

# The Seventh Circuit Widens a Split Among the Circuits on SLUSA Preemption of State Class Actions

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IN a pair of notable decisions handed down on January 23, 2017, the Seventh Circuit Court of Appeals affirmed dismissals of two separate class actions under the Securities Litigation Uniform Standards Act (“SLUSA” or the “Litigation Act”). In *Goldberg v. Bank of America*,<sup>1</sup> and *Holtz v. JPMorgan Chase Bank, N.A.*,<sup>2</sup> the Seventh Circuit held that SLUSA bars state law breach of contract and breach of fiduciary duty class actions that look much different than the standard securities cases SLUSA was intended to preempt and prevent. Indeed, the reach of these decisions

– and the scope of the class action claims they prevent – is likely to be very broad.

*Goldberg* and *Holtz* have widened an already significant split of authority among the circuit courts of appeal regarding SLUSA preemption. In the words of dissenting Judge David Hamilton, these decisions “effectively immunize a favored category of defendants – banks and securities businesses – from liability for their breaches of contract and fiduciary duty.”<sup>3</sup> Arguing that they “shelter the wrongful conduct of powerful financial institutions from the only

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<sup>1</sup> 846 F.3d 913 (7th Cir. 2017).

<sup>2</sup> 846 F.3d 928 (7th Cir. 2017).

<sup>3</sup> *Goldberg*, 846 F.3d at 922 (Hamilton, J., dissenting).

viable means to enforce contractual and fiduciary duties,”<sup>4</sup> Judge Hamilton invited *certiorari* petitions by writing that “[o]nly the Supreme Court can settle this three- or four-way circuit split.”<sup>5</sup>

While the plaintiffs in *Goldberg*<sup>6</sup> and in *Holtz*<sup>7</sup> answered Judge Hamilton’s invitation, filing petitions for writ of *certiorari* with the Supreme Court on June 21, 2017 and June 22, 2017, respectively, that Court denied the same on October 2, 2017. This serious circuit split therefore continues.<sup>8</sup>

### I. Background: The SLUSA Saga

The SLUSA saga, and how it resulted from legislation intended to rein in federal securities class actions, is well known. In 1995, Congress passed the Private Securities Litigation Reform Act (“the PSLRA”) to eliminate abusive securities litigation. The

prototypical cases the PSLRA was intended to address were the meritless strike suits plaintiffs reflexively filed after unexpected stock price drops. Congress clearly heard and responded to the criticism that, to avoid expensive discovery, corporate defendants simply settled even weak and abusive cases. To separate the allegedly meritorious wheat from the meritless chaff, the PSLRA substantially increased the burdens on plaintiffs to plead securities fraud with particularity. The PSLRA also stayed discovery until plaintiffs could satisfy its higher pleading standards.

Rather than deal with the PSLRA and its onerous requirements, securities plaintiffs and their counsel stayed in state court and avoided them. Specifically, plaintiffs often repackaged and filed in state court, under state law theories, securities claims they could no

<sup>4</sup> *Id.* at 921.

<sup>5</sup> *Id.* at 925.

<sup>6</sup> *Goldberg v. Bank of America, et al.*, 846 F.3d 913 (7th Cir. 2017), *petition for cert. filed*, (U.S. June 21, 2017) (No. 16-1541). Plaintiff’s petition for *certiorari* was denied on October 2, 2017.

<sup>7</sup> *Holtz v. JPMorgan Chase Bank, N.A., et al.*, 846 F.3d 928 (7th Cir. 2017), *petition for cert. filed*, (U.S. June 22, 2017) (No. 16-1536).

<sup>8</sup> The Supreme Court has recently granted *certiorari* in another SLUSA case, however. In *Cyan v. Beaver County Employees Retirement Fund, et al.*, No. 15-1439, the Court agreed to review a decision of a California state court *denying* a motion for

judgment on the pleadings that contended that SLUSA removed state court jurisdiction over class actions that allege only claims under the Securities Act of 1933, despite the Securities Act’s grant of concurrent jurisdiction for such claims. The petition for *certiorari* came after the California Court of Appeal denied a writ of mandate, prohibition or other relief in an unpublished one-line order, and the California Supreme Court denied review, also in an unreported one-line order. The Supreme Court granted *certiorari* in *Cyan* after it requested the Acting Solicitor General to express the United States’ view of whether the petition should be granted, even though there are no federal appellate court decisions in conflict.

longer successfully pursue in federal court. Allowing plaintiffs to pursue weak and abusive securities cases in state court under another name obviously frustrated the purpose of the PSLRA, and this state law end around did not last long. In 1998, Congress passed SLUSA.

