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Class Size Doesn't Matter—Seventh Circuit Holds That Federal Law Bars Private Securities Class Actions Brought Under State Law Regardless of the Number of Putative Class Members

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In *Nielen-Thomas v. Concorde Investment Servs., LLC*, No. 18-2875, 2019 WL 302766 (7th Cir. Jan. 24, 2019), the United States Court of Appeals for the Seventh Circuit held that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. 105-353, 112 Stat. 3227, bars all putative class actions brought by private plaintiffs in a representative capacity under state law, regardless of the estimated size of the class. The Seventh Circuit's decision effectively eliminates the ability of a single plaintiff in a securities class action to represent a putative class of unnamed persons in any State within the Seventh Circuit (Illinois, Wisconsin, and Indiana).

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In *Concorde Investment Services*, plaintiff Susan Nielen-Thomas filed a complaint in Wisconsin state court alleging that she and other class members were defrauded by their investment advisor. Plaintiff sued her advisor and several investment firms under various state-law claims for defendants' alleged failure to properly managed the class members' investments. Nielen-Thomas was the only named plaintiff, but the putative class included retail clients of the investment advisor and his investment advisory firm.

After removing the action to federal court, defendants moved to dismiss plaintiff's complaint as barred by SLUSA. In granting the motion to dismiss, the district court held that plaintiff's lawsuit met SLUSA's definition of a "covered class action" and therefore must be dismissed with prejudice as required under the statute. Plaintiff appealed the dismissal of her state law class action claims.

SLUSA prohibits certain securities class actions from proceeding under state law. Specifically, under SLUSA, "[n]o *covered class action* based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party" if that party alleges either "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" or "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1) (emphasis added).

SLUSA provides that a "single lawsuit" qualifies as a "covered class action" when:

1. Damages are sought on behalf of *more than 50 persons* or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any question affecting only individual persons or members; *or*
2. one or more named parties seek to recover damages *on a representative basis on behalf of themselves and other unnamed parties similarly situated*, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members . . . .

Plaintiff did not dispute that her class action claims were (a) based on state law, (b) involved a 'covered security' and (c) allege misrepresentations "in connection with the purchase or sale of" that security. Thus, there was only

one issue before the Court: whether plaintiff's lawsuit was a "covered class action" as that term is defined under SLUSA. Plaintiff argued that her lawsuit was not a "covered class action" under Subparagraph (I) because her estimated class size was less than 50. The Seventh Circuit rejected plaintiff's attempt to characterize her lawsuit as outside the bounds of SLUSA, holding that plaintiff's carve-out of classes with less than 50 putative members ignored subparagraph (II), which expressly bars *all* class actions that are brought on a "representative basis," regardless of class size. Under the express terms of subparagraph (II), plaintiff's lawsuit was a "covered class action" and therefore precluded under SLUSA. The Seventh Circuit recognized that there could be some overlap in the scope of each subparagraph (*i.e.*, a putative class action in which the proposed class exceeds fifty members would be covered under both subparagraphs), but found the redundancy to be neither "unusual or problematic."

Going forward, it should not be possible (at least in the Seventh Circuit) for private plaintiffs in securities class actions to sue on behalf of a class of unnamed persons. *Concorde Investment Services* teaches that the size of the class simply does not matter under SLUSA. While it remains to be seen whether other Circuits will follow the Court's rationale, representative "covered class actions" under state law are now a thing of the past in the Seventh Circuit.

On *de novo* review, the unanimous Seventh Circuit panel held that giving effect to the clear meaning of the statute as written, plaintiff's claims met the definition of a "covered class action" under subparagraph (II). In analyzing the issue, the Court reviewed the text of SLUSA and noted that subparagraph (II) unequivocally precludes all class actions brought by "one or more named parties" who seek to recover damages "on a representative basis on behalf of themselves and other unnamed parties similarly situated." In other words, subparagraph (II) prohibits the exact type of representative class action brought by plaintiff. Based upon the clear statutory text, the Seventh Circuit held that plaintiff's lawsuit was barred under SLUSA, and accordingly affirmed the district court's ruling.

15 U.S.C. § 78bb(f)(5)(B)(i) (emphasis added).