



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

11-2021

To Remove or Not To Remove - Is That the Question in 1933 Act Securities Cases?

Tanya Pierce

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Civil Procedure Commons](#), [Courts Commons](#), [Legal Remedies Commons](#), [Litigation Commons](#), and the [Securities Law Commons](#)

TO REMOVE OR NOT TO REMOVE—IS THAT THE QUESTION IN 1933 ACT SECURITIES CASES?

Tanya Pierce*

Litigants spend immense time and money fighting over procedure. That fact is especially true for procedural rules concerning where a case may be heard—which, in the context of class actions, can determine the viability of claims almost regardless of their underlying merit. The potential for class certification, which tends to be greater in state than in federal courts, can transform claims that alone are too small to even justify suing into threats so large that defendants routinely use the words “judicial blackmail” to describe them. This paper focuses on a growing conflict between federal statutory removal provisions that arises in alleged class actions involving the initial sale of securities, like cryptocurrencies, that are not sold on public exchanges. In this category of cases, the Securities Act of 1933 strictly prohibits removal to federal courts, while the Class Action Fairness Act appears to broadly allow it. Thus, courts have determined the two statutes are “irreconcilable.”

*This article disagrees with the growing trend to hold CAFA prevails and allows removal, but it first pushes back against the conclusion that the two statutes must be irreconcilable. It illustrates how CAFA could be read to exclude cases alleging claims solely under the 1933 Act, which would avoid the potential for conflict altogether. It then analyzes, in the alternative, why the Supreme Court’s 2018 decision in *Cyan Inc. v. Beaver County Employees Retirement Fund*¹ suggests that the 1933 Act should prevail. After *Cyan*, filings of securities class actions have increased dramatically, meaning understanding the interplay between these two statutes will become increasingly important.*

* I would like to thank the participants at the *Inaugural Workshop for Asian American Women in the Legal Academy* (especially Ming Chen, Monika Ehrman, Suzanne Kim, and Huyen Pham) for their valuable feedback on this article. I would also like to thank faculty members at Louisiana State University School of Law and the Texas A&M University School of Law who provided valuable feedback on the development of this article. I’m also grateful to Saurabh Vishnubhakat for his insightful, detailed comments on a later draft of the article.

¹ 138 S. Ct. 1061 (2018).

2021] *TO REMOVE OR NOT TO REMOVE* 597

Introduction.....	597
I. Summarizing Relevant Statutes	599
A. The 1933 Act and Other Relevant Securities Statutes	600
B. CAFA’s Jurisdiction and Removal Provisions	607
II. Identifying the Conflict.....	613
A. The Ninth Circuit’s Approach.....	615
B. The Seventh Circuit’s Approach	616
C. Analysis of the Approaches.....	622
III. Harmonizing the Statutes.....	626
A. Statutory Language	630
B. Statutory Framework.....	633
C. Legislative Intent.....	635
Conclusion	641

INTRODUCTION

As a practical matter, “procedure is power.”² Were that fact not true, litigants would not spend enormous time and expense fighting over procedure. But they do.³ Procedural rules—especially those involving whether certain aggregate litigation tools are available and whether courts have authority to hear a case—can enable plaintiffs to sue who would not otherwise be able to, and such choices can drive settlements, even where defendants think a case lacks merit.⁴ These forces are especially amplified in class actions, where plaintiffs often lack means to sue individually, but where together, the potential for outsized damages can impose enormous pressure on a defendant to settle. This paper focuses on a narrow but important procedural question that arises in the context of class action litigation involving the sale of securities that are not sold on public exchanges. These kinds of securities include cryptocurrencies, which are increasingly the

²Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1442 (2008).

³Cf. Rory Ryan, *It’s Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass*, 75 TENN. L. REV. 659, 679–82 (2008) (using empirical data to illustrate the high cost and long delays associated with litigating federal question removal under the *Grable* text).

⁴Burbank, *supra* note 2 at 1442; *see also, e.g.*, Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1861 (2006).

subject of public offerings, and mortgage-backed securities, which were at the center of the 2008 recession.

Over the past several decades, Congress has attempted to curb or eliminate the use of the class action device in securities cases and in other types of litigation.⁵ Specific to securities, in the 1990s, Congress passed two statutes specifically in response to concerns surrounding the use of the class action device in these kinds of cases.⁶ And more generally applicable to all of the nation's largest class actions, in 2005, Congress passed the Class Action Fairness Act⁷ to avoid what it perceived as state courts' eagerness to certify class actions, without subjecting them to the kind of careful scrutiny Rule 23 of the Federal Rules of Civil Procedure requires.⁸

Unfortunately, a conflict has developed between the non-removal provision, Section 22(a) of the Securities Act of 1933,⁹ and the jurisdiction and removal provisions in CAFA.¹⁰ While both statutes provide for concurrent state and federal jurisdiction, somewhat unusually, the 1933 Act contains an anti-removal provision.¹¹ That provision prevents defendants from removing certain cases to federal courts if plaintiffs choose to file them in state courts.¹² In contrast, CAFA, which amended the general diversity jurisdiction statute—28 U.S.C. § 1332—contains generous removal provisions.¹³ Indeed, the United States Supreme Court has declared that CAFA's removal provisions should be applied liberally, without any presumption against removal.¹⁴ In the category of cases to which both statutes

⁵ See *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066–67 (2018) (discussing the history of congressional attempts to curb securities class action litigation).

⁶ *Id.*

⁷ See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1332(d)(2)) (significantly expanding federal courts' subject matter jurisdiction over class actions).

⁸ See Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2525 (2008).

⁹ 15 U.S.C. § 77v(a).

¹⁰ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as 28 U.S.C. §§ 1332(d), 1453).

¹¹ 15 U.S.C. § 77v(a).

¹² *Id.*

¹³ See 28 U.S.C. § 1332(d); 28 U.S.C. § 1453.

¹⁴ *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014) (citing *Standard Fire Ins. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting S. Rep. 109-14, at 43 (2005))).

arguably apply, courts thus far have agreed the 1933 Act and CAFA conflict.¹⁵

In the last few years, filings of securities class actions have increased dramatically, with 1933 Act filings reaching “unprecedented levels” in recent years.¹⁶ Questions about whether CAFA applies at all in these cases, and, if so, whether Section 22(a)’s removal ban or CAFA’s liberal removal provisions should prevail are likely to continue occurring with increasing frequency.

This article attempts to bring clarity to the confusing question of which statute’s removal provision should apply, largely by illustrating the two statutes do not have to be interpreted in a way that creates the conflict. Instead, CAFA contains a specific exemption that could be interpreted to exempt from CAFA’s reach cases that allege certain kinds of claims solely under the 1933 Act. Interpreting this CAFA exemption in this way would eliminate CAFA’s jurisdiction and removal provisions from the calculus altogether. Thus, providing a clear answer: only the 1933 Act’s non-removal provision would apply.

I. SUMMARIZING RELEVANT STATUTES

As necessary context, one must consider the statutory framework in which the relevant securities statutes and CAFA are situated. One must also understand some of the ways in which Congress specifically attempted to limit the availability of the class action device in securities-related litigation as context for analyzing whether Congress intended to also affect the reach of the 1933 Act’s non-removal provision when it passed CAFA. An adequate understanding of these statutes and their relevant provisions allows one to identify the category of cases that arguably implicate both statutes’ provisions concerning removal. Thus, before the next section that explains how the statutes can and should be reconciled to avoid the conflict and in the

¹⁵Luther v. Countrywide Home Loans Servicing, L.P., 533 F.3d 1031, 1033 (9th Cir. 2008); Katz v. Gerardi, 552 F.3d 558, 561 (7th Cir. 2008).

¹⁶*Securities Class Actions filings—2019 Year in Review*, CORNERSTONE RSCH., 1, (comparing average annual class action filings from 1997–2018 of 215 with 2019’s class action filings of 428) available at <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review> (last visited Nov. 17, 2021). Filings in the first half of 2020 dropped somewhat. *Securities Class Actions Filings—2020 Mid-Year Assessment*, CORNERSTONE RSCH., 14, available at <https://www.cornerstone.com/Publications/Reports/2020-Securities-Class-Action-Filings-2020-Midyear-Assessment>. But given the COVID-19 crisis, many businesses, law offices, and courts were closed for months.

alternative which statute should prevail and why, this section first highlights Congress's initial creation of private rights of action in the 1930s related to securities transactions and summarizes the provisions of the 1933 Act that are relevant to understanding their interplay with certain provisions of CAFA. The section then briefly outlines Congress's two specific legislative attempts in the 1990s to curtail perceived abuses of the class action device by plaintiffs in certain kinds of securities cases. Finally, it describes Congress's passage of CAFA, largely in response to state courts' certifications of large, nationwide consumer class actions that CAFA's proponents argued exploited the use of the class action device without adequately subjecting certification decisions to the kind of scrutiny they would be subjected to if the cases were pending in federal courts that would have to apply Federal Rule of Civil Procedure 23's requirements.

A. *The 1933 Act and Other Relevant Securities Statutes*

Responding to the stock market crash of 1929, Congress sought “to promote honest practices in the securities markets,” so it passed two laws—the 1933 Act and the Securities Act of 1934 (the 1934 Act).¹⁷ The fundamental purpose underlying these acts was “to eliminate serious abuses in a largely unregulated securities market.”¹⁸ Congress recognized the “virtually limitless scope of human ingenuity, especially in the creation of ‘countless and variable schemes devised by those who seek to use the money of others on the promise of profits.’”¹⁹ Thus, in both acts, Congress defined the term “security” broadly such that the term encompasses “virtually any instrument that might be sold as an investment.”²⁰ The 1933 Act covers the original issuance of securities, requiring, among other things, that companies

¹⁷ *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018). For a description of market forces and how the “ebb and flow” of the market has influenced the securities legislation from the stock market crash of 1929 through the 2008 financial crisis precipitated by the housing market and subprime mortgages, see Denise Mazzeo, Note, *Securities Class Actions, CAFA, and a Countrywide Crisis: A Call for Clarity and Consistency*, 78 *FORDHAM L. REV.* 1433, 1433 (2009) (proposing removal be allowed under CAFA for securities cases “that are of real national importance”).

¹⁸ *Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990) (quoting *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975)).

¹⁹ *Reves*, 494 U.S. at 60–61 (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946)).

²⁰ *Reves*, 494 U.S. at 61 (interpreting term “security” in 1933 and 1934 Acts to include a demand note issued by a farmers’ co-op and outlining standards used to determine whether an instrument qualifies as a security) (citing *United Hous. Found., Inc.*, 421 U.S. at 847 n.12).

that sell securities to the public “make ‘full and fair disclosure’ of relevant information.”²¹ To enforce the obligations created by the Act, Congress included within it private rights of action to enforce those obligations.²²

The 1933 Act authorizes concurrent state and federal court subject matter jurisdiction over claims that arise under it.²³ Thus, plaintiffs have a choice and can choose to seek redress by filing in either state court or in federal court. Somewhat unusually, however, Section 22(a) of the 1933 Act specifically provides that if plaintiffs choose to file 1933 Act cases in state courts, defendants may not remove those cases to federal courts.²⁴ As originally enacted, Section 22(a) provided, “No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”²⁵ Thus, as originally drafted, no exceptions applied; cases filed in state court pursuant to the 1933 Act stayed there due to Section 22(a). In 2018, describing Section 22(a) as that provision was originally enacted, the Supreme Court explained, “So if a plaintiff chose to bring a 1933 Act suit in state court, the defendant could not change the forum.”²⁶ As explained below, in the 1990s, Congress amended Section 22(a) when it passed one of the statutes aimed at reforming class actions involving publicly traded securities, but it did not similarly amend Section 22(a) when it passed CAFA.²⁷

A year after passing the 1933 Act, Congress passed another securities statute: the 1934 Act. While the 1933 Act regulates the original issuance of

²¹ *Cyan*, 138 S. Ct. at 1066 (citing *Pinter v. Dahl*, 486 U.S. 622, 646 (1988)).

²² *Id.*

²³ *Cyan*, 138 S. Ct. at 1066 (citing § 22(a), 48 Stat. 86 (“The district courts of the United States . . . shall have jurisdiction[,] concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title.”)); *Luther v. Countrywide Home Loans Serv. L.P.*, 533 F.3d 1031, 1032 (9th Cir. 2008). Recall that federal courts have jurisdiction over only those matters permitted by the Constitution and authorized by Congress. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

²⁴ *Cyan*, 138 S. Ct. at 1066; *Luther*, 533 F.3d at 1033. Although the 1933 Act’s non-removal provision is unusual, it is not the only federal statute to contain such a provision. *See, e.g.*, 28 U.S.C. 1445 (listing some types of nonremovable actions); *Nielsen v. Weeks Marine Inc.*, 910 F. Supp. 84, 87 (E.D.N.Y. 1995) (recognizing Jones Act contains removal provision providing plaintiffs the privilege to file a claim in state court without risking removal).

²⁵ 15 U.S.C. § 77v(a). SLUSA amended this provision as described *infra*.

²⁶ *Cyan*, 138 S. Ct. at 1066.