SLUSA bars state law class actions involving more than 50 class members that allege fraud in the purchase and sale of securities. Such claims may only be brought under federal law. SLUSA accomplishes this through the following key language:

No covered class action [*i.e.*, a class action involving more than 50 class members] based on the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security [*i.e.*, a security traded on a national exchange, or a security of

registered investment company]; or

(B) that the defendant used or employed any manipulative or deceptive practice or contrivance in connection with the purchase or sale of a covered security.<sup>9</sup>

To insure that federal courts, and not state courts, have the last say on SLUSA's reach, the statute also allows removal from state court. Federal courts of appeal, however, have differed substantially on how far SLUSA reaches to bar state law claims.

## II. SLUSA Preemption Before *Goldberg* and the Seventh Circuit's Decision in *Brown v. Calamos*

Before the Seventh Circuit heard *Goldberg*, various United States courts of appeal had developed at least three lines of authority to determine whether SLUSA bars class actions that allege state law contract and fiduciary duty claims that also involve securities. The Seventh Circuit described these varying lines of authority as the Sixth Circuit's "Literalist

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<sup>9</sup> 15 U.S.C. § 78bb(f)(1).

Approach,”<sup>10</sup> the Third Circuit’s the “LaSala Approach,”<sup>11</sup> and the Ninth Circuit’s the “Intermediate Approach.”<sup>12</sup> While the Seventh Circuit could have consulted any of these lines of authority in deciding *Goldberg* and *Holtz*, it also could have followed its earlier decision in *Brown v. Calamos*.<sup>13</sup>

Written by Judge Richard Posner, the opinion of the Court in *Brown* discussed the competing lines of SLUSA authority.<sup>14</sup> While *Brown* did not specifically decide to adopt any of these three approaches, Judge Posner nonetheless expressed concern over the Intermediate Approach, which would allow dismissal of the complaint without prejudice and with leave to amend – so long as the amended complaint would not include any offending allegations that violated SLUSA.<sup>15</sup> In expressing his concerns, Judge Posner identified what he deemed an unacceptable “reinsertion risk.”<sup>16</sup> Specifically, he suggested that once plaintiffs were released from federal court and remanded to state court, they would simply reallege fraud

and violate SLUSA again – despite any federal order prohibiting the same. Worse, state court judges might grant them leave to do so. In Judge Posner’s words, “a plaintiff might be allowed by a state court to reinsert fraud allegations in the course of a litigation by a fresh state court complaint after dismissal of the removed suit, and press them at trial.”<sup>17</sup>

While Judge Posner recognized that a defendant could always again remove the case if this happened, he noted that “to allow removal of a complex commercial case after, maybe long after, the pleadings stage had been concluded would increase the length and cost of litigation unreasonably.”<sup>18</sup> With this reinsertion risk in mind, Judge Posner concluded that

The plaintiff in the present case 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

<sup>10</sup> *Brown*, 664 F.3d at 127 (citing *Atkinson v. Morgan Asset Management, Inc.*, 658 F.3d 549, 554-555 (6th Cir. 2011), and *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 311 (6th Cir. 2009)).

<sup>11</sup> *Brown*, 664 F.3d at 127 (citing *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008) and *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 300 (3d Cir. 2005)).

<sup>12</sup> *Brown*, 664 F.3d at 127 (citing *Stoody-Broser v. Bank of America*, 442 Fed.Appx. 247, 248 (9th Cir. 2011)).

<sup>13</sup> 664 F.3d 123 (7th Cir. 2011).

<sup>14</sup> It is worth noting that both Judge Joel Flaum and Judge Diane Sykes joined this opinion.

<sup>15</sup> *Brown*, 664 F.3d at 127.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

SLUSA *only* if the allegations of the complaint make it *likely* that *an issue of fraud will arise* in the course of the litigation.<sup>19</sup>

Judge Posner further found that the allegations of fraud in *Brown* would be “difficult and maybe impossible to disentangle” from the non-fraud allegations plaintiff had made.<sup>20</sup> Nor could the plaintiff be trusted to honor any promise – or order – to keep offending allegations out of the case:

Anyway, deletion of the fraud allegation would not be credible, if we are correct that the allegation may be central to the plaintiff’s case despite his disclaimer. The likelihood that he would do everything he could to sneak the allegation back into the case, if the complaint were amended and remand to the state court followed, would be so great as to make it imprudent to allow the complaint to be amended to delete the allegation.<sup>21</sup>

Thus, concluding that fraud was likely to arise in the course of the litigation, *Brown* held that “the suit was properly dismissed on the merits” with prejudice.<sup>22</sup>

