

## [Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION— 9th Cir.: Twin opinions find SLUSA barred state claims and that SLUSA dismissals are jurisdictional, \(Aug. 25, 2017\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

The Ninth Circuit engaged in some wordsmithing while holding in an unpublished opinion that the Securities Litigation Uniform Standards Act (SLUSA) barred state-law breach of contract and breach of fiduciary duty claims while also holding in a separate published opinion that dismissals under SLUSA involve subject-matter jurisdiction and cannot be made with prejudice. The court reiterated SLUSA's broad reach to allegations that suggest the likelihood that a statement was false when made, here in the context of state-law claims against an open-end fund (*Hampton v. Pacific Investment Management Company LLC*, August 24, 2017, Korman, E.).

**SLUSA barred state-law claims.** The complaint sought to avoid SLUSA by alleging breach of contract and breach of fiduciary duty claims under Massachusetts law. But the court noted that SLUSA comes into play if deception (e.g., a false statement at the time it was made) likely lies at the heart of a plaintiff's claims, with emphasis on the substance of the claims and not the exact words used. SLUSA, among other things, bars "covered class actions" that allege "[a]n untrue statement or omission of a material fact." Other elements of SLUSA were undisputed in this case.

Here, the court said PIMCO's Total Return Fund, an open-end fund, adopted a riskier emerging markets strategy than previously announced such that the plaintiff's claims, albeit couched in contract and fiduciary duty language, substantively focused on deception (i.e., a false statement). The court said a key factor in its analysis was that the Total Return Fund was an open-end fund meaning that its prospectus representations were made continuously and, thus, suggested the likelihood that the plaintiff was actually trying to allege a false statement.

In reaching its conclusion that SLUSA barred the state law claims, the court distinguished two Ninth Circuit cases that held SLUSA did not bar contract claims (See *Freeman Investments v. Pacific Life Insurance Co.*; *Falkowski v. Imation Corp.*). As for the plaintiff's argument that the case against PIMCO did not involve an allegation of fraud, the court reiterated that SLUSA nevertheless applies to allegations regarding "simple false statements."

Lastly, the court declined to mull whether other class-wide claims might survive SLUSA. Specifically: "...whether a class composed only of people who bought shares while the Emerging Markets Policy was still being followed would have their claims barred by SLUSA on account of the policy later becoming false."

**Dismissal without prejudice.** The court's unpublished opinion dealing with substantive aspects of SLUSA hinted at the result of a related published opinion holding that SLUSA dismissals involve subject-matter jurisdiction and that dismissals should be *without* prejudice. The district court had dismissed the instant complaint *with* prejudice and without any opportunity for the plaintiff to re-plead his claims.

Although the Ninth Circuit had not previously "directly" answered whether SLUSA requires dismissal under FRCP 12(b)(1) (lack of subject-matter jurisdiction) or FRCP 12(b)(6) (failure to state a claim), the court drew strength for its conclusion that SLUSA dismissals are jurisdictional from the court's "dictum" in *Freeman Investments* (see link above): "If plaintiffs presented viable individual claims, the district court should have dismissed them without prejudice so that plaintiffs might bring them in state court."

The court reminded readers that the distinction between FRCP 12(b)(1) and FRCP 12(b)(6) is significant: the former is not a merits judgment while the latter is a merits judgment with attendant implications for claim preclusion. For the court, SLUSA's language about covered class actions not being "maintained in any State or Federal court by any private party" has jurisdictional underpinnings. Moreover, the court's understanding of

SLUSA as jurisdictional would align it with a similar "summary" conclusion by the Third Circuit ([LaSala v. Bordier](#)—See footnote 7) (but see also the court's citation to a Seventh Circuit case, [Brown v. Calamos](#), a unanimous panel opinion by Judge Posner suggesting the contrary and affirming dismissal "on the merits").

Still, the court noted that the plaintiff here may have some options. For example, he could re-plead his individual state-law claims in a federal or state court. He also could plead fresh federal securities law claims on an individual or class basis. But with respect to the plaintiff's current state-law claims, despite winning dismissal without prejudice, the court declined to overturn the district court's denial to the plaintiff of a chance to replead these state-law claims as a class action.

**Court as wordsmith.** According to the court, even the Supreme Court has sometimes complained that SLUSA harbors terms that may be confusing in a procedural context. As a result, in its published opinion, the court said that SLUSA bars claims rather than preempts or precludes them. "Moreover, this opinion also addresses questions related to claim preclusion, and we have a measure of 'pity for the tired reader' who would have to see-saw between the term's dual meanings" (citation to Supreme Court case omitted). The court's attempt to clarify the multiple meanings associated with preclusion would frame its published opinion on SLUSA's jurisdictional aspects.

The case is [No. 15-56841](#) (published opinion); [Unpublished Opinion](#).

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Companies: Pacific Investment Management Company LLC

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