Need for Appellate Review}

Federal courts have struggled in determining which state law claims are preempted by SLUSA.\textsuperscript{208} It is critical for courts to decide the issue correctly because of the impact preemption has on the course of the litigation.\textsuperscript{209} In \textit{Kircher}, Judge Easterbrook highlighted the need for appellate review in this area to "promote accurate and consistent implementation of [SLUSA]."\textsuperscript{210}

Appellate review of remand orders is not available because of the § 1447(d) bar.\textsuperscript{211} The creation of another judicial exception to § 1447(d)
would frustrate the strong congressional bias against review of remand orders.\textsuperscript{212} This congressional policy against remand review ensures fairness to the litigants by preventing delay.\textsuperscript{213} Section 1447(d) is straightforward in its limit on review of remand orders, but the doctrine is complicated by the numerous judicially manufactured exceptions.\textsuperscript{214} SLUSA remand orders are clearly governed by § 1447(d) and none of the present exceptions are applicable.\textsuperscript{215} Therefore, in order to preserve the strong congressional policy against review of remand orders, the § 1447(d) bar on appellate review must not be devalued by another judicially created exception.\textsuperscript{216}

\textsuperscript{212} See Sykes v. Tex. Air Corp., 834 F.2d 488, 490 (5th Cir. 1987) (recognizing "strong congressional policy against review of remand orders"). "Congress' purpose in barring review of all remand orders has always been very clear—to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand." Thermitron Prods., Inc. v. Herman- sdoerfer, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting); \textit{see also} Solimine, \textit{supra} note 46, at 289 (noting effects of judicial exceptions on § 1447(d) bar). "The evisceration of the bar of Section 1447(d) initiated by \textit{Thermitron} continues to have an impressive and largely unreviewed ripple effect in the doctrine of lower federal courts." \textit{Id.}

\textsuperscript{213} See United States v. Rice, 327 U.S. 742, 751–52 (1946) (stating purpose for adoption of statutory provision that barred appellate review).

Congress, by the adoption of these provisions, ... established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand . . . . \textit{Id.} at 751.

\textsuperscript{214} See Solimine, \textit{supra} note 46, at 333 (noting that judicial interpretation of § 1447(d) is "largely unsatisfactory, as it departs without good reason from the relatively clear meaning of the bar to appellate review found in that statute"). Despite the clear language of § 1447(d), "the Supreme Court and the courts of appeals have concluded that [§] 1447(d) does not mean precisely what it says in all cases." See Wasserman, \textit{supra} note 46, at 108–09 (noting judicially created exceptions to statutory bar on review of remand orders); \textit{see also In re Amoco Petroleum Additives Co.}, 964 F.2d 706, 708 (7th Cir. 1992) ("\textit{Thermitron} holds that § 1447(d) does not mean what it says . . . .").

\textsuperscript{215} See Abada v. Charles Schwab & Co., Inc., 300 F.3d 1112, 1119 (9th Cir. 2002) ("none of the relevant exceptions to the statutory prohibition of appellate review of district court orders remanding complaints for lack of subject matter jurisdiction applies"). For a discussion of the absence of an exception to the § 1447(d) bar on review of remand orders, see \textit{supra} notes 163–92 and accompanying text.

\textsuperscript{216} See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 127 (2d Cir. 2003) (holding rejection of appellate review "aligns with Congress' intent and its aware[ness] of the universality of . . . denying appellate review of remand orders") (alteration in original) (quotations omitted). In \textit{Spielman}, the Second Circuit rejected the defendant's argument to construe a new exception to the § 1447(d) bar by drawing on SLUSA's silence regarding appellate jurisdiction. \textit{See id.} (citing W. Va. Univ. Hosp. v. Casey, 499 U.S. 83, 101 (1991)) (stating "[i]t is not our place as jurists to supply that which is omitted by the legislature"). Some commentators have called for Congress to address the review of remand orders and provide clearer language. \textit{See}, e.g., Hrdlick, \textit{supra} note 46, at 579 ("It is time for Congress to revisit the question of appellate review of remand orders in re-
Appellate review of dismissal orders under SLUSA, on the other hand, is permitted because the language of § 1447(d) does not govern these orders.\textsuperscript{217} A dismissal order under SLUSA is a final appealable order under 28 U.S.C. § 1291.\textsuperscript{218} Numerous cases reach appellate courts when a plaintiff appeals a district court’s determination that SLUSA preempts the state action.\textsuperscript{219} When a district judge finds SLUSA preemption, the district court must dismiss the plaintiff’s action.\textsuperscript{220} Upon dismissal, the plaintiff may either refile the action in federal court by omitting any state law claims or appeal the dismissal order.\textsuperscript{221} When the plaintiff appeals the dismissal, a court of appeals is able to review whether the district judge correctly applied the four-part preemption test.\textsuperscript{222}

Consistent and accurate implementation of SLUSA will be attained through the establishment of clear guidelines derived from appellate review of dismissal orders.\textsuperscript{223} This appellate review will provide the necessary precedent for district courts to follow in applying the four-part

moved causes, and then to legislate—more clearly and forcefully—its decision on the matter.”); Solimine, supra note 46, at 290 (recommending solution of “amend[ing] the relevant statutes, rather than torture their language via doctrinal interpretation”); Wasserman, supra note 46, at 130 (“That the clear language of the statute no longer correctly states the law is reason enough for amending the statute.”) (footnote omitted).