²⁷ *See infra*.

securities, the 1934 Act regulates any subsequent trading of securities.²⁸ Like the 1933 Act, the 1934 Act's obligations can be enforced through private rights of action.²⁹ But unlike the 1933 Act's authorization of concurrent federal and state court jurisdiction, the 1934 Act provides exclusive federal court jurisdiction over suits filed pursuant to the 1934 Act.³⁰ Thus, while the 1933 Act allows plaintiffs to file claims in state courts, and if they do, prohibits removal of those cases to federal courts, the 1934 Act does not allow plaintiffs to file claims in state courts and does not allow those cases to proceed in state courts.³¹

By the mid-1990s, many argued plaintiffs were abusing the class-action vehicle in various kinds of securities cases.³² And, after the 1994 congressional elections, the securities and accounting industries, in particular, gained leverage in Congress and lobbied for reform.³³ In response to pressure from these and other groups, Congress passed two additional securities-specific statutes. First, it enacted the Private Securities Litigation Reform Act of 1995 (the Reform Act).³⁴ The Reform Act amended the 1933 and 1934 Acts in several ways in an attempt to thwart the alleged abuses by class action plaintiffs and their lawyers.³⁵

But the Reform Act proved to be less effective than its proponents had hoped because some of the Reform Act's provisions apply only to cases pending in federal courts and not to cases pending in state courts.³⁶ For example, when plaintiffs file a class action in federal court, the Reform Act requires the lead plaintiff's attorney to swear that he or she has not directed the lead plaintiff to purchase the security at issue.³⁷ In addition, when a case

²⁸ *Cyan*, 138 S. Ct. at 1066 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 752 (1975)).

²⁹ *Id.* (citing *Blue Chip Stamps*, 421 U.S. at 730, n.4).

³⁰ *Id.* (citing § 27, 48 Stat. 902–03).

³¹ *Id.*

³² *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)).

³³ Matthew O'Brien, *Choice of Forum in Securities Class Actions: Confronting "Reform" of the Securities Act of 1933*, 28 REV. LITIG. 845, 857 (citing Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 32 (1998)).

³⁴ Pub. L. No. 104-67, 109 Stat. 737.

³⁵ *Id.*; Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1489 (2006).

³⁶ *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066–67 (2018).

³⁷ *Id.* at 1067.

is pending in federal court, the Reform Act provides strict sanctions designed to discourage attorneys from bringing frivolous claims.³⁸

To circumvent these and other requirements of the Reform Act that targeted securities cases, knowledgeable plaintiffs' attorneys avoided federal courts.³⁹ During this time period, after the Reform Act was passed but before Congress addressed the weaknesses in the Reform Act and its later attempt through CAFA to limit the availability of nationwide class actions more generally, the law provided opportunities for plaintiffs to keep class actions in state rather than in federal courts.⁴⁰ They could file securities class actions in state courts based on the 1933 Act, which according to Section 22(a) could not be removed to federal court.⁴¹

Or they could file class action claims based solely on state laws, rather than pursuing those claims under the 1934 Act.⁴² These securities claims based on state laws did not provide for jurisdiction under the federal question jurisdiction statute.⁴³ In addition, the plaintiffs in an alleged nationwide class action could avoid federal court jurisdiction under the diversity statute by suing a defendant who shared citizenship with one of the plaintiffs, assuming the joinder was not fraudulent or by alleging individual damages that did not exceed the \$75,000, exclusive of costs and interests.⁴⁴ Because federal courts are courts of limited subject matter jurisdiction,⁴⁵ plaintiffs could avoid a

³⁸ See 15 U.S.C. § 77z-1(c) (mandating review to determine whether attorneys complied with Fed. R. Civ. P. 11 and mandating sanctions upon finding violations of that rule); 15 U.S.C. § 78u-4(c) (mandating review and sanctions similar to 15 U.S.C. § 77z-1(c)).

³⁹ *Cyan*, 138 S. Ct. at 1067 (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006)).

⁴⁰ *Id.*

⁴¹ See O'Brien, *supra* note 33, at 858–59 (citing 15 U.S.C. § 78u-4(b) and Jeffrey T. Cook, *Recrafting the Framework of Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 624 (2006)).

⁴² *Cyan*, 138 S. Ct. at 1062.

⁴³ See 28 U.S.C. § 1331; *Sissom v. Countrywide Homes Loans, Inc.*, 772 F. Appx. 75, 76 (5th Cir. 2019) (mem. op.) (holding that “there is generally no federal jurisdiction if the plaintiff pleads only a state law cause of action” unless “the complaint itself states a substantial federal claim”) (citing *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 489 (5th Cir. 2002); and *Maroney v. Univ. Interscholastic League*, 764 F.2d 403, 405 (5th Cir. 1985)).

⁴⁴ See 28 U.S.C. § 1332; Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1450–51 (2008) (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005)).

⁴⁵ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); see also, e.g., Tanya Pierce, *Dueling Grants: Reimagining CAFA's Jurisdictional Provisions*, 33 GA. ST. U. L. REV. 723, 727–28 (2017).

federal forum through carefully pleading claims, deliberately suing non-diverse parties, or limiting the alleged amount-in-controversy. By carefully crafting their complaints to avoid the original jurisdiction of federal courts and filing those complaints in state courts, plaintiffs increasingly succeeded in avoiding the reach of the Reform Act.⁴⁶ In response, defendants increasingly argued plaintiffs were exploiting “loopholes” in the Reform Act that allowed plaintiffs to continue pursuing securities class actions freely, despite the Reform Act’s attempts to reign in the use of the class action device in securities cases.⁴⁷

In response to these perceived shortcomings in the Reform Act, in 1998, just three years after passing the Reform Act, Congress passed yet another securities-specific statute aimed at curbing the use of class actions in securities cases: the Securities Litigation Uniform Standards Act (SLUSA).⁴⁸ Like the Reform Act before it, SLUSA attempted to circumvent plaintiffs’ use of the class action device in certain kinds of securities-related cases.⁴⁹ Among other things, SLUSA targeted plaintiffs’ ability to allege claims based solely on state law and avoid pleading any bases for federal question jurisdiction, thus avoiding the reach of the Reform Act.

SLUSA also targeted plaintiffs’ ability to rely on Section 22(a) of the 1933 Act as a sure-fire way to avoid removal to federal court. By specifically prohibiting plaintiffs from pursuing as class actions certain kinds of securities cases that allege misrepresentations or omissions of material fact or fraudulent activity connected to the purchase or sale of certain kinds of securities, SLUSA reaches many of the types of claims that plaintiffs bring under the 1933 Act. And prior to SLUSA’s enactment, all claims brought

⁴⁶ *Cyan*, 138 S. Ct. at 1067.

⁴⁷ See O’Brien, *supra* note 33, at 859 (illustrating that the “extent to which plaintiffs took advantage of these loopholes in uncertain”); see also Michael A. Perino, *Fraud and Federalism: Preempting Private Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 274 (1998) (describing the shift from filings in federal courts to state courts as “unintended” and a “by-product” of the Private Securities Litigation Reform Act); Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 351 (2011) (discussing same).

⁴⁸ Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

⁴⁹ *Cyan*, 138 S. Ct. at 1067. Legislative history further suggests SLUSA’s purpose was to provide a uniform, country-wide approach to litigation involving nationally traded securities. S. Rep. No. 105-182, at 3 (1988); see also Denise Mazzeo, *supra* note 17, at 1436–38 (arguing that market forces influence the level of investor protections, or lack thereof, in securities laws).

solely under the 1933 Act were subject to Section 22(a)'s prohibition against removal to federal court.⁵⁰

Broadly speaking, SLUSA prohibits plaintiffs from bringing “covered class actions” concerning “covered securities.”⁵¹ The term “covered class action” means a putative class action that involves common questions of law or fact brought on behalf of more than fifty persons.⁵² The term “covered security” means a security that is traded on a national exchange, such as the New York Stock Exchange, the NASDAQ, or the American Stock Exchange.⁵³

To give effect to SLUSA's prohibition against the use of the class action device in class actions involving fifty or more class members and claims concerning securities traded on a national exchange, Congress needed to prevent plaintiffs from avoiding SLUSA's reach in the ways that plaintiffs had learned to avoid the Reform Act's reach. In SLUSA, therefore, Congress provided an avenue for defendants to remove cases covered by SLUSA to federal court, even if plaintiffs alleged only state-law-based securities claims and even if plaintiffs alleged only claims under the 1933 Act.

Especially relevant to analyzing Section 22(a)'s interaction with CAFA's removal provision, one should note that in SLUSA, Congress amended Section 22(a) by removing the section's prohibition against removal for covered class actions involving securities traded on national exchanges.⁵⁴ Thus, SLUSA amended Section 22(a), which after SLUSA's amendment reads: “*Except as provided in section 77p of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.*”⁵⁵ The cross-referenced section in amended Section 22(a) is Section 77p, which provides “covered class

⁵⁰ *Cyan*, 138 S. Ct. at 1066–67.

⁵¹ 15 U.S.C. § 78bb(f).

⁵² *Id.* A covered class action is one that involves common questions of law or fact brought on behalf of more than fifty persons.

⁵³ 15 U.S.C. § 77p(c); 15 U.S.C. § 77r(b) (listing definitions).

⁵⁴ 15 U.S.C. § 77p(b). After SLUSA's passage, the 1933 Act's jurisdictional grant in § 77b(a) reads as follows:

The district courts of the United States . . . shall have jurisdiction[,] concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. (emphasis added).

⁵⁵ *Cyan*, 138 S. Ct. at 1068 (emphasis in original); 15 U.S.C. § 77v(a).

actions” (those filed on behalf of more than fifty persons) can be removed to federal court if the alleged class concerns a “covered security” (those traded on a national exchange).⁵⁶ Once these cases are removed, SLUSA instructs federal courts to dismiss them, thus giving effect to SLUSA’s prohibition against using the class action device in “covered class actions” involving “covered securities.”⁵⁷

In light of SLUSA’s passage, plaintiffs cannot pursue as class actions any sizable cases alleging claims solely under the 1933 Act if those claims involve covered securities traded on national exchanges. But SLUSA did not address non-covered securities that are not publicly traded on national stock exchanges. And recall that securities are defined broadly to include many types of instruments that might be sold as an investment, including, for example, debt-backed securities, mortgage-backed securities, cryptocurrencies, and others.⁵⁸ Class actions involving the initial sale or offerings of these non-covered securities are still covered by Section 22(a)’s prohibition.⁵⁹

While courts generally agreed that SLUSA removal and dismissal applied to all securities-related class actions concerning covered securities, the statute is not well written, and, as a result, over time, a split developed concerning whether SLUSA divested state courts of subject matter jurisdiction over class actions brought solely pursuant to the 1933 Act.⁶⁰ The Ninth Circuit Court of

⁵⁶ *Cyan*, 138 S. Ct. at 1067 (citing 15 U.S.C. § 77p(f)(3) and cross-referencing § 77r(b)).

⁵⁷ 15 U.S.C. § 77p(c).

⁵⁸ In the cryptocurrency industry, the initial public offering is an initial coin offering. See Jake Frankenfield, *Cryptocurrency: Initial Coin Offering (ICO)*, INVESTOPEDIA (November 3, 2020), <https://www.investopedia.com/terms/i/initial-coin-offering-ico.asp>; see also *Investor Bulletin: Initial Coin Offerings*, U.S. SEC. AND EXCH. COMM’N (July 25 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_coinofferings (explaining that depending on the offering, individual tokens or coins may qualify as securities subject to the securities laws); *Coffey v. Ripple Labs Inc.*, 333 F. Supp. 3d 952, 955–56 (N.D. Cal. 2018); *Reves v. Ernst & Young*, 494 U.S. 56, 60–61 (1990) (interpreting term “security” broadly to include demand note issued by farmers co-op); see also *Lincoln Nat’l Life Ins. v. Bezich*, 610 F.3d 448, 450 (7th Cir. 2010) (recognizing “a ‘security’ includes an interest in something that gives the holder the right to purchase a security”).

⁵⁹ *Cyan*, 138 S. Ct. at 1069, 1075.

⁶⁰ *Id.* at 1068–69 n.1 (comparing *Luther v. Countrywide Fin. Corp.*, 195 Cal. App. 4th 789, 797–98, 125 Cal. Rptr. 3d 716, 721 (2011) (holding continued state court jurisdiction) with *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009), abrogated by *Cyan*, 138 S. Ct. 1061 (2018) (holding no state court jurisdiction); see also Richard K. Neumann Jr., *Why Congress Drafts Gibberish*, 16 LEGAL COMM. & RHETORIC: JALWD 111, 111–14 (2019) (describing SLUSA, in

Appeals held SLUSA did not divest state courts of concurrent jurisdiction, while courts in the Second Circuit held the opposite.⁶¹ And, although that split is not the subject of this article, the Supreme Court's resolution in the *Cyan v. Beaver County* case in favor of Section 22(a) provides insight into how this section should interact with CAFA's removal provisions. Before delving into those insights, however, a brief explanation of CAFA's relevant provisions is necessary.

B. CAFA's Jurisdiction and Removal Provisions

Like the 1933 Act that authorizes concurrent jurisdiction in state and federal courts over securities cases that meet its requirements, CAFA authorizes concurrent jurisdiction in federal and state courts over class actions that meet CAFA's requirements as long as the class actions do not fall within CAFA's carve-outs or exceptions.⁶² In this way, both statutes' grants of jurisdiction are consistent with the "deeply rooted presumption in favor of concurrent" state and federal court jurisdiction.⁶³ Unless a statute explicitly calls for exclusive jurisdiction, the statute's legislative history is unmistakable in requiring it, or there exists a "clear incompatibility between state-court jurisdiction and federal interests," courts interpret jurisdictional grants as incorporating concurrent subject matter jurisdiction.⁶⁴

Similar to the motivation underlying the passage of the securities-specific Reform Act and SLUSA in the 1990s, Congress's passage of CAFA in 2005 has been described as a response to perceived abuses of the class action system and as an attempt to "address some of the most egregious problems

response to oral argument in *Cyan*, as "a statute so complicated that neither the [Supreme Court] justices nor the lawyers arguing the case could really understand it").

