



Recent Developments in Federal Preemption of State Securities Law Claims

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Federal law such as the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), 15 U.S.C. §§ 77p(b), 78bb(f)(1), and the National Securities Markets Improvement Act of 1996 (“NSMIA”), 15 U.S.C. 77(r), provides important limitations on the application of state securities laws. The Supreme Court may soon further clarify the scope of federal preemption under these acts. This presentation will address this important federal litigation, and its use in preventing state court actions arising from investments in covered securities, including private placements.

SLUSA

Congress enacted SLUSA to deal with plaintiffs attempts to avoid the Private Securities Litigation Reform Act of 1995’s (“PSLRA”) stringent pleading requirements by pleading only state law claims in state court.” SLUSA generally precludes state court class actions on behalf of more than fifty class members that assert state law claims alleging an untrue statement or omission of a material fact in connection with the purchase or sale of a “covered security.”

Recent decisions have focused on the issue of whether a case involves a “covered security,” and the Supreme Court granted *certiorari* to address the issue next term.

A. Supreme Court

- *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012), *cert. granted*, *Proskauer Rose LLP v. Troice*, 133 S.Ct. 978 (2013)

These cases arise from an alleged Ponzi scheme involving R. Allen Stanford and Stanford International Bank (“SIB”). The plaintiffs purchased CDs issued by SIB. After Stanford was indicted and certain of his companies placed in receivership, the plaintiffs sued third-party advisors alleging that the advisors were complicit in the Ponzi scheme. The defendants argued that SLUSA precluded the claims because although the

CDs themselves were not covered securities, the alleged misrepresentations related to the covered securities that purportedly backed the CDs. The district court granted motions to dismiss, but the Fifth Circuit reversed, holding that the alleged fraudulent scheme was only “tangentially related” to the trading of covered securities. In doing so, the Fifth Circuit agreed with the Ninth Circuit and in conflict with the Second, Sixth, and Eleventh Circuits. The Supreme Court granted *certiorari* on the issue of whether SLUSA “prohibits private class actions based on state law only where the alleged purchase or sale of a covered security is ‘more than tangentially related’ to the ‘heart, crux or gravamen’ of the alleged fraud.”

B. Courts of Appeals

- *In re Bernard L. Madoff Inv. Securities LLC*, 721 F.3d 54 (2d Cir. 2013)
- *Freeman Investments, L.P. v. Pacific Life Insurance Co.*, 704 F.3d 1110 (9th Cir. 2013)
- *Brockway v. Evergreen Intern. Trust*, 496 F. App’x 357, 2012 WL 5458464 (4th Cir. 2012)
- *Daniels v. Morgan Asset Management, Inc.*, 497 Fed. App’x 548, 2012 WL 3799150 (6th Cir. 2012)
- *Meridian Horizon Fund, LP v. KPMG (Cayman)*, 487 Fed. App’x. 636, 2012 WL 2754933 (2d Cir. 2012)

C. District and Bankruptcy Courts

- *Holtz v. J.P. Morgan Securities LLC*, 2013 WL 3240181 (N.D. Ill. June 26, 2013)
- *Tolin v. Standard & Poor’s Financial Services, LLC*, --- F.Supp.2d ---, 2013 WL 3192115 (June 24, 2013)
- *Broyles v. Cantor Fitzgerald & Co.*, 2013 WL 1681150 (M.D. La. April 17, 2013)
- *In re Austin Capital Management, Ltd.*,

Securities & Employee Retirement Income Sec. Act (ERISA) Litigation, 2013 WL 1680109 (S.D.N.Y. April 16, 2013); *In re Austin Capital Management, Ltd., Securities & Employee Retirement Income Sec. Act (ERISA) Litigation*, 2012 WL 6644623 (S.D.N.Y. December 21, 2012)