\textsuperscript{217} See 28 U.S.C. § 1447(d) (2004) (stating only remand orders are not reviewable on appeal).

\textsuperscript{218} See 28 U.S.C. § 1291 (2004) (“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .”); see also Behlen v. Merrill Lynch, 311 F.3d 1087, 1096 (11th Cir. 2002) (reviewing and affirming district court finding of SLUSA preemption and dismissal); Currie v. Diamond Mortgage Corp. of Ill., 859 F.2d 1538, 1540 (7th Cir. 1988) (holding order dismissing on preemption grounds was final and appealable).

\textsuperscript{219} For a discussion of the cases that reach the courts of appeals and the nature of the review, see infra note 222.


\textsuperscript{221} See 15 U.S.C. § 77p(b) (omitting federal law claims from those preempted under SLUSA); 15 U.S.C. § 78bb(f)(1) (same); see also 28 U.S.C. § 1291 (permitting appeal of dismissal as final decision of district court).

\textsuperscript{222} See Patenaude v. Equitable Life Assurance Soc’y, 290 F.3d 1020, 1023 (9th Cir. 2002) (stating issue on appeal is whether district court properly applied SLUSA preemption). Many of the cases on appeal evaluate certain aspects of the SLUSA four-part preemption test. See, e.g., Dudek v. Prudential Sec., Inc., 295 F.3d 875, 878 (8th Cir. 2002) (reviewing preemption grounds for dismissal order and affirming on ground that tax-deferred annuities are covered securities); Riley v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 292 F.3d 1334, 1346–47 (11th Cir. 2002) (concluding SLUSA preempts misrepresentation cases that lack scienter and affirming dismissal); Landau v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 120 (2d Cir. 2001) (affirming dismissal by finding variable annuities are within scope of SLUSA).

\textsuperscript{223} See Kircher v. Putnam Funds Trust, 373 F.3d 847, 850 (7th Cir. 2004) (commenting that appellate review will provide means for accurate and consistent implementation of SLUSA preemption).
preemption test. Because SLUSA was only enacted in 1998, many aspects of SLUSA preemption have not been fully litigated. Over time, more dismissals will be appealed, and appellate courts will be able to provide workable guidelines for district courts. The result will be consistent and accurate application of SLUSA preemption without undermining the strong congressional policy against review of remand orders.

VI. Conclusion

District courts are struggling with the scope of SLUSA preemption. Private securities class actions are predicted to increase in the coming years as a result of corporate governance legislation and accounting rule changes. The judicial interpretation of SLUSA’s preemption provision will be crucial in managing this increased securities litigation. Appellate review of remand orders, however, is not available to ensure consistency and accuracy of the district courts’ application of SLUSA. First, the §1447(d) bar on review of remand orders is applicable to remand orders under SLUSA’s remand provision. Second, there is no statutory or judicially created exception that permits review of SLUSA remand orders. Finally, a new exception should not be created because it defeats:

224. See Patenaude, 290 F.3d at 1023 (evaluating district court’s application of SLUSA preemption).

225. See Cent. Laborers’ Pension Fund v. Chellgren, No. Civ. A 02-220-DLB, 2004 WL 1348880, at *15 (E.D. Ky. Mar. 29, 2004) (“SLUSA is fairly new legislation, the application of which is still being determined by the courts.”). For a discussion of how courts are struggling to interpret SLUSA’s preemption provision, see supra note 208 and accompanying text.

226. For a discussion of the circuit court decisions that provide precedent for the application of SLUSA’s four-part preemption test, see supra note 222.

227. Compare Kircher, 373 F.3d at 850 (presenting benefits of appellate review), with Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 127 (2d Cir. 2003) (concluding that appellate review of remand orders would eviscerate §1447(d) bar).

228. See Magery v. Transamerica Fin. Advisors, Inc., 315 F. Supp. 2d 954, 959 (N.D. Ind. 2004) (“The district court cases appear to be all over the map on the issue of what state law claims are preempted by SLUSA.”).

229. Compare PricewaterhouseCoopers, supra note 3, at 3 (stating increase in securities litigation is expected due to Sarbanes-Oxley and new accounting rules from Public Company Accounting Oversight Board), with CORNERSTONE RESEARCH, supra note 15, at 3 (theorizing about whether new class of securities actions will develop in future).


231. See Kircher, 373 F.3d at 850 (commenting that SLUSA preemption is major issue in course of litigation). For a discussion of the need to avoid another judicially created exception, see supra notes 211–16 and accompanying text.


233. See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 126 (2d Cir. 2003) (noting there is no express statutory exception in SLUSA for appellate review of remand orders); Abada v. Charles Schwab & Co. Inc., 300 F.3d 1112, 1119 (9th Cir. 2002) (concluding no judicial exception permits review).
the congressional intent to bar appellate review of remand orders.\textsuperscript{234} Appellate review of SLUSA preemption is needed for consistency and accuracy, but that need is satisfied when a plaintiff appeals a dismissal order under SLUSA to a circuit court.\textsuperscript{235}

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\textsuperscript{234} See \textit{Things Remembered}, 516 U.S. at 136 (Ginsburg, J., concurring) (noting "strong congressional policy against [appellate] review of remand orders" in § 1447(d) (quoting Sykes v. Tex. Air Corp., 834 F.2d 488, 490 (5th Cir. 1987))).

\textsuperscript{235} For a discussion of how cases dismissed under SLUSA provide the opportunity for circuit courts to review the district court determination, see \textit{supra} note 217–22 and accompanying text.