⁶¹ *Cyan*, 138 S. Ct. at 1068–69 (comparing *Luther*, 195 Cal. App. 4th 789, 797–98, 125 Cal. Rptr. 3d 716, 721 (2011) with *Knox*, 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009), abrogated by *Cyan*, 138 S. Ct. 1061 (2018)).

⁶² Compare 28 U.S.C. § 1332(d)(2) with *Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990) (recognizing a "deeply rooted presumption in favor of concurrent" state court jurisdiction unless the statute explicitly calls for exclusive jurisdiction, the legislative history is unmistakable in requiring it, or a "clear incompatibility" exists between state court jurisdiction and federal interests"). That concurrent jurisdiction is intended is also evidenced by CAFA's provisions providing federal courts discretion to decline hearing certain kinds of class actions. See 28 U.S.C. § 1332(d)(3).

⁶³ *Tafflin*, 493 U.S. at 459–60.

⁶⁴ *Id.*

in class action practice.”⁶⁵ Before CAFA’s enactment, federal courts rarely had jurisdiction over large, nationwide class actions that were based on state rather than federal law.⁶⁶ Unless the underlying claims implicated federal question jurisdiction under 28 U.S.C. 1331, federal courts generally lacked subject matter jurisdiction.⁶⁷ The general diversity statute nearly never provided jurisdiction because in nationwide class actions, the alleged class presumably would include members domiciled in every state, thus defeating the traditional requirement of complete diversity.⁶⁸

Thus, there existed a perception that unscrupulous lawyers were filing lawsuits for their own personal gains and choosing to file in state courts that were “lax about following the strict requirements of Rule 23.”⁶⁹ The lack of an available federal forum for most consumer class actions, proponents argued, allowed plaintiffs “unbounded leverage,” forced defendants to pay “ransom” settlements, and encouraged “blatant forum shopping.”⁷⁰ Thus, CAFA’s supporters, on the one hand, argued that large class actions should be decided by federal courts that would more carefully weigh certification decisions independent of the potential merits of underlying claims, which might otherwise improperly influence those decisions.⁷¹ CAFA’s detractors, on the other hand, argued CAFA symbolized an attempt to preempt state class

⁶⁵ S. Rep. 109-14, 2005 U.S.C.C.A.N. 3; G. Shaun Richardson, *Class Dismissed, Now What? Exploring the Exercise of CAFA Jurisdiction After the Denial of Class Certification*, 39 N.M. L. REV. 121, 125 n.30 (2009) (citing Pub. L. No. 109-2 § 2(b)(2), 119 Stat. 4 (2005) (“The purposes of this Act are to . . . restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”)). *But see* Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 760–61 (aptly describing the title of the Class Action Fairness Act as “a misnomer if ever there was one” and the Act’s passage as being the result of a more conservative Congress responding to business interests and corporate and defense groups).

⁶⁶ *Compare, e.g.*, the general diversity statute, 28 U.S.C. § 1332, which requires complete diversity of citizenship, *with* CAFA, 28 U.S.C. § 1332(d), which requires only minimal diversity.

⁶⁷ Tanya Pierce, *It’s not Over ‘til It’s Over: Mandating Federal Pretrial Jurisdiction and Oversight in Mass Torts*, 79 MO. L. REV. 27, 38 (2014).

⁶⁸ *See* *Strawbridge v. Curtiss*, 7 U.S. 267 (1807) (requiring complete diversity of citizenship for jurisdiction to exist under § 1332); *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1451 (2008).

⁶⁹ S. Rep. 109-14, 2005 U.S.C.C.A.N. at 14–15.

⁷⁰ MCLAUGHLIN ON CLASS ACTIONS, § 12:6 (17th ed.) (citing S. Rep. No. 108-123, at 15, 18, 21 (2003); S. Rep. No. 108-144, at 12 (2003); 151 Cong. Rec. H729 (Feb. 17, 2005)).

⁷¹ *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 165 (citing S. Rep. 109-14, 2005 U.S.C.C.A.N. at 6, 7) (quoting Senator Arlen Specter).

actions to benefit “corporate behemoths” at the expense of the country’s most vulnerable citizens’ rights to seek redress through the courts for corporate wrongdoings.⁷² Despite these conflicting views, courts have recognized Congress’s intent, in part, was to ““restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.””⁷³

CAFA attempted to do so by effectively federalizing the nation’s largest class actions, with certain exceptions.⁷⁴ CAFA thus allows federal courts to hear most of the nation’s largest multi-state class actions, even those based solely on state law.⁷⁵ To implicate subject matter jurisdiction under CAFA, an alleged class must involve at least 100 members, the alleged amount in controversy in the aggregate must exceed \$5 million, the citizenship of the plaintiffs and defendants must be at least “minimally diverse,” and none of CAFA’s carve-outs or CAFA’s exceptions can apply.⁷⁶

⁷² *Id.* at 164 n.4 (citing 151 Cong. Rec. H. 643-01, H. 644 (daily ed. Feb. 16, 2005) (statement of Rep. McGovern) (“[T]his bill . . . closes the courthouse door in the face of people who need and deserve help . . . unduly limit[ing] the right of individuals to seek redress for corporate wrongdoing in their state courts.”)).

⁷³ *Luther v. Countrywide Home Loans Serv. L.P.*, 533 F.3d 1031, 1034 (9th Cir. 2008) (citing Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (codified as a note to 28 U.S.C. § 1711)).

⁷⁴ *Id.*; Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as 28 U.S.C. § 1332(d) (significantly expanding federal courts’ jurisdiction over class actions that meet its requirements); *Cunningham Charter Corp. v. Learjet, Inc.* 592 F.3d 805, 806–07 (7th Cir. 2010); see also Tanya Pierce, *supra* note 67, at 38; Elizabeth Chamblee Burch, *CAFA’s Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2525–26 (2008).

⁷⁵ 28 U.S.C. § 1332(d). Minimal diversity exists when the citizenship of any class member is diverse from that of any defendant. 28 U.S.C. § 1332(d)(1)(D); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1194 n.24 (7th Cir. 2007). Before CAFA, federal courts would in most cases lack jurisdiction of nationwide class actions unless the underlying cause of action were based on federal law, implicating federal question jurisdiction under 28 U.S.C. § 1331. Jurisdiction under the diversity statute nearly never existed in cases involving U.S. companies because in nationwide class actions, the alleged class presumably would include members domiciled in every state. See *Strawbridge v. Curtiss*, 7 U.S. 267 (1807) (requiring complete diversity of citizenship for jurisdiction under § 1332).

⁷⁶ The relevant jurisdictional provision in 28 U.S.C. § 1332(d)(2) provides:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign sate and any defendant is a citizen of a State; or

Despite CAFA's expansion of diversity jurisdiction to most of the nation's largest class actions, however, Congress incorporated into the statute some limitations to CAFA's reach. Such limitations include the following: (1) CAFA carves out class actions in which "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief";⁷⁷ (2) CAFA does not apply to class actions in which the "number of members of all proposed plaintiff classes in the aggregate is less than 100";⁷⁸ (3) CAFA mandates courts "shall decline to exercise jurisdiction" in some cases;⁷⁹ (4) CAFA allows courts discretion to decline to exercise jurisdiction in other cases;⁸⁰

any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

Section 1332(d)(9) lists CAFA's exceptions, providing the following:

Paragraph (2) [the jurisdictional grant] shall not apply to any class action that solely involves a claim—(A) concerning a covered security as defined under § 16(f)(3) of the Securities Act of 1933 (15 U.S.C. § 78p(f)(3)) and § 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. § 78bb(f)(5)(E)); (B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or (C) that relates to the rights, duties (including fiduciary duties), and obligations related to or created by or pursuant to any security (as defined under § 2(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77b(a)(1)) and the regulations issued thereunder).

⁷⁷ 28 U.S.C. § 1332(d)(5)(A).

⁷⁸ 28 U.S.C. § 1332(d)(5)(B).

⁷⁹ 28 U.S.C. § 1332(d)(4) provides:

A district court shall decline to exercise jurisdiction . . . (A)(i) over a class action in which—(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed; (II) at least 1 defendant is a defendant—(aa) from whom significant relief is sought by members of the plaintiff class; (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and (cc) who is a citizen of the State in which the action was originally filed; and (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or (B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

⁸⁰ 28 U.S.C. § 1332(d)(3) provides:

and (5) CAFA excludes certain types of claims from its jurisdictional grant altogether.⁸¹

Among the kinds of cases for which CAFA excludes from its jurisdiction are three categories of class actions involving securities and business governance. The first category exempts class actions that solely involve a claim concerning a “covered security” as defined by the 1933 and 1934 Acts.⁸² The second category exempts class actions arising under the laws of the state in which a business is organized and related to the internal affairs or governance of the business.⁸³ The third category—1332(d)(9)(C)—exempts any “class action that solely involves a claim” related to the “rights, duties (including fiduciary duties), and obligations related to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).”⁸⁴ Each of these exemptions is mirrored in CAFA’s removal provisions in Section 1453.

A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of (A) whether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by the laws of the State in which the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens in the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year prior preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

⁸¹ 28 U.S.C. § 1332(d)(9). For the language of these exceptions, see *supra* note 76.

⁸² *Id.* at § 1332(d)(9)(A) (citing 15 U.S.C. §§ 78p(f)(3) and 78bb(f)(5)(E)). Under the 1933 Act, a “covered security” is a security “traded nationally or listed on a regulated national exchange.” *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1063 (2018); *Estate of Pew*, 527 F.3d at 34 (citing 15 U.S.C. §§ 77r(b), 77p(f)(3), 78bb(f)(5)(E)); *Owen v. Elastos Found.*, 438 F. Supp. 3d 187, 188–89 (S.D.N.Y. 2020); *Davis v. Chase Bank U.S.A.*, 453 F. Supp. 2d 1205, 1209 (C.D. Cal. 2006) (holding credit card agreements, bills, and finance charges are not securities, so this exemption does not apply to them).

⁸³ 28 U.S.C. § 1332(d)(9)(b).

⁸⁴ 28 U.S.C. § 1332(d)(9)(c).

With regard to removal from state to federal court, CAFA is quite different than the 1933 Act. Indeed, in CAFA, Congress enacted liberalized removal rules, exempting from cases removed pursuant to CAFA many of the traditional limitations on removals to federal court and all of the diversity specific limitations.⁸⁵ Instead, for class actions that are not subject to mandatory abstention under the carve-outs⁸⁶ or that do not fall within the listed exclusions to CAFA's jurisdictional grant,⁸⁷ CAFA provides quite liberal removal rules.⁸⁸ Under CAFA:

A class action may be removed to a district court of the United States in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.⁸⁹

Thus, while under the general diversity statute, all defendants must join in or consent to the removal for it to be valid, in cases removed pursuant to CAFA, any defendant may remove a qualifying alleged class action on its own accord.⁹⁰ In addition, in other cases removed pursuant to the diversity statute, removal is not allowed if any of the defendants are citizens of the state in which the case is filed.⁹¹ But the existence of a home-state defendant does not affect the availability of removal pursuant to CAFA.⁹² Similarly, ordinarily, in cases removed under the diversity statute, there is a one-year outer limit on removals in the absence of bad faith on the part of the plaintiff, but the one-year limit does not apply to removals under CAFA.⁹³

Finally, while ordinarily, a presumption against removal exists, the Supreme Court in the *Dart Cherokee Basin Operating Co. v. Owens* case

⁸⁵ 28 U.S.C. § 1453 (allowing class actions to be removed in accordance with the removal rules in § 1446, but not applying the 1-year limitation, the home-state defendant limitation, or the requirement that all defendants consent in the removal).

⁸⁶ 28 U.S.C. § 1332(d)(4).

⁸⁷ 28 U.S.C. § 1332(d)(9).

⁸⁸ See 28 U.S.C. § 1453 (providing for removal of class actions irrespective of the typical one-year limitation and without regard to whether any defendant is a citizen of the forum state).

⁸⁹ *Id.*

⁹⁰ See *id.*

⁹¹ 28 U.S.C. § 1441(b)(2).

⁹² See 28 U.S.C. § 1453.

⁹³ Compare 28 U.S.C. § 1446(c)(1), with 28 U.S.C. § 1453.

categorically declared that “no anti-removal presumption attends cases invoking CAFA,” which is a significant departure from ordinary removals, for defendants must overcome a presumption against removal.⁹⁴ In *Dart Cherokee*, the Supreme Court instead announced, “CAFA’s provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.”⁹⁵ And unlike traditional remand decisions in other types of cases for which immediate appeal is not available, CAFA’s removal provisions provide courts of appeals discretion to “accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed,” as long as the appeal is timely filed.⁹⁶

II. IDENTIFYING THE CONFLICT

If a court determines that both the 1933 Act and CAFA simultaneously apply in a case, the two statutes’ removal provisions will inevitably conflict.⁹⁷ The kind of cases in which both statutes could arguably apply are fairly narrow. To implicate Section 22(a)’s prohibition against removal, plaintiffs must allege only claims arising under the 1933 Act concerning defendants’ failure to make required disclosures in the original issuance of securities, but not just any securities.⁹⁸ The securities at issue would have to be so-called “noncovered securities” under SLUSA, meaning the securities could not be ones traded on any national market.⁹⁹ To implicate CAFA’s jurisdiction and removal in the same case, the plaintiffs would have to allege a large nationwide class action that includes at least 100 putative class members, at least minimal diversity between the plaintiffs and defendants, and aggregated damages that exceed \$5 million, exclusive of interest and costs.¹⁰⁰

⁹⁴ 574 U.S. 81, 89 (2014) (citing *Standard Fire Ins. v. Knowles*, 568 U.S. 588, 595 (2013)).

