A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

46. *London* at *18. Notably, under this analysis, claims for restitution, unjust enrichment, and other nonlegal remedies might remain viable despite the existence of a § 102(b)(7) provision.
47. *London* at **23-24.
48. *London* at *24.
49. *London* at *25.
50. *London*.
51. *London* at *16.

SLUSA Bars Breach of Duty Claim That's Tangled with Misrepresentation

BY THOMAS O. GORMAN

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The Securities Litigation Uniform Standards Act of 1998 (SLUSA) was passed to prevent a class action plaintiff from circumventing the stringent pleading requirements of the Private Securities Litigation Reform Act (PSLRA) by filing in state court. Since that time, the U.S. Courts of Appeal for the Third, Sixth, and Ninth Circuits have developed different approaches to the application of SLUSA. In *Brown v. Calamos*, decided in mid-November, the Seventh Circuit affirmed an Illinois district court's dismal in accordance with SLUSA. In doing so, the Seventh Circuit disagreed with the approach of the Ninth Circuit, but concluded that under the approach of the Sixth or one approaching that of the Third, an action brought in state court that centered on a claimed breach of fiduciary duty tangled with a misrepresentation claim was properly dismissed under SLUSA.[1]

In *Brown*, the plaintiff brought a state court class action centered on a claim that an investment adviser breached its fiduciary duty by redeeming auction market preferred stock (AMPS) to placate banks and brokers important to other funds in the adviser's fund family. The suit was brought on behalf of the owners of the common stock of Calamos Convertible Opportunities and Income Fund, a closed-end investment fund. The defendants are the adviser, the fund and the parent company's board of trustees.

AMPS are preferred shares in the fund, and paid an interest rate recomputed at short intervals at auctions. The auctions gave the AMPS shareholders liquidity. The funds from the purchase of the preferred shares are pooled with the money from the common shareholders. The AMPS were essentially a kind of nonredeemable bond which gave the fund inexpensive financing. When the auctions failed, the AMPS shareholders demanded redemption. The investment adviser redeemed the shares although there was no obligation, reducing the fund's liquidity and leverage. Additional money was borrowed at a higher interest rate to cover the shortfall.

The plaintiff's complaint in *Brown* claims that the redemption constituted a breach of fiduciary duty and that it was undertaken to maintain relations with investment bankers essential to other funds managed by the adviser. The complaint also contains a disclaimer which specifies that it does not contain a fraud claim. Following removal, the Illinois district court dismissed the case under SLUSA.[2]

SLUSA prohibits securities class actions of more than 50 members based on state law alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security. (A covered security is one traded nationally and listed on a regulated national exchange.)

Once a case is removed from state court the district court has two options. First, if the case falls within the ambit of SLUSA the court must grant a motion to dismiss. This is an adjudication on the merits. If, however, the suit is not within the purview of the statute then it must be remanded to state court. In that event the district court has no jurisdiction to hear the case.

Three approaches have evolved to the application of SLUSA. Under the literalist approach of the Sixth Circuit if the complaint can be interpreted as containing a misrepresentation and the other requirements of SLUSA are met, it must be dismissed. The Third Circuit, in contrast, has concluded that if a misrepresentation or material omission is not essential to the success of the plaintiff's claim, it is not a bar to the suit. The Ninth Circuit takes an intermediate approach which permits the complaint to be dismissed but without prejudice. Plaintiffs can then file an amended complaint in state court without the misrepresentation.

Three approaches have evolved to the application of SLUSA. Under the literalist approach of the Sixth Circuit if the complaint can be interpreted as containing a misrepresentation and the other requirements of SLUSA are met, it must be dismissed.

In *Brown*, the Seventh Circuit concluded that the suit was properly dismissed. The approach of the Ninth Circuit is contrary to SLUSA, the Seventh Circuit Court found. In the ruling, Circuit Court Judge Richard Posner wrote that the *Brown* plaintiff however:

> **must lose even under a looser approach than the Sixth Circuit's (not the Ninth Circuit's approach, however, but one close to the Third Circuit's), whereby suit is barred by SLUSA only if the allegations of the complaint make it likely that an issue of fraud will arise in the court of the litigation—as in this case. The allegation of fraud would be difficult and maybe impossible to disentangle from the charge of breach of the duty of loyalty that the defendants owed their investors.**

Under these circumstances, and despite the disclaimer in the complaint, the suit is barred by SLUSA.

NOTES

1. *Brown v. Calamos*, No. 11-1785 (7th Cir., Decided Nov. 10, 2011).
2. *Brown v. Calamos*, No. 10-C-6558 (N. Dist. of Illinois, Eastern Div., Decided March 14, 2011).