- *Handal v. State Street Bank and Trust Co.*, --- F.Supp.2d ---, 2013 WL 1775300 (D. Mass. March 19, 2013)
- *Hidalgo-Velez v. San Juan Asset Management, Inc.*, 2012 WL 4427077 (D.P.R. September 24, 2012); *Hidalgo-Velez v. San Juan Asset Management, Inc.*, 2013 WL 1089745 (D.P.R. March 15, 2013) Slip Copy
- *Yale M. Fishman 1998 Ins. Trust v. General American Life Ins. Co.*, 2013 WL 842642 (S.D.N.Y. March 7, 2013)
- *Campbell v. American Intern. Group, Inc.*, --- F.Supp.2d ---, 2013 WL 765328 (D.D.C. March 1, 2013)
- *In re Facebook, Inc., IPO Securities and Derivative Litigation*, 922 F.Supp.2d 445 (S.D.N.Y. 2013); *In re Facebook, Inc., IPO Securities and Derivative Litigation*, 288 F.R.D. 26 (S.D.N.Y. 2012)
- *Liberty Media Corp. v. Vivendi Universal, S.A.*, 923 F.Supp.2d 511 (S.D.N.Y. 2013)
- *In re Satyam Computer Services Ltd. Securities Litigation*, 915 F.Supp.2d 450 (S.D.N.Y. 2013)
- *In re Lehman Bros. Securities and ERISA Litigation*, 2012 WL 6603321 (S.D.N.Y. December 17, 2012); *In re Lehman Bros. Securities and ERISA Litigation*, 903 F.Supp.2d 152 (S.D.N.Y. 2012)
- *Niitsoo v. Alpha Natural Resources, Inc.*, 902 F.Supp.2d 797 (S.D. W. Va. 2012)
- *Levinson v. Westport Nat. Bank*, 2012 WL 4490534 (D. Conn. September 28, 2012)
- *Lakeview Inv., LP v. Schulman*, 2012 WL 4461762 (S.D.N.Y. September 27, 2012)
- *Wilson v. Wells Fargo Advisors, LLC*, 2012 WL 5240815 (D. Del. September 25, 2012)
- *Hubuschman v. Zuckerberg*, 2012 WL 3985509 (N.D. Cal. September 11, 2012)
- *In re Fannie Mae 2008 Securities Litigation*, 891 F.Supp.2d 458 (S.D.N.Y. 2012)
- *Lapin v. Facebook, Inc.*, 2012 WL 3647409 (N.D. Cal. August 23, 2012)
- *Deangelis v. Corzine*, --- B.R. ---, 2012 WL 3526659 (S.D.N.Y. August 08, 2012)

- *Stichting Pensioenfonds ABP v. Merck & Co., Inc.*, 2012 WL 3235783 (D. N.J. August 01, 2012)
- *Brady v. Kosmos Energy Ltd.*, 2012 WL 6204247 (N.D. Tex. July 10, 2012)

D. State Courts

- *Nickell v. Shanahan*, 2013 WL 2402852 (Mo. Ct. App. June 4, 2013)

NSMIA

The NSMIA created a new class of securities, called “federal covered securities.” Federal covered securities are from state securities registration. Federal covered securities include:

- Securities listed, or authorized for listing, on the New York or American Stock Exchange, the NASDAQ Stock Market, or on a national exchange which the SEC by Rule determines has listing standards substantially similar to those of the named markets (In January of 1998, the SEC also designated by rule securities listed on the Chicago Board Options Exchange, Tier 1 of the Pacific Exchange, and Tier 1 of the Philadelphia Stock Exchange);
- Securities equal in seniority or senior to securities described in the preceding paragraph;
- Securities issued by an investment company registered under the Investment Company Act of 1940;
- Securities that are the subject of non-issuer secondary trading transactions under section 18(b)(4)(A) of the federal Securities Act of 1933 (involving reporting companies under section 13 or 15(d) of the Securities Exchange Act of 1934);
- Securities offered or sold to a “qualified purchaser” as that term is defined by the SEC (expected to be similar to “accredited investor” in Rule 501 of Regulation D under the 1933 Act);
- Securities offered or sold pursuant to most of the exemptions contained in 1933 Act Section 3(a), plus under Section 4(2)(including certain exchange offers but excluding the intrastate exemption in Section 3(a)(11), the non-profit exemption in Section 3(a)(4), and any municipal/governmental security offered and sold in the state in which the issuer of the security is located); and
- Securities that will be federal covered securities under any of the above upon completion of the transaction.
- NSMIA provides that states may continue to impose filing requirements for documents filed with the SEC, may require the filing of consents to service of process, and may impose filing fees

in the amounts provided by state law on the day before NSMIA became effective.