⁹⁵ *Id.* (quoting S. Rep. 109-14, at 43 (2005)).

⁹⁶ 28 U.S.C. § 1453(c)(1).

⁹⁷ Compare 15 U.S.C. § 77v(a) (providing an express exception to removal for certain class actions under the ‘33 Act), with 28 U.S.C. § 1453(c)(1) (providing a broad right to remove class actions).

⁹⁸ See 15 U.S.C. § 77k (providing for civil liability for untrue or misleading registration statements); 15 U.S.C. § 77l (providing for civil liability for untrue or misleading prospectuses).

⁹⁹ See *Cyan, Inc. v. Beaver Cnty Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018) (citing *Pinter v. Dahl*, 486 U.S. 622, 646 (1988)).

¹⁰⁰ See, e.g., *Owen v. Elastos Found.*, 438 F. Supp. 3d 187, 190 (S.D.N.Y. 2020); *Luther v. Countrywide Home Loans Servicing, L.P.*, 533 F.3d 1031, 1033–34 (9th Cir. 2008).

Even though the category of cases in which the conflict between the two statutes can arise is narrow, the number of cases being filed is likely to grow at an alarming rate. Indeed, since the Supreme Court decided the *Cyan Inc. v. Beaver County Employees Retirement Fund* case,¹⁰¹ filings under the 1933 Act have increased a great deal.¹⁰² At the same time, offerings of securities that are not traded on a national market have also rapidly increased, especially in the form of initial public offerings for various kinds of cryptocurrencies.¹⁰³ Thus, cases implicating the potential conflict between the two statutes removal provision are likely to grow rapidly as well.

And in those cases, unless, as described in the next section, a court determines that CAFA does not apply, the two statutes' removal provisions will contradict each other. Application of Section 22(a) would deny a defendant the right to remove, while CAFA would simultaneously grant the defendant the right to remove.¹⁰⁴ Consequently, every court that has determined both statutes applied and "considered the interplay between [the 1933 Act's] removability bar and CAFA's removal provision has found that the two statutes are irreconcilable."¹⁰⁵ Some courts, following the Ninth Circuit's approach, hold the 1933 Act should prevail.¹⁰⁶ Other courts, following the Seventh Circuit's approach, hold CAFA should prevail.¹⁰⁷ Both approaches are described and critiqued below.

¹⁰¹ 138 S. Ct. 1061 (2018) (settling conflicts surrounding jurisdiction and removal in cases in which both the 1933 Act and in the 1998 Securities Litigation Uniform Standards Act applied); Johnson, *supra* note 47, at 349–351 (discussing same).

¹⁰² Maureen Farrell, *U.S. IPO Market Reaches Record Total*, WALL ST. J., Dec. 31, 2020.

¹⁰³ See Patricia Kowsmann and Caitlin Ostroff, *Biggest Crypto Exchange is Everywhere and Nowhere.*, WALL ST. J., Nov. 12, 2021.

¹⁰⁴ The Supreme Court instructs that to determine the meaning of a statute, courts must begin by consulting the statute's text: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

¹⁰⁵ *Owen*, 438 F. Supp. 3d at 191 (citing *Katz v. Gerardi*, 552 F.3d 558, 561 (7th Cir. 2009); *N. J. Carpenters Vacation Fund v. Harborview Mortg. Loan Tr.* 2006-4, 581 F. Supp. 2d 581, 586 (S.D.N.Y. 2008); *Luther v. Countrywide Home Loans Servicing, L.P.*, No. 2:07-cv-08165-MRP, 2008 WL 11339604, at *3 (C.D. Cal. Feb. 28, 2008), *aff'd*, 533 F.3d 1031 (9th Cir. 2008)).

¹⁰⁶ See, e.g., *Greenwald v. Ripple Labs, Inc.*, No. 18-cv-04790-PJH, 2018 WL 4961767, at *3 (N.D. Cal. Oct. 15, 2018) ("And while defendants are free to argue to the Ninth Circuit that *Luther* was wrongly decided, those arguments fail to persuade this court.").

¹⁰⁷ See, e.g., *Owen*, 438 F. Supp. 3d at 190 (holding Section 22(a) of the 1933 Act must cede to CAFA's removal provisions).

A. The Ninth Circuit's Approach

As the first of the circuit courts to confront the conflict, the Ninth Circuit, in the *Luther v. Countrywide Home Loans Servicing* case, held CAFA did not supersede the 1933 Act's prohibition against removal.¹⁰⁸ *Luther* involved a class of investors who sought compensation for alleged violations of the 1933 Act involving the acquisition of hundreds of billions of dollars of mortgage pass-through certificates from the defendants.¹⁰⁹ The defendants, they alleged, issued false and misleading registration statements and prospectus materials for the certificates, violating several sections of the 1933 Act and causing the investments to be much riskier than represented.¹¹⁰ The complaint expressly excluded and disclaimed any allegations of fraud or intentional or reckless misconduct—claims that would not have arisen under the 1933 Act and would have been subject to removal and dismissal under SLUSA.¹¹¹

One of the defendants, Countrywide, removed the action to federal court pursuant to CAFA.¹¹² Relying on Section 22(a) of the 1933 Act, the named plaintiff moved to remand the case back to state court, arguing the 1933 Act specifically prohibited the removal of claims filed in state court arising under the 1933 Act.¹¹³ Countrywide countered that Section 22(a)'s prohibition against removal did not operate to prevent removal under CAFA because none of CAFA's exemptions applied.¹¹⁴ The district court agreed with the plaintiff, however, "holding CAFA and [Section] 22(a) cannot mutually coexist and that the specific bar against removal in the Securities Act of 1933 trumps CAFA's general grant of diversity and removal jurisdiction."¹¹⁵ Defendants sought permission to appeal the remand order, which the Ninth Circuit granted.¹¹⁶

Applying a *de novo* review standard, the Ninth Circuit upheld the district court's order remanding the case.¹¹⁷ The Ninth Circuit's reasoning rested on

¹⁰⁸ 533 F.3d 1031, 1034 (9th Cir. 2008).

¹⁰⁹ *Id.* at 1032.

¹¹⁰ *Id.* at 1032–33 (Plaintiffs alleged violations of sections 11, 12(a)(2), and 15 of the 1933 Act, 15 U.S.C. §§ 77k, 771 (a)(2) and 77o.).

¹¹¹ *See id.* at 1033.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1033–34.

two grounds. First, the court determined that the defendant did not meet its burden to establish that removal was proper, given the traditional rule that “removal statutes are strictly construed against removal,” with doubts resolved against removability.¹¹⁸ Second, the court compared the two statutes and determined that the 1933 Act’s prohibition against removal was more specific than “CAFA’s general grant of the right of removal of high-dollar class actions.”¹¹⁹ “It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”¹²⁰ The court reasoned the 1933 Act was more specific because it applies only to a narrow subject of securities cases and because the non-removal provision, Section 22, applies more precisely only to claims arising under that Act.¹²¹ In contrast, CAFA “applies to ‘a generalized spectrum’ of class actions.”¹²² Thus, the court held the plaintiffs class action that alleged violations of only the 1933 Act was not removable.¹²³

B. *The Seventh Circuit’s Approach*

Fewer than six months after the Ninth Circuit decided the *Luther* case, the Seventh Circuit decided *Katz v. Gerardi*, in which it reached the opposite conclusion.¹²⁴ According to the Seventh Circuit, CAFA should prevail over the 1933 Act.¹²⁵ Three primary reasons underlie the Seventh Circuit’s decision in *Katz*: (1) an apparent belief that the plaintiff plead nonviable claims under the 1933 Act specifically to avoid removal to federal court; (2) the maxim that older laws generally must yield to conflicting newer laws when neither statute is more specific than the other; and (3) its conclusion

¹¹⁸ *Id.* at 1034 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941)); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). This ground has been called into question by the Supreme Court’s decision in 2014 in *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014) (citing *Standard Fire Ins. v. Knowles*, 568 U.S. 588, 593–94 (2013) (quoting *S. Rep.* 109-14, at 43 (2005)), in which the Court declared that no anti-removal presumption accompanies removal under CAFA.

¹¹⁹ *Luther*, 533 F.3d at 1034.

¹²⁰ *Id.* (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 552 F.3d 558 (7th Cir. 2008).

¹²⁵ *Id.* at 561.

that to hold Section 22(a) prevailed would render most of CAFA's removal provisions "pointless."¹²⁶ Each of these reasons is discussed in turn.

Both the district court and the Seventh Circuit in *Katz* expressed significant skepticism regarding whether the plaintiff's claims arose under the 1933 Act at all.¹²⁷ The plaintiff's proposed class included persons who contributed to a real estate investment trust in exchange for interests, called A-1 units, in the trust.¹²⁸ When the owners of the trust merged with another company, the owners offered those with original A-1 units money or new units in the merger's newly formed entity.¹²⁹ The plaintiff accepted cash for the units but then filed a putative class action in state court claiming the merger violated the terms of the original A-1 units.¹³⁰ The defendant removed the action pursuant to CAFA.¹³¹

Plaintiff's class-complaint alleged claims under the 1933 Act, but the defendants argued that plaintiff cast the complaint under the 1933 Act specifically to avoid removal to federal court.¹³² There was, after all, a duplicative class action pending in the District Court for the District of Colorado with the same putative class of plaintiffs against the same defendants arising from the same transaction.¹³³ The difference, however, was that in the Colorado case, the plaintiff had asserted state law claims, rather than 1933 Act claims, taking that case out of Section 22(a)'s prohibition and rendering it removable to the Colorado federal district court.¹³⁴ The defendants thus urged the court to deny remand because if the court were to look beyond the allegations of the complaint, it would find that the plaintiff's alleged claims under the 1933 Act were not viable.¹³⁵

Both the district court and the Seventh Circuit expressed skepticism concerning the doctrine through which the plaintiff argued its 1933 Act

¹²⁶ *Id.* at 560–63.

¹²⁷ *Id.* at 560.

¹²⁸ *Id.* at 559.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Katz v. Gerardi*, No. 08 cv 04035, 2008 WL 4376815, at *1, *3 n.3 (N.D. Ill. Sept. 23, 2008), *rev'd by* 552 F.3d 558 (7th Cir. 2008).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.*

claims in Seventh Circuit case were viable.¹³⁶ The Seventh Circuit even characterized the plaintiff's actions as "word play designed to overcome the actual text of the securities laws."¹³⁷

Nevertheless, and unlike the Seventh Circuit, the district court concluded the state court was the proper forum for the propriety of the alleged claims to be determined due to Section 22(a)'s prohibition on removal.¹³⁸ Because plaintiff alleged solely claims arising under the 1933 Act, the district court reasoned that Section 22(a) evidenced "Congress's intent to have such actions heard in state court if they were initially filed there."¹³⁹ Further, recognizing "a plaintiff is the master of his complaint," the court determined that "even if the Court agreed with Defendants that Katz's claims under the [1933] Act lacked merit and that Katz alleged them to avoid removal," such claims could still not be removed under Section 22(a).¹⁴⁰ Regarding defendants' arguments that removal was proper under CAFA, the district court disagreed, instead finding the Ninth Circuit's reasoning in *Luther* persuasive.¹⁴¹ Like the Ninth Circuit before it, the district court concluded that Section 22 of the 1933 Act was more specific than CAFA, because section "22(a) deals only with securities litigation," while CAFA "covers class actions in many substantive fields."¹⁴² Thus, the district court granted the plaintiff's motion to remand.¹⁴³

On appeal, the Seventh Circuit's discussion began by pointing out, as the defendants had argued below, that only purchasers of securities may pursue actions under the 1933 Act.¹⁴⁴ But the Seventh Circuit pointed out that the plaintiff "sold his units for cash; he did not buy any new security."¹⁴⁵ Then, characterizing the "new A-1 Units" as "figments of a lawyer's imagination,"

¹³⁶ *Katz*, 552 F.3d at 560; *Katz*, 2008 WL 4376815, at *4 ("The Court does not necessarily find Katz's argument factually persuasive that he is a purchaser or acquirer of securities under the fundamental change doctrine.")

¹³⁷ *Katz*, 552 F.3d at 560.

¹³⁸ *Katz*, 2008 WL 4376815, at *4.

¹³⁹ *Id.* (citing *Luther v. Countrywide Home Loan Servicing, L.P.*, 533 F.3d 1031 (9th Cir. 2008); and *Nauheim v. Interpublic Group of Cos.*, No. 02-C-9211, 2003 WL 1888843 (N.D. Ill. Apr. 16, 2003)).

¹⁴⁰ *Id.* at *4.

¹⁴¹ *Id.*

¹⁴² *Katz*, 552 F.3d at 560.

¹⁴³ *Katz*, 2008 WL 4376815, at *5.

¹⁴⁴ *Katz*, 552 F.3d at 560.

