

## [Securities Regulation Daily Wrap Up, TOP STORY—9thCir.: Firm's claims of best execution were deceptive conduct actionable as fraud, \(Jan. 2, 2018\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

A Ninth Circuit panel has affirmed a district court's conclusion that it lacked subject matter jurisdiction over a securities class action. The complaint alleged that a financial services firm's routing of order executions breached various state-law duties. The panel affirmed that the firm's promises of best execution were a misrepresentation actionable under the federal securities laws and that the claims were thus barred by the Securities Litigation Uniform Standards Act (*Fleming v. The Charles Schwab Corporation*, December 29, 2017, Hurwitz, A.).

In 2004, financial services firm Charles Schwab Corporation agreed to route 95 percent of its "non-directed trades" to UBS Securities LLC. The plaintiffs, who were Schwab retail customers, claimed that Schwab could have routed its trades to many other venues and that the arrangement with UBS sometimes resulted in unfavorable executions.

**District court dismisses.** The complaints alleged, among other claims, that Schwab's routing of order executions to UBS violated the California Unfair Competition Law, breached Schwab's fiduciary duty to its clients, and was an intentional or negligent misrepresentation. Schwab contended that the plaintiffs' claims were precluded by the SLUSA, and the [district court](#) agreed. According to the court, Schwab met the two elements of SLUSA preclusion at issue: Schwab made a misrepresentation or omission or employed any manipulative or deceptive device "in connection with" the purchase or sale of a covered security.

**Standing.** The appellate panel first found that the customers had Article III standing to bring their complaints. The complaints alleged that Schwab's routing to UBS resulted in higher execution prices than might have otherwise occurred and the panel concluded that this established the required injury in fact, including both particularized and concrete injuries. At the motion to dismiss stage, the panel said, it was not required to identify which specific trades were more costly and less expeditious, only that some were.

**SLUSA.** The panel then affirmed the district court's holding that it lacked subject matter jurisdiction. The gravamen of the complaints, the panel stated, was that Schwab intentionally breached a duty of best execution. The SLUSA will bar a best execution claim to the extent that it is based on fraud or nondisclosure and, in this case, all of the pleaded causes of action alleged deceptive conduct actionable under federal securities law, the panel found. The district court correctly concluded that Schwab either misrepresented that best execution would be achieved or failed to disclose that best execution was not possible. Also, since the promise of best execution induced the customers to purchase or sell securities through Schwab, the "in connection with" requirement was met.

The case is [No. 16-15179](#).

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Companies: The Charles Schwab Corp.; Charles Schwab & Co., Inc.

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