A. Case Law

- *People ex rel. Cuomo v. Greenberg*, 95 A.D.3d 474 946 N.Y.S.2d 1 (1st Dept 2012)
- *NNN Durham Office Portfolio 1, LLC v. Highwoods Realty Ltd. Partnership*, 2013 WL 625065 (N.C. Superior Court of North Carolina, Durham County, Business Court. February 19, 2013)

B. Administrative

- *ING Life Insurance and Annuity Company*, 2012 WL 3862169 (2012): ING Life Insurance and Annuity Company requested a no-action letter regarding its intention to permit certain sponsors of retirement programs that are subject to the Employee Retirement Income Security Act of 1974 to apply proceeds from their redemption of mutual fund shares to the purchase of a group variable annuity contract issued by ING Life; and automatically enroll employees in the sponsors' retirement program by adding such employees as participants under a group variable annuity contract issued by ING Life and to apply contributions on behalf of such participants to designated

investment options under the contract. The Division of Investment Management found that it would not recommend enforcement under Sections 22(e) and 27(i)(2)(A) of the Investment Company Act of 1940, so long as ING Life obtained a signed statement of understanding from each program participant.

- *The Options Clearing Corporation*, 2013 WL 620835 (2013): The Options Clearing Corporation requested interpretive guidance regarding seniority of over the counter options cleared by OCC pursuant to its bylaws and rules in relation to OCC issued standardized options which are listed on a national securities exchange. OCC believed that the cleared OTC options were equal in seniority to those listed on a national securities exchange for purposes of federal preemption of state securities registration requirements under Section 18(a) of the Securities Act of 1933. The Division of Corporation finance found that OTC options would have equal priority with listed options with respect to the distribution of assets and payment of amounts due to option holders, and would be considered covered securities under the Act, based on the representations in the request.

About Duris Holmes

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Duris L. Holmes is a member of the firm's Business Department. He has more than twenty-five years of experience representing clients in the matters of antitrust and trade regulation, bankruptcy, business organization, contracts (government and private), directors' and officers' liability, franchising, health care, insurance, intellectual property, mergers and acquisitions, shareholders' rights, and trusts and estates. Mr. Holmes' practice includes representing clients in transactional matters as well as arbitration and litigation.

In the community, Mr. Holmes is active in Scouting, serving on the Executive Board of the Southeast Louisiana Area Council of the Boy Scouts of America. He is also the president of Advocates for Academic Excellence in Education, which is the sponsoring organization for Benjamin Franklin High School, recognized as one of the top high schools in the United States.

Mr. Holmes attended Louisiana Tech University. He earned his juris doctorate, cum laude in 1986 from Tulane University Law School, 1986, where he was a member of the Order of the Coif and The Order of Barristers and served as Chief Justice of the Moot Court Board. He received the Leadership in Law Award: Top 50 Lawyers in New Orleans, 2008 from New Orleans City Business. Mr. Holmes is also co-chair of the Securities Arbitration Subcommittee of the Business Litigation Committee of the American Bar Association Section of Business Law.

Professional Honors and Activities

- Leadership in Law Award: Top 50 Lawyers in New Orleans, 2008
- American Bar Association -- Forum on Franchising (Litigation and Dispute Resolution Division); Business Section (Commercial Litigation Committee and Business Torts Subcommittee); Intellectual Property Law Section (Franchising and Insurance Committees); Co-chair, Securities Arbitration Subcommittee (Business and Corporate Litigation Committee of the Section of Business Law)
- Louisiana State Bar Association -- Antitrust and Trade Regulation Law Section; Corporate and Business Law Section; Consumer Protection Section; Lender Liability & Bankruptcy Law Section; Intellectual Property Law Section
- New Orleans Bar Association -- Intellectual Property Committee (Subcommittee on Franchising); Internet Committee

Education

- J.D., cum laude, Tulane University, 1986 -- Order of the Coif; The Order of Barristers; Chief Justice, Tulane Moot Court Board
- Louisiana Tech University, 1980-1983 -- Omicron Delta Kappa; Lambda Chi Alpha Fraternity; Past president and director, Theta Psi Zeta Corporation of Lambda Chi Alpha Fraternity