¹⁴⁵ *Id.*

the Seventh Circuit warned that using “legally fictitious (and factually nonexistent) ‘new A-1 Units’ to nullify a legislative decision that only buyers have rights under the 1933 Act would be wholly unjustified,” and “this circuit follows the statutes rather than trying to evade them with legal fictions.”¹⁴⁶

According to the Seventh Circuit, the plaintiff’s claims arose under state law rather than under federal securities law.¹⁴⁷ It stated, “[i]t is hard to distinguish between a claim artfully designed to defeat federal jurisdiction and one that is properly pleaded but unsuccessful on the merits, but it cannot be right to say that a pleader’s choice of language always defeats removal.”¹⁴⁸ Instead, the court declared:

A complaint pleads grievances rather than law; a federal court must decide for itself the claim’s legal classification. This is true whether the pleader tries to get into federal court by insisting that a state-law claim “really” arises under federal law, or to stay out by declaring that a claim arising under federal law “really” depends on state law alone.¹⁴⁹

The Seventh Circuit warned that parties cannot block removal or, conversely, try to attain federal court jurisdiction by asserting that a claim “really” arises under the law that results in the desired forum that would otherwise be unavailable.¹⁵⁰

After expressing this significant doubt that the plaintiff’s claims arose under the 1933 Act, the court acknowledged federal securities law had “some role to play” such that the court thought “it best to assume that Katz’s complaint is not *just* artful pleading, and to ask whether § 22(a) insulates all claims under the 1933 Act from removal under the 2005 Act.”¹⁵¹ Moving to the interplay between Section 22(a) and CAFA, like the Ninth Circuit, the Seventh Circuit found the provisions incompatible and declared “one or the other must yield.”¹⁵² “Usually the older law yields to the newer.”¹⁵³ Without citation then, the Seventh Circuit stated that the canon relied on by the Ninth

¹⁴⁶ *Id.* (citing *SEC v. Jakubowski*, 150 F.3d 675, 680 (7th Cir. 1998); *Isquith v. Caremark Int’l, Inc.*, 136 F.3d 531, 535–37 (7th Cir. 1998)).

¹⁴⁷ *Katz*, 552 F.3d at 560 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 561.

¹⁵⁰ *See id.*

¹⁵¹ *Id.* (emphasis in original).

¹⁵² *Id.*

¹⁵³ *Id.*

Circuit—preserving older, more specific statutes over newer, more general statutes—“works when one statute is a subset of the other,” and it questioned the premise that the 1933 Act is more specific than CAFA.¹⁵⁴

The Seventh Circuit pointed out that while Section 22(a) covers only securities actions, its coverage is not limited to securities actions of a certain size.¹⁵⁵ Rather, Section 22(a) covers single-investor suits and class actions—both large and small.¹⁵⁶ By contrast, it observed CAFA applies only to large, multi-state class actions.¹⁵⁷ And it posed the following question: “Is the 1933 Act more specific because it deals only with securities law, or is [CAFA] more specific because it deals only with nationwide class actions?”¹⁵⁸ Finding no answer to its own question, the court declared the canon relied on by the Ninth Circuit did not provide the answer to the question of which statute should prevail.¹⁵⁹ Since *Katz* was decided, courts in the Second Circuit have agreed with its analysis.¹⁶⁰

The court in *Katz* also stated its conclusion was necessary because to hold Section 22(a) prevailed would render most of CAFA’s removal provisions “pointless.”¹⁶¹ It stated CAFA’s three exemptions listed in Section 1453(d), which mirror the exemptions in Section 1332(d)(9), “tell[] us how the new removal rule applies to corporate and securities actions.”¹⁶² Unremarkably, it stated that claims listed in those sections are not removable, but other securities actions that meet CAFA’s requirements are removable.¹⁶³ It then declared that to read Section 22(a) of the 1933 Act as preventing the plaintiff’s case from being removed “would be to make most of [CAFA’s removal provisions] pointless.”¹⁶⁴

Remarkably, given the Ninth Circuit’s opposite decision just months earlier, the Seventh Circuit concluded, “Section 1453(d) leaves no doubt

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 561–62.

¹⁶⁰ *See, e.g.,* *Owen v. Elastos Found.*, 438 F. Supp. 3d 187, 191 (S.D.N.Y. 2020) (citing *Cal. Pub. Emps. Ret. Sys. v. WorldCom, Inc.*, 368 F. 86, 102 (2d Cir. 2004), which held a non-removal provision in the Bankruptcy Act did not prevent removal under CAFA).

¹⁶¹ *Katz*, 552 F.3d at 562.

¹⁶² *Id.* at 562.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

about how the 1933 Act . . . and [CAFA] fit together.”¹⁶⁵ It stated the Ninth Circuit in *Luther* “failed to recognize that § 22(a) of the 1933 Act is not a subset” of CAFA and did not “appear to understand that § 1453(d) [in which CAFA’s removal provisions appear] tells us how [CAFA] affects securities cases.”¹⁶⁶

Turning to CAFA’s security exemptions—subsections 1453(d)(1) through (3),—the Seventh Circuit stated that the first removal exemption did not apply as the class plaintiffs’ claims did not concern a “covered security,” meaning one traded on a national exchange.¹⁶⁷ The court concluded the second exemption did not apply because that subsection dealt with corporate internal affairs, and the plaintiffs’ claims were not characterized as such.¹⁶⁸ As to the third exemption, however, the named plaintiff, like the plaintiffs in the *Cardarelli* case discussed below, argued that CAFA’s removal provisions exempted plaintiff’s 1933 Act claim because the claim “relates to the rights, duties, (including fiduciary duties), and obligations relating to or created by or pursuant to any security.”¹⁶⁹ The Seventh Circuit rejected the argument, however, that subsection 1453(d)(3) exempted securities-related lawsuits only if the plaintiff’s claims arose out of the terms of securities themselves and not if the claims arose under the 1933 Act due to alleged misconduct in the initial offerings of securities.¹⁷⁰

As to the removability of plaintiff’s claims, the court remanded the case to the district court for a hearing on whether the plaintiff’s claims arose from the terms of the securities at issue such that subsection 1453(d)(3) would exempt them from CAFA’s reach.¹⁷¹ The Seventh Circuit reasoned that to be exempted from CAFA’s reach under this removal provision, the claims would have to have arisen from the securities themselves.¹⁷² And, if the claims arose from the securities themselves such that the provision exempted the claims from CAFA’s reach, then it would be impossible for the claims to have arisen solely under the 1933 Act, so Section 22(a) still would not apply to prevent the removal of the plaintiff’s claims to federal court. The court

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 562–63.

¹⁶⁸ *Id.* at 563.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (citing *Estate of Pew v. Cardarelli*, 527 F.3d 25, 31–33 (2d Cir. 2008)); *see also* *Owen v. Elastos Found.*, 438 F. Supp. 3d 187, 193–94 (S.D.N.Y. 2020).

¹⁷¹ *Katz*, 552 F.3d at 563.

¹⁷² *Id.*

explained that if plaintiff's claims were exempted from CAFA, they would likely be removable under "some other statute, for a suit to enforce a security's terms does not arise under the 1933 Act."¹⁷³

C. Analysis of the Approaches

In 2014, the Supreme Court decided the *Dart Cherokee Basin Operating Co. v. Owens* case,¹⁷⁴ which some have argued undermines the Ninth Circuit's reasoning and strengthens the Seventh Circuit's.¹⁷⁵ The Court in *Dart Cherokee*, while analyzing whether parties had to submit proof to support allegations concerning the amount-in-controversy requirement in CAFA, announced that "no antiremoval presumption attends cases invoking CAFA."¹⁷⁶ Instead, according to the Supreme Court, "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in federal court if properly removed by any defendant.'"¹⁷⁷

After *Dart Cherokee*, a district court in California decided the *Coffey* case in which the court opined that "part of *Luther*'s reasoning has been undermined by the Supreme Court's decision in *Dart Cherokee*."¹⁷⁸ The court in *Coffey* pointed out that the Ninth Circuit in *Luther* followed the traditional rule strictly construing removal statutes against removal.¹⁷⁹ But the court in *Coffey* pointed out that the Supreme Court in *Dart Cherokee* rejected that traditional rule in CAFA cases.¹⁸⁰ The court in *Coffey* further pointed out that "one authority has suggested that *Dart Cherokee*'s 'assertion that no antiremoval presumption applies to cases removed under CAFA,' calls into

¹⁷³ *Id.*

¹⁷⁴ 135 S. Ct. 547 (2014).

¹⁷⁵ See, e.g., *Coffey v. Ripple Labs Inc.*, 333 F. Supp. 3d 952 (N.D. Cal. Aug. 10, 2018); 2 MCLAUGHLIN ON CLASS ACTIONS § 12:6 (14th ed. 2017).

¹⁷⁶ *Dart Cherokee*, 135 S. Ct. at 558.

¹⁷⁷ *Id.* (citing *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting S. Rep. 109-14, at 43 (2005))).

¹⁷⁸ *Coffey*, 333 F. Supp. 3d at 958 (citing *Jordan v. Nationstar Mortg. L.L.C.*, 781 F.3d 1178, 1183 n.3 (9th Cir. 2015) (noting it was not bound by *Luther* because *Dart Cherokee* undermined the reasoning on which the Ninth Circuit based its holding in *Luther*)).

¹⁷⁹ *Id.* (citing *Luther v. Countrywide Home Loans Serv.*, 533 F.3d 1031, 1034 (9th Cir. 2008)).

¹⁸⁰ *Id.* at 958 (citing *Dart Cherokee*, 135 S. Ct. at 554; and *Jordan v. Nationstar Mortg. L.L.C.*, 781 F.3d 1178, 1183 n.3 (9th Cir. 2015)).

question *Luther*'s holding" regarding Section 22(a) and CAFA's removal provision.¹⁸¹ The Ninth Circuit's approach may, therefore, be on the decline.

The Seventh Circuit's approach, however, is also not without flaws. Indeed, the Seventh Circuit's suggestion that no answer exists to the question of which statute is more specific is logically flawed. To start, the Seventh Circuit asked the wrong question. The appropriate question was not, as the Seventh Circuit put it, "whether § 22(a) insulates all claims under the 1933 Act from removal under the 2005 Act."¹⁸² The question it should have asked was whether Section 22(a) was more specific than the removal provisions in CAFA found in Section 1453. This question would more logically compare each statute's removal provisions to determine which is more specific.

Had the question been properly focused, the court would likely have concluded that Section 22(a) is more specific. Section 22(a) prohibits removal only if claims are brought solely pursuant to the 1933 Act. That means the claims can involve only allegations of defendant's failure to disclose information required by the 1933 Act in conjunction with the defendant's original offering of the securities at issue. Applying Section 22(a) further requires that those securities cannot be ones that are traded on a national market. Indeed, the Supreme Court's decision in *Cyan* makes clear that Section 22(a)—as amended by SLUSA—covers only a small subsection of securities-related claims. It does not apply to an alleged claim arising under state law or arising under the 1934 Act. It does not apply to claims arising solely under the 1933 Act if the claims involve a covered security, meaning any security traded on a national market. Even if the claim meets all of Section 22(a)'s other requirements, the removal bar does not apply if plaintiffs combine their 1933 Act claims with any other claims. In each of these situations, Section 22(a) would not apply to the alleged securities class action. In other words, all of these claims would be beyond Section 22(a)'s reach.

In contrast, CAFA's removal provisions are broad, as they mirror CAFA's jurisdictional grants. Thus, CAFA removal applies to most large class actions covering many different subjects. As long as plaintiffs allege a sufficiently large class—meaning the class includes at least 100 members and involve aggregate damages that exceed \$5 million—and sues a defendant who is minimally diverse, CAFA applies, unless one of CAFA's exemptions

¹⁸¹ *Id.* (citing 16 MOORE'S FEDERAL PRACTICE—SCOPE OF REMOVAL, § 107.91[1][b] (2018)).

¹⁸² *Katz v. Gerardi*, 552 F.3d 558, 561 (7th Cir. 2009).

also applies, and keeping in mind the Supreme Court's instruction to interpret removal under CAFA broadly.

Thus, the suggestion that one cannot discern which statute is more general and which is more specific is based on the failure to focus on the relevant removal provisions—the narrowly applicable Section 22(a) and the broadly applicable removal provisions in CAFA that even the Supreme Court has declared must be interpreted broadly. The idea that one can make a plausible argument that one cannot determine when comparing the two statutes' removal provisions which is more specific and which is more general strains credibility.

In addition, the Supreme Court's 2018 decision in the *Cyan Inc. v. Beaver County Employees*¹⁸³ case also suggests CAFA should not be read to trump the 1933 Act. Although the case did not involve the conflict between CAFA and the 1933 Act, the Court analyzed a similar issue—the relationship between Section 22(a) of the 1933 Act and the removal provisions in SLUSA.¹⁸⁴ Recall that Congress passed SLUSA in part to address plaintiffs' use of the class action device to pursue claims that defendants and other critics argued lacked merit. SLUSA, like the Reform Act that Congress passed earlier, was targeted specifically to address perceived abusive use of the class action device in the context of securities litigation. To prevent these perceived abusive class actions involving securities, SLUSA provides for, among other things, exclusive federal court jurisdiction and removal of "covered" class actions—those involving securities traded on a national exchange and for which allegations were "based upon the statutory or common law of any State or subdivision thereof."¹⁸⁵

Like the conflict that is the subject of this paper, over time, a similar conflict developed in the circuit courts over whether SLUSA divested state courts of concurrent jurisdiction over alleged 1933 Act violations filed in state courts and whether its removal provisions superseded the 1933 Act's prohibition against removal.¹⁸⁶ Thus, the Supreme Court granted certiorari to

¹⁸³ 138 S. Ct. 1061 (2018).

¹⁸⁴ *Cyan*, 138 S. Ct. at 1068 (emphasis in original); 15 U.S.C. § 77v(a).

¹⁸⁵ 15 U.S.C. § 78bb. But unlike CAFA's aim to have large class actions litigated in federal courts, SLUSA's purpose was to foreclose covered class actions based on state law from being litigated altogether. *Cyan*, 138 S. Ct. at 1067. Thus, cases removed under SLUSA are not to be litigated in federal court but rather to be dismissed to give effect to SLUSA's prohibition against pursuing large class actions founded on state law alleging dishonest practices related to a nationally traded security's sale. *Id.*

¹⁸⁶ *Cyan*, 138 S. Ct. at 1069.

decide those issues.¹⁸⁷ The plaintiffs in *Cyan* were three pension funds and an investor.¹⁸⁸ The defendants were a telecommunications company—Cyan—and its officers and directors.¹⁸⁹ In an initial public offering, the plaintiffs bought shares of Cyan stock.¹⁹⁰ When the stock value declined, the plaintiffs filed a class action in California state court, alleging that the defendants’ original offering documents included material misstatements that violated the 1933 Act.¹⁹¹

Importantly, the plaintiffs did not assert any state-law-based claims and did not involve securities that were traded on a national stock exchange. Nevertheless, the defendants moved to dismiss the action for lack of subject matter jurisdiction.¹⁹² Their argument was that SLUSA’s amendment to the 1933 Act’s concurrent jurisdiction clause “stripped state courts of power to adjudicate 1933 Act claims in ‘covered class actions.’”¹⁹³ Certain amici also argued the related point that SLUSA’s removal provisions superseded Section 22(a) of the 1933 Act.¹⁹⁴ The Supreme Court rejected both arguments.¹⁹⁵ Instead, the Court declared in cases involving securities not traded on a national exchange, SLUSA “does nothing to deprive state courts of their jurisdiction to decide class actions brought under the 1933 Act,” and SLUSA’s removal authorization does not apply either.¹⁹⁶

In its analysis, among other things, the Court rejected the defendants’ arguments that to interpret the statute differently than the defendants proposed would render parts of SLUSA meaningless.¹⁹⁷ The Supreme Court instead pointed out that it had “encountered many examples of Congress legislating in that hyper-vigilant way, to ‘remov[e] any doubt’ as to things not particularly doubtful in the first instance.”¹⁹⁸ As discussed below, similar

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1068.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1068–69.

¹⁹⁵ *Id.* at 1078.

¹⁹⁶ *Id.* at 1069, 1075.

¹⁹⁷ *Id.* at 1073 (“Cyan contends, unless we take up its invitation to look to § 77p(f)(2)’s definition of ‘covered class action,’ the except clause excepts ‘exactly nothing.’”)

¹⁹⁸ *Id.* at 1074 (citing *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 383–84 (2013); *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 646 (1990)).

arguments regarding CAFA's exemptions related to securities class actions should also fail.

When courts find that both the 1933 Act and CAFA apply in a way that creates the conflict, courts must choose between these different approaches, each flawed in its own ways, to decide whether a case can be removed and heard in federal court or not. As illustrated below, however, the statutes do not have to be read as inevitably raising the conflict. Rather, the two statutes can be harmonized by reading CAFA's relevant exemption in a way that avoids the conflict altogether.

III. HARMONIZING THE STATUTES

Both statutes have been disparaged for how confusing they are to understand. Perhaps, therefore, no one should find it surprising that courts have struggled and reached opposite conclusions regarding the interplay between Section 22(a)'s non-removal provision and CAFA's generous removal provisions. Section 22(a), especially as it relates to SLUSA, has been harshly criticized for its perplexing wording and convoluted application. For example, after listening to the Supreme Court oral argument in the *Cyan Inc. v. Beaver County Employees Retirement Fund* case,¹⁹⁹ one scholar highlighted the justices' use of the word "gibberish" to describe Section 22(a) and observed that Section 22(a)'s effect on SLUSA was "so complicated that neither the [Supreme Court] justices nor the lawyers arguing the case could really understand it."²⁰⁰

Similarly CAFA's language is just as puzzling as evidenced by the significant litigation CAFA has spawned in the sixteen years since its initial enactment.²⁰¹ CAFA's provisions have been described as "detailed, complicated, and replete with both undefined terms and ambiguous phrases," leaving "questions implicating forum allocation unanswered," and "guarantee[ing] years of work for lawyers and courts that is unrelated to the

¹⁹⁹ 138 S. Ct. 1061 (2018) (settling conflicts surrounding jurisdiction and removal in cases in which both the 1933 Act and in the 1998 Securities Litigation Uniform Standards Act applied); Johnson, *supra* note 47, at 349–351 (discussing same).

²⁰⁰ Richard K. Neumann Jr., *Why Congress Drafts Gibberish*, 16 LEGAL COMM. & RHETORIC: JALWD 111, 111 (2019).

²⁰¹ For treatment of the broad variety of CAFA-related issues that have been litigated over the past sixteen years, see Marcy Hogan Greer (ed.), A PRACTITIONER'S GUIDE TO CLASS ACTIONS, *The Class Action Fairness Act*, Chapter 11 (3d ed. 2021).

2021]

TO REMOVE OR NOT TO REMOVE

627

merits of the underlying dispute.”²⁰² It has likewise been described as “poorly drafted” and its wording characterized as both “clumsy” and “bewildering.”²⁰³ CAFA has been derided as “the product of poor draftsmanship.”²⁰⁴ Recently, a court went so far as to describe opinions interpreting CAFA as “supply[ing] even more confusion with their nuanced and potentially conflicting holdings, or [as] suffer[ing] from the lack of any meaningful analysis at all.”²⁰⁵

Against this backdrop, the confusion surrounding the two statutes’ removal provisions’ applicability and operation is unremarkable, but that fact does not lessen the need for clarification. One of the securities-related exemptions in CAFA, subsection 1453(d)(3), provides an avenue to avoid the conflict between CAFA and the 1933 Act. The stated purpose behind the securities-related exemptions in CAFA, after all, was to “avoid disturbing in any way the federal vs. state court jurisdictional lines already drawn in the securities litigation class action context by the enactment of the [SLUSA].”²⁰⁶ Unfortunately, while some courts have in fact interpreted CAFA’s securities provisions to avoid affecting jurisdictional lines in securities class actions,²⁰⁷ others have interpreted the exemptions overly narrowly.

As illustrated below, where a class action alleges only 1933 Act claims, a logical argument can be made that such claims “solely” relate to the “rights,

²⁰² Burbank, *supra* note 68, at 1444; *see also* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1823, 1857 (2008) (similar criticisms).

²⁰³ *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181 (9th Cir. 2013).

²⁰⁴ *Schumel v. Bank Mut. Corp.*, No. 17-CV-1240-JPS, 2017 WL 4564908, at *5 (E.D. Wis. Oct. 11, 2017).

²⁰⁵ *Id.* Another potential area for confusion is the use of the term “removal jurisdiction.” *See, e.g.*, *Vanbecelaere v. YayYo, Inc.*, No. CV 20-7997-PA (AGRx), 2020 WL 5362696, at *3 (C.D. Ca. Sept. 8, 2020) (concluding that because actions were not removable under CAFA and because Section 22(a) bars removal, the court “lack[ed] subject matter jurisdiction” over the actions when in fact, SLUSA provided subject matter jurisdiction in the federal courts for the purpose of dismissal). Removal, however, is a purely statutory construct that is distinct from the existence of subject matter jurisdiction. In the context of Section 22(a) of the 1933 Act, for example, a federal court can have jurisdiction over an action (concurrent with state courts) under the 1933 Act, at the same time that the action is not removable to court based on Section 22(a). This distinction matters because subject matter jurisdiction cannot be waived, while failure to follow rules for removal can be waived. *See* *Cyan v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1068 (2018).

²⁰⁶ *See* Burbank, *supra* note 2, at 1454 (citing S. REP. 109-14, at 45 and Cook, *supra* note 41, at 646–47)).

²⁰⁷ *See, e.g.*, *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012) (concluding CAFA did not apply because federal jurisdiction existed under SLUSA).

duties, and obligations” “related to” any “security,” and thus such claims fall within 1332(d)(9)(C)’s exemption to CAFA jurisdiction and 1453(d)(3)’s exemption to removal authority.²⁰⁸ Some courts read the exemptions in this way. In addition to being consistent with the exemptions’ plain language, the result is preferable as it would exempt from CAFA’s reach the kind of cases in which the two removal provisions would inevitably collide because 1933 Act claims would not be subject to CAFA at all. Some courts, however, interpret this CAFA exemption to not apply to cases that allege violations of the 1933 Act, as opposed to alleging claims that arise out of the security instruments themselves.²⁰⁹

Subsection 1332(d)(9)(c) states the following:

(9) Paragraph (2)²¹⁰ shall not apply to any class action that solely involves a claim—

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).²¹¹

The Second Circuit was the circuit court to interpret subsections 1332(d)(9)(3) and 1453(d)(9)(C)’s exemptions.²¹² The case, *Estate of Pew v. Caradelli*, involved alleged violations of New York state law, rather than violations of the 1933 Act, but the analysis applies equally to both kinds of claims.²¹³ The majority in *Pew* construed the exemption in the narrow way described above.²¹⁴ The plaintiffs had sought relief under New York’s consumer fraud statute, alleging that officers of the issuer of the securities, along with the issuer’s auditor, violated the law when they marketed the

²⁰⁸ 28 U.S.C. § 1332(d)(9)(c).

²⁰⁹ See, e.g., *Katz v. Gerardi*, 552 F.3d 558, 562 (7th Cir. 2008); see also Marina G. Aronchik, *A Fair Share (of Removal): Resolving a Conflict Between the Class Action Fairness Act and the Securities Act*, 4 SEVENTH CIR. REV. 456, 466 (2009).

²¹⁰ Paragraph 2, in relevant part, states, “(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interests and costs” 28 U.S.C. § 1332(d)(2).

²¹¹ 28 U.S.C. § 1332(d)(9)(c).

²¹² *Estate of Pew v. Caradelli*, 527 F.3d 25 (2d Cir. 2008).

²¹³ *Id.* at 27.

²¹⁴ *Id.*

securities and failed to disclose the issuer's insolvency.²¹⁵ The plaintiffs sued in state court, and the defendants removed the case to federal court, relying on CAFA for jurisdiction and removal authority.²¹⁶ Relying on the exemption to jurisdiction in subsection 1332(d)(9)(C) along with the exemption to removal in 1453(d)(3), the plaintiffs moved to remand.²¹⁷ Agreeing with the plaintiffs, the district court remanded the action.²¹⁸ The question on appeal was whether the plaintiffs' claims fell within the CAFA exemptions.²¹⁹

The majority rejected the plaintiffs' argument, with which the dissent and some lower courts agree,²²⁰ that the terms "rights . . . relating to . . . any security" in 1332(d)(9)(C) should include the right to bring any cause of action that relates to a security.²²¹ Thus, the argument would be that plaintiffs' claims related to the security because the plaintiffs' claims arose from the marketing of those securities and the failure to disclose relevant information about the financial situation of the issuers of the securities. Without the securities, therefore, plaintiffs would have no claims. Thus, their claims related to the securities.

The majority, however, took a much narrower view of subsection 1332(d)(9)(C)'s exemption from CAFA jurisdiction and 1453(d)(3)'s corresponding exemption from CAFA removal and held plaintiffs' case was not exempted from CAFA's reach.²²² In doing so, the majority identified three reasons to support its conclusion: plain language, the exemptions' relationship to other statutory provisions, and legislative history.²²³ The majority first stated that an analysis of the statute's language, although imperfect, supported its conclusion.²²⁴ After explaining its reading of the relevant provisions, however, the majority in *Cardarelli* concluded the

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 28.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See, e.g., Firemen's Ret. Sys. of St. Louis on Behalf of SCANA Corp. v. Addison*, No. CV 3:18-501-MBS, 2018 WL 11312486, at *7 (D.S.C. June 27, 2018); *Schumel v. Bank Mut. Corp.*, Nos. 17-CV-1240-JPS, 17-CV-1241-JPS, 17-CV-1242-JPS, 2017 WL 4564908, at *3 (E.D. Wis. Oct. 11, 2017).

²²¹ *E.g., Firemen's Ret. Sys. of St. Louis*, 2018 WL 11312486, at *7; *Schumel*, 2017 WL 4564908, at *3.

²²² *Estate of Pew v. Caradelli*, 527 F.3d 25, 33 (2d Cir. 2008).

²²³ *Id.* at 30.

²²⁴ *Id.*

language of the exemptions was ambiguous and the answer not “entirely clear given the imperfect wording of the statute.”²²⁵ Thus, it explained that one must look beyond the statute’s plain meaning.²²⁶ Thus, the majority considered the statutory context and legislative history. It declared that the statutory framework required a narrow reading of subsections 1332(d)(9)(C) and 1453(d)(3).²²⁷ It concluded its narrow reading is most consistent with CAFA’s purpose; thus, it held the case did not fall within the exemptions.²²⁸ The following discussion explains each of the arguments and illustrates the ways in which each is flawed, rendering the narrow reading of 1332(d)(9)(C) and 1453(d)(3) equally flawed.

A. *Statutory Language*

As part of the statutory language analysis, the majority stated the statute itself provides “clues” about what each of the terms, “rights,” “duties,” and “obligations” in the exemptions means.²²⁹ The fact that the statute includes “fiduciary duties” as an example of the “duties,” in the court’s view, reinforced the “common understanding” that duties are owed by persons or companies. And it stated that while “obligations” can be owed by persons or instruments, the natural reading of the exemption’s language is to “differentiate obligations from duties by reading obligations to be those created in instruments, such as a certificate of incorporation, an indenture, a note, or some other corporate document.”²³⁰ The court recognized, however, that certain duties and obligations “of course, ‘relate to’ securities even though they are not rooted in a corporate document but are instead superimposed by a state’s corporation law or common law on the relationships underlying that document.”²³¹

Nevertheless, the majority determined that duties and obligations that relate to securities but that arise from law—as opposed to those that arise from a security or its instruments—are not exempted by subsection 1332(d)(9)(C) and are thus not exempted by 1453(d)(3).²³² Under this

²²⁵ *Id.* at 26, 30 (citing *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 26

²²⁹ *Id.* at 31.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

2021]

TO REMOVE OR NOT TO REMOVE

631

reading, the plaintiffs' claims regarding the fraudulent marketing of a debt security were not exempted because the fraudulent marketing claims did not arise from a breach of a duty created by the instruments themselves, but rather arose from a breach of a duty that arose from a source of law.²³³

It further reasoned the plaintiffs' interpretation of the exemptions would defeat any limitation meant by the use of the term "rights" in the phrase, "rights, duties . . . , and obligations," and the exemptions' later inclusion of the terms "related to or created by or pursuant to."²³⁴ To illustrate, the majority separated the parts of the exemptions as follows:

- [i] [Section 1332(d)(2) and section 1453(b)] shall not apply to any class action that solely involves a claim that relates to
- [ii] the rights, duties (including fiduciary duties), and obligations
- [iii] relating to or created by or pursuant to
- [iv] any security²³⁵

The majority explained the exemption, being made up of these four parts, could "not be read to cover any and all claims that relate to any security," because reading it that way "would afford no meaning to [ii] and [iii], which are evidently terms of limitation."²³⁶

The way in which the majority broke up the exemptions, however, and its conclusion that they apply only to claims that arise from securities instruments themselves, is logically flawed. It treats all three options in part [iii] as meaning only "created by," which ignores the options of "relating to" or "pursuant to" that also appear in the language of part [iii]. Just as the majority complains that the plaintiffs' reading would ignore a part of the statute, the majority's reading ignores a part of the statute. The majority ignores that part [iii] has three options, any of which alone is sufficient, as evidenced by the inclusion of the word "or" in between each of the options.

²³³ *Id.* at 26; *see also* Greenwich Fin. Servs. Distressed Mortg. Fund 3 L.L.C. v. Countrywide Fin. Corp., 603 F.3d 23, 29 (2d Cir. 2010) (clarifying that in the Second Circuit, to determine whether 1332(d)(9)(c) exempts an action from CAFA's jurisdiction and removal provisions, the inquiry should focus on determining whether the source of the right the plaintiff seeks to enforce arises from a security or security-related instrument, rather than from a source of law).

²³⁴ *Id.*

²³⁵ Estate of Pew v. Cardarelli, 527 F.3d 25, 31 (2d Cir. 2008).

²³⁶ *Id.*

Thus, building on the majority's own analysis, one could argue that subsection should be broken up as follows:

- [i] [Section 1332(d)(2) and section 1453(b)] shall not apply to any class action that solely involves a claim that relates to
- [ii] the rights, duties (including fiduciary duties), and obligations
- [iii.a.] relating to or
- [iii.b.] created by or
- [iii.c.] pursuant to
- [iv] any security

Allowing part [iii]'s "relating to" to be treated as an option separate from the "created by or pursuant to" language in part [iii] would give meaning to each of the items listed and to Congress's decision to separate those items with the disjunctive word "or." This reading would support the broader view that the plaintiffs' claims that the defendants violated New York law when they failed to make relevant disclosures when they sold the securities to plaintiffs are indeed claims that are related to the securities. Without the securities, no such claims would exist. Thus, subsection 1332(d)(9)(C) should be read to exempt plaintiffs' claims from CAFA's jurisdictional reach, and 1453(d)(3) should be read to exempt them from CAFA's removal authority.

Indeed, some courts have read the exemption to do just that. These courts disagree with the Second Circuit's narrow interpretation. For example, the court in *Schumel v. Bank Mutual Corporation* did not find the plain language of subsection 1332(d)(9)(C) sufficiently ambiguous to warrant the kind of "nuanced scrutiny" applied by the Second Circuit in the *Cardarelli* case.²³⁷ Finding no controlling authority in its circuit, the court in *Schumel* stated it was "constrained to rely on the plain text of the statute."²³⁸ The court then characterized the language in subsection 1332(d)(9)(C) as having "incredibly

²³⁷ *Schumel v. Bank Mut. Corp.*, Nos. 17-CV-1240-JPS, 17-CV-1241-JPS, 17-CV-1242-JPS, 2017 WL 4564908, at *4 n.5 (E.D. Wis. Oct. 11, 2017).

²³⁸ *Id.* at *5 (pointing out that both parties relied on opinions from other circuits and finding it "most prudent to avoid reliance" on them) (citing *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1187 (11th Cir. 2007); *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011)).

broad reach.”²³⁹ Given the limited jurisdiction of federal courts, the court in *Schumel* held that doubts about federal subject matter jurisdiction should be resolved in favor of rejecting jurisdiction.²⁴⁰ “If Congress had intended a different result,” the court reasoned, Congress “could have carefully crafted CAFA’s language more succinctly.”²⁴¹

Even the majority in *Cardarelli* conceded that certain duties and obligations “of course, ‘relate to’ securities even though they are not rooted in a corporate document but are instead superimposed by a state’s corporation law or common law on the relationships underlying that document.”²⁴² Indeed, the Supreme Court has described the word “relates” as “highly general,” and the Court interprets the word “relates” broadly.²⁴³ In interpreting “relates” in provisions in other statutes, for example, the Court has stated that the words “relate to” have a “broad-common-sense meaning,” such that one thing relates to another “if it has a connection with or reference to” the other.²⁴⁴ Certainly, one can reasonably conclude that if a plaintiff alleges a claim under the 1933 Act based on the assertion that a seller violated the 1933 Act, that claim, although not arising from the security, should nevertheless relate to the security.

Indeed, as described above, the language of this exemption does not require plaintiffs to be holders of securities nor does it require that plaintiffs’ claims arise out of the securities themselves. Instead, the wording states the exemption covers a class action that solely involves a claim related to the rights, duties, and obligations related to or created by or pursuant to any security.

B. Statutory Framework

The majority in *Cardarelli* further supported its holding by reasoning that the plaintiff’s reading of subsection 1332(d)(9)(C) and 1453(d)(3) would render other provisions, namely 1332(d)(9)(A) and 1453(d)(1),

²³⁹ *Id.* at *3, *5 (interpreting exemption to cover claims relating to breach of fiduciary duties).

²⁴⁰ *Id.* (citing *Hart v. FedEx Ground Package Sys.*, 457 F.3d 675, 679 (7th Cir. 2006)).

²⁴¹ *Id.*

²⁴² *Estate of Pew v. Cardarelli*, 527 F.3d 25, 31 (2d Cir. 2008).

²⁴³ *See, e.g., Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 38 (1996) (interpreting the words “relate to” as they appear in the McCarran Ferguson Act, 15 U.S.C. § 1012(b)).

²⁴⁴ *Id.* (quoting *Met. Life Ins. v. Massachusetts*, 471 U.S. 724, 739 (1985)).

superfluous.²⁴⁵ Subsection 1332(d)(9)(A) exempts from CAFA's jurisdiction and 1453(d)(1) exempts from CAFA's removal authority class actions "concerning a covered security."²⁴⁶ According to this view, if subsections 1332(d)(9)(C) and 1453(d)(3) were read to exempt all claims that relate to securities, there would be no need to also separately exempt claims that concern a covered security.

The Supreme Court's recent decision in *Cyan v. Beaver County*, however, suggests this argument regarding rendering parts of the statute superfluous should not be given much weight.²⁴⁷ There, the Supreme Court was analyzing SLUSA's removal provision's interaction with the 1933 Act's non-removal provision.²⁴⁸ One of the primary arguments the defendants raised in favor of interpreting SLUSA to allow removal of all securities related to class actions was that an interpretation of SLUSA that allowed Section 22(a) to continue barring removal of some kinds of securities cases would render parts of SLUSA meaningless.²⁴⁹ The Supreme Court rejected this argument. In doing so, the Court conceded that it was not sure why Congress drafted SLUSA to include arguably superfluous language, but the Court opined that Congress could have added the supposedly extraneous clause "in a more general excess of caution" and that it had observed other instances in which Congress legislated in "hyper-vigilant" ways.²⁵⁰

The argument then that subsection 1332(d)(9)(C) must be broadly interpreted to avoid rendering 1332(d)(9)(A) meaningless is unpersuasive in light of the Court's reasoning in *Cyan*. Instead, Congress's decision to include overlapping exemptions in CAFA subsections 1332(d)(9)(A) and 1332(d)(9)(C) could reflect, as the Court opined regarding overlapping provisions in SLUSA, another example of Congress drafting hyper-vigilant legislation to make clear that CAFA did not change the jurisdictional regime as it stood under existing securities laws.

Had Congress intended CAFA to override Section 22(a), it could have made that fact clear. When Congress passed SLUSA to allow for removal of certain categories of securities class actions to federal courts, it passed a conforming amendment to Section 22(a) of the 1933 Act to make clear that

²⁴⁵ *Cardarelli*, 527 F.3d at 31.

²⁴⁶ *Id.*

²⁴⁷ 138 S. Ct. 1061 (2018).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1073 ("Cyan contends, unless we take up its invitation to look to § 77p(f)(2)'s definition of 'covered class action,' the except clause excepts 'exactly nothing.'").

²⁵⁰ *Id.* at 1074.

Section 22(a) did not apply to class actions covered by SLUSA.²⁵¹ When it passed CAFA, Congress passed no conforming amendment or any other kind of amendment to Section 22(a). This lack of action undermines the conclusion that Congress intended to override Section 22(a)'s removal prohibition in securities cases brought as large class actions. Regarding the specific kind of cases in which Section 22(a) and CAFA collide, the Supreme Court in *Cyan* declared SLUSA “‘expresses no concern’ with ‘transactions in uncovered securities’—precisely because they are not traded on national markets.”²⁵² Such suits, therefore, are not “a matter of distinct federal concern.”²⁵³

With this context, one could reasonably conclude that the securities and business governance exemptions codified in CAFA subsections 1332(d)(9) and 1435(d) reflect the contemporaneous intent to carve out all securities-related claims for which jurisdiction already existed under the securities statutes, those arising under the 1933 and 1934 Acts and affected by the passage of the Reform Act and SLUSA. After all, the Supreme Court presumes that “Congress is aware of existing law when it passes legislation,”²⁵⁴ even when the consideration of different pieces of litigation do not overlap, and here, they did overlap.

C. Legislative Intent

The majority in *Cardarelli* also suggested the language in subsections 1332(d)(9)(C) and 1453(d)(3) reflected Congress's intent not to disturb the balance of federal and state court jurisdiction over securities litigation as that jurisdiction had been set forth in the 1933 and 1934 Act, the Reform Act, and finally in SLUSA.²⁵⁵ But narrowly interpreting these provisions, especially in cases in which Section 22(a) of the 1933 Act conflicts with CAFA's removal exemption in 1453(d)(3), does disturb the balance of federal and state court jurisdiction as that jurisdiction had been set forth in the securities-specific statutes prior to CAFA's passage.

²⁵¹ See *id.* at 1068 (describing SLUSA's amendments to Section 22(a)).

²⁵² *Id.* at 1071 (citing *Chadbourne & Parke L.L.P. v. Troice*, 571 U.S. 377 (2014)).

²⁵³ *Id.*

²⁵⁴ *Hall v. United States*, 566 U.S. 506, 516 (2012) (citing *Miles v. Apex Marine Corp.*, 489 U.S. 19, 32 (1990)). Unrelated to this presumption, *Hall's* interpretation of the law regarding the sale of farm assets in Chapter 12 bankruptcy cases was superseded by statute, as stated in *In re Richards*, 616 B.R. 879, 880–81 (S.D. Ind. 2020).

²⁵⁵ *Estate of Pew v. Cardarelli*, 527 F.3d 25, 32 (2d Cir. 2008).

Here, again, the Supreme Court's decision in *Cyan* undermines the reasoning of the majority in *Cardarelli*. The defendants in *Cyan* argued that SLUSA operated to deprive state courts of all large securities classes.²⁵⁶ But the Supreme Court in *Cyan* illustrated the significance of the suggested changes and the unlikelihood that Congress would have made this change lightly.²⁵⁷ Historically, the Court declared, state courts "had as much or more power over the 1933 Act's enforcement as over any federal statutes."²⁵⁸ Section 22(a)'s prohibition against removal codified that state court power over 1933 Act cases. In light of that history, the Supreme Court declared Congress was unlikely to make "radical—but entirely implicit" changes to the way in which the 1933 Act is enforced.²⁵⁹ Defendant's argument that SLUSA stripped state courts of concurrent jurisdiction over all large class actions involving the offering of any kind of security would be a significant change to the operation of Section 22(a)'s prohibition against removal. The Court declared, "Congress does not 'hide elephants in mouseholes.'"²⁶⁰

The majority in *Cardarelli* and courts that follow its lead, however, suggest that in passing CAFA, Congress radically changed the way that the 1933 Act is enforced and did so implicitly and without amending or even referring to the 1933 Act. SLUSA, at least, amended Section 22(a) and added language to it to explicitly carve out from the 1933 Act's prohibition against removal the kinds of cases covered by SLUSA. To suggest that Congress, through the passage of CAFA, intended to make the kind of radical change about which the Supreme Court expressed significant skepticism in *Cyan*, without referring to Section 22(a) at all, is simply untenable. Just as the unanimous Court in *Cyan* rejected distortions of SLUSA's text based on the likelihood that "Congress must have wanted 1933 Act cases to be litigated in federal court," courts interpreting the conflict between CAFA removal and Section 22(a) non-removal should reject distortions of subsection 1332(d)(9)(C), which would only cover claims arising from securities but not those related to securities and brought under the 1933 Act or other securities-specific laws.

The majority in *Cardarelli* also attempted to bolster its narrow interpretation of subsection 1332(d)(9)(C) by declaring that interpretation

²⁵⁶ See *Cyan*, 138 S. Ct. at 1068.

²⁵⁷ *Id.* at 1070–73.

²⁵⁸ *Id.* at 1071.

²⁵⁹ *Id.* (citing *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001)).

²⁶⁰ *Id.* (citing *Whitman*, 531 U.S. at 468).

2021]

TO REMOVE OR NOT TO REMOVE

637

consistent with CAFA's purpose and position within the statutory framework of statutes concerning class actions and securities litigation.²⁶¹ It reasoned that the SLUSA and CAFA statutes together "confirm[] an overall design to assure that the federal courts are available for all securities cases that have national impact"²⁶² The majority stated the Senate Judiciary Committee Report confirmed its reading of CAFA.²⁶³ To illustrate, the court cited the following passages from the committee's report:

[T]he Act excepts from . . . [its grant to district courts of original] jurisdiction those class actions that solely involve claims that relate to matters of corporate governance arising out of state law By corporate governance litigation, the Committee means only litigation based solely on . . . the rights arising out of the *terms of the securities* issued by business enterprises.

The subsection 1332(d)(9) exemption to new section 1332(d) jurisdiction is also intended to cover disputes over the meaning of the terms of a security, which is generally spelled out in some formative document of the business enterprise, such as a certificate of incorporation or certificate of designations.²⁶⁴

The idea that Congress gave much thought to securities laws while drafting CAFA, however, is belied by the fact that in the ninety-six-page report the majority quotes in *Cardarelli*, securities class actions are mentioned on just a single page of the report.²⁶⁵ While the report contains numerous examples of purported abuses in consumer class actions Congress intended to cure in passing CAFA, it cites no examples of securities class actions other than to note that "Federal courts certify numerous class actions for a broad range of claims including securities fraud, antitrust violations,

²⁶¹ *Estate of Pew v. Cardarelli*, 527 F.3d 25, 32 (2d Cir. 2008).

²⁶² *Id.*

²⁶³ *Id.* (analyzing the context of the statute and its legislative history) (citing *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (citing S. Rep. No. 109–14, at 45 (2005) and recognizing the report was issued after CAFA's passage but finding it probative nonetheless because it was submitted before CAFA's passage) and (citing *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006); and (citing *Lowrey v. Ala. Power Co.*, 483 F.3d 1184, 1206, n.50 (11th Cir. 2007) (recognizing some probative value because report was submitted before CAFA's passage)).

²⁶⁴ *Id.* at 33.

²⁶⁵ *See generally*, S. Rep. No. 109-14, 64 (2005) (sole reference to securities class actions).

and discrimination every year.”²⁶⁶ If Congress had intended through CAFA to implicitly repeal Section 22(a), it is strange that it would not have mentioned perceived abusive use of the class action device in securities litigation.

Further supporting the conclusion that Congress was not intent on expanding jurisdiction over securities class actions in CAFA is the fact that Congress attempted to pass CAFA many times with its first iteration introduced in 1998—the same year that Congress passed SLUSA, the law specifically enacted to address perceived abusive use of the class-action device in securities litigation.²⁶⁷ Although CAFA was not finally passed until 2005, given its predecessors’ overlap with Congress’s enactment of SLUSA, one may reasonably conclude that in passing CAFA, Congress was unconcerned with class actions in securities cases since it had passed the Reform Act and SLUSA to address perceived abuses specific to securities litigation.

Although it is always the case that courts should reconcile legal authorities to avoid finding the authorities conflict whenever doing so is possible, at a time when both state and federal court systems are overly burdened,²⁶⁸ that obligation is even more compelling. In the context of securities class actions brought under the 1933 Act, since the Supreme Court’s decision in *Cyan*, plaintiffs have filed increasing numbers of securities-related claims in both state and federal courts.²⁶⁹ Meanwhile, a growing number of federal court cases have languished for years without

²⁶⁶ *Id.*

²⁶⁷ Mazzeo, *supra* note 17, at 1452 (citing H.R. 3789, 105th Cong. (1998) (introduced)); see also Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform*, 156 U. PA. L. REV. 1823, 1823 (2008) (characterizing the eight-year effort to get CAFA passed as “grinding”).

²⁶⁸ See, e.g., Alexander Mallin et al., *How coronavirus is crippling the courts and raising concerns among civil liberties advocates*, (March 24, 2020, 3:06 AM) (discussing challenges faced by both state and federal court systems in light of COVID 19 and predicting a huge increase in federal bankruptcy filings in light of its economic consequences), <https://abcnews.go.com/US/coronavirus-crippling-courts-raising-concerns-civil-liberties-advocates/story?id=69757862>; see also Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can’t Solve Inequality*, 148(A) DAEDALUS 128, 128 (2019), https://scholarship.law.columbia.edu/faculty_scholarship/2352/ (“State civil courts are at the core of the modern American justice system, and they are overwhelmed.”).

²⁶⁹ *Securities Class Actions Filings—2020 Mid-Year Assessment*, CORNERSTONE RSCH., 18, 25, <https://www.cornerstone.com/Publications/Reports/2020-Securities-Class-Action-Filings-2020-Midyear-Assessment> (last visited Nov. 12, 2020).

resolution. Indeed, in 2006, just over 20,000 civil cases had been pending in federal court for more than three years.²⁷⁰ But by September of 2019, the most recent time frame for which data is available, the number of civil cases pending for more than three years grew to nearly 35,000 cases.²⁷¹

In addition, filings of securities class actions continue to increase dramatically. In 2019, plaintiffs filed 428 new securities class actions, which is nearly double the yearly average from 1997 to 2018.²⁷² In the two and a half years preceding the *Cyan* decision, plaintiffs had filed fifty-seven new 1933 Act class actions in state court.²⁷³ In the two and a half years after the *Cyan* decision, state court filings of 1933 Act class actions increased dramatically, with plaintiffs filing eighty-seven new 1933 Act class actions in state courts.²⁷⁴

There is no indication that defendants will not continue to prefer litigating securities cases in federal court, nor is there reason to believe plaintiffs will not continue to prefer litigating such cases in state courts, which are considered more likely than federal courts to certify class actions.²⁷⁵ In deciding *Cyan*, the Supreme Court eliminated one avenue defendants had used to prevent plaintiffs from being able to litigate violations of the 1933

²⁷⁰ *Civil Justice Reform Act of 1990: Report of Motions Pending More than Six Months, Bench Trial Submitted More than Six Months, Bankruptcy Appeals Pending More than Six Months, Social Security Appeal Cases Pending More than Six Months, and Civil Cases Pending More than Three Years on March 31, 2006*, ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/sites/default/files/cjramarch2006_0.pdf (last visited Oct., 29, 2020) (20,544 cases).

²⁷¹ *September 2019 Civil Justice Reform Act*, <https://www.uscourts.gov/statistics-reports/september-2019-civil-justice-reform-act> (last updated Sept. 30, 2019) (34,997 cases),

²⁷² *Securities Class Actions Filings—2019 Year in Review*, CORNERSTONE RSCH., 1, <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review> (last visited Nov. 9, 2020) (comparing average annual class action filings from 1997–2018 of 215 with 2019’s class action filings of 428). Filings in the first half of 2020 dropped somewhat. *Securities Class Actions Filings—2020 Mid-Year Assessment*, CORNERSTONE RSCH., 1, <https://www.cornerstone.com/Publications/Reports/2020-Securities-Class-Action-Filings-2020-Midyear-Assessment> (last visited Nov. 9, 2020). But given the COVID 19 crisis, many businesses, law offices, and courts were closed for months.

²⁷³ *Securities Class Actions Filings—2020 Mid-Year Assessment*, CORNERSTONE RSCH., 14, <https://www.cornerstone.com/Publications/Reports/2020-Securities-Class-Action-Filings-2020-Midyear-Assessment> (last visited Nov. 12, 2020) (adding cases filed from the first half of 2015 through the second half of 2017).

²⁷⁴ *Id.* at 14 (adding cases filed from the first half of 2018 through the first half of 2020) (last visited Nov. 12, 2020).

²⁷⁵ See Purcell, *supra* note 267, at 1864–65, 1887–88.

Act as class actions in state courts. The *Cyan* decision thus may provide an incentive for plaintiffs to carve out certain claims involving offerings of noncovered securities and file those claims solely under the 1933 Act, safe in the knowledge that Section 22(a) prevents defendants from removing those cases to federal court under SLUSA.

Of course, to escape SLUSA's reach, plaintiffs' 1933 Act claims must concern noncovered securities. But there are a growing number of offerings for securities that are not traded on national exchanges, especially in the world of cryptocurrencies. Cryptocurrencies have enjoyed explosive growth over the last decade. Indeed, Bitcoin, which is credited as the first cryptocurrency, was not introduced until 2009.²⁷⁶ The first widely known initial coin offering in the United States, the Ethereum ICO, did not occur until 2016.²⁷⁷ By 2017, over 1,000 cryptocurrencies were already in circulations with new ones continually being created and marketed to investors.²⁷⁸ During that year alone, estimates suggest block chain projects raised over \$5.6 billion in funding from investors in the United States.²⁷⁹ Thus, it is unsurprising that offerings of cryptocurrencies have given rise to increasing numbers of securities class actions in recent years.²⁸⁰

While the Court in *Cyan* made clear that SLUSA did not allow removal of 1933 cases involving noncovered securities, the opinion did not address the other avenue defendants have pursued to remove these kinds of cases despite Section 22(a)'s prohibition—removal under CAFA. Indeed, after *Cyan*, removal under CAFA may be the only potential option for defendants to remove these cases to federal courts where defendants expect class certification decisions to be more stringent and to more closely adhere to Federal Rule of Civil Procedure 23's requirements. Unfortunately for both sides, courts are currently split as to whether CAFA's generous removal

²⁷⁶ Bernard Marr, *A Short History of Bitcoin & Cryptocurrency Everyone Should Read*, FORBES (Dec. 6, 2017, 12:28 AM), <https://www.forbes.com/sites/bernardmarr/2017/12/06/a-short-history-of-bitcoin-and-crypto-currency-everyone-should-read/?sh=635fa5ba3f27>.

²⁷⁷ *Id.*

²⁷⁸ *Id.*; *Why Aren't Certain ICOs open to U.S. Citizens*, COIN INSIDER (Dec. 11, 2018), <https://www.coininsider.com/why-arent-certain-icos-open-to-us-citizens/>.

²⁷⁹ *Why Aren't Certain ICOs open to U.S. Citizens*, COIN INSIDER (Dec. 11, 2018), <https://www.coininsider.com/why-arent-certain-icos-open-to-us-citizens/>.

²⁸⁰ See, e.g., *Owen v. Elastos Found.*, 438 F. Supp. 3d 187, 193–94 (S.D.N.Y. 2020); *Vanbecelaere v. YayYo, Inc.*, No. CV 20-7997-PA, 2020WL 5362696, at *1 (C.D. Ca. Sept. 8, 2020); *Coffey v. Ripple Labs Inc.*, 333 F. Supp. 3d 952, 955 (N.D. Cal. 2018); *Greenwald v. Ripple Labs, Inc.*, No. 18-cv-04790-PJH, 2018 WL 4961767, at *1 (N.D. Cal. Oct. 15, 2018).

2021]

TO REMOVE OR NOT TO REMOVE

641

provisions can circumvent the 1933 Act's strict prohibition against removal in cases still subject to Section 22(a).

CONCLUSION

At a time when both state and federal court systems are overly burdened,²⁸¹ confusion as to where cases may be heard is as damaging as it has ever been. Confusion regarding the interplay between the removal provisions in the 1933 Act and CAFA, perhaps combined with the increased numbers of new coin offerings, encourages parallel litigation and inspires sprawling satellite litigation over whether cases may be heard in state or federal courts. Both the 1933 Act and CAFA have been consistently criticized as confusing and poorly drafted. Both have spawned significant litigation over their jurisdiction and removal provisions.

This article seeks to provide clarity on the complicated issue of how courts should treat cases that arguably implicate both statutes. Such clarity benefits court and litigants by saving valuable time and resources that would otherwise be spent fighting over the procedural issue of where the cases should be heard, rather than the substantive issues concerning whether the plaintiffs' claims are viable and whether defendants' securities offerings violated the law. Clear rules regarding whether a state or a federal court is the proper forum in which to hear these cases will promote greater predictability, and, of course, greater predictability benefits courts and litigants, as well as individuals, businesses, and investors.²⁸²

²⁸¹ See, e.g., Mallin, *supra* note 268, (discussing challenges faced by both state and federal court systems in light of COVID 19 and predicting a huge increase in federal bankruptcy filings in light of its economic consequences); see also Shanahan, *supra* note 268, at 128 ("State civil courts are at the core off the modern American justice system, and they are overwhelmed.").

²⁸² See *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (recognizing benefits of clear, readily applicable jurisdictional rules, even if in application in some cases such rules lead to absurd results).