### III. Facts and Procedural Histories of *Goldberg* and *Holtz*

#### 1. *Goldberg*

The complaint in *Goldberg* does not resemble a run-of-the-mill securities claim. Rather than seeking recovery of investment losses, the claims involve custodial bank accounts where “[i]f an account had a cash balance at the end of the day, the cash would be invested in (‘swept into’) a mutual fund from a list that the client chose.”<sup>23</sup> The defendant in *Goldberg*, LaSalle National Bank, would then automatically sell shares in the mutual fund to pay for other investments or to allow cash withdrawals.<sup>24</sup> While it charged the accounts a fee for this sweeping service, LaSalle National did not disclose to its account holders that it did so.<sup>25</sup>

Bank of America acquired 100% of LaSalle National’s stock in 2007. In June 2009, Bank of America advised its legacy LaSalle National account holders that their accounts would be

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<sup>19</sup> *Id.* at 128-129 (emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 131.

<sup>22</sup> *Id.*

<sup>23</sup> *Goldberg*, 846 F.3d at 915.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

converted to Bank of America accounts.<sup>26</sup> In its notice, Bank of America advised that one of the benefits of the conversion was that “[t]he daily cash reinvestment (sweep) fees that you currently pay will be eliminated beginning August 1, 2009, resulting in a decrease in fees charged against your account.”<sup>27</sup> This was allegedly the first disclosure that the Bank had ever charged any of these accounts these fees.

In response to the plaintiff’s request for information regarding these fees, Bank of America wrote that although “the sweep fees were automatically deducted per each vehicle’s unique fee basis, we cannot accurately portray how sweep fees were assessed from inception to current.”<sup>28</sup> Nonetheless, Bank of America could say that the most recent charges to the accounts were calculated at 35 basis points.<sup>29</sup> Plaintiffs ultimately alleged that LaSalle National had been receiving fees directly from the investment vehicles “which were as much as 35 or 45 basis points, [and] were based on the average daily invested balance that had been swept from the Custody accounts into the investment vehicles....”<sup>30</sup>

*Goldberg’s* original complaint was filed in state court against Bank of America and LaSalle National Bank, who removed the same to federal court under SLUSA.<sup>31</sup> Defendants also removed the complaint under the Class Action Fairness Act (“CAFA”), arguing that the amount in controversy was more than \$5 million and that the class was in excess of 100 members.<sup>32</sup> The plaintiff then filed an amended class action complaint in federal court that sought recovery under state law theories of breach of fiduciary duty, breach of contract, unjust enrichment and accounting. Notably, the plaintiff’s amended complaint also invoked federal jurisdiction under CAFA.<sup>33</sup> The district court, however, dismissed the entire complaint under SLUSA.<sup>34</sup>

## 2. *Holtz*

Unlike *Goldberg*, the plaintiffs in *Holtz* did not file in state court; asserting federal jurisdiction under CAFA, they filed their original complaint in federal court against JPMorgan Chase Bank, N.A. and its affiliates.<sup>35</sup> Like in *Goldberg*, however, the plaintiffs’ in *Holtz* sought to recover fees their accounts

<sup>26</sup> Amended Complaint at ¶ 16, *Ricke v. Bank of America, et al.*, No. 10-CV-6779, 2011 WL 3421512 (N.D. Ill. Aug. 4, 2011) (hereinafter *Am. Cmplt.*).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 18.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Goldberg*, 846 F.3d at 915.

<sup>32</sup> Notice of Removal, ¶¶ 18-30, *Ricke v. Bank of America, et al.*, No. 10-CV-6779, 2011 WL 3421512 (N.D. Ill. Aug. 4, 2011).

<sup>33</sup> *Am. Cmplt.* at ¶ 3.

<sup>34</sup> *Goldberg*, 846 F.3d at 915.

<sup>35</sup> *Holtz*, 846 F.3d at 929.

were charged under state law, seeking recovery under breach of contract, breach of fiduciary duty and unjust enrichment theories. The gravamen of their complaint was that the defendants did not earn the fees they charged. While plaintiffs paid for independent investment advice and skilled research from JPMorgan, plaintiffs did not get the benefits they bargained for as JPMorgan favored its own investment funds and provided its employees with incentives to favor investments in these funds. Plaintiff also alleged that JPMorgan did not disclose to its customers the incentives it gave its employees to favor its own funds. Plaintiffs did not seek any investment losses in *Holtz*.

The district court dismissed the complaint in its entirety under SLUSA.

#### IV. The Seventh Circuit's Decisions

##### A. The *per curiam* decision in *Goldberg* and the panel's decision in *Holtz*

Oral argument in *Goldberg* was held before Judge Frank Easterbrook, Senior Judge Richard Cudahy and Judge David Hamilton on January 17, 2012. The five page *per curiam* decision affirming the dismissal, however, came more than five years later. In the interim, in September

2015, Judge Cudahy passed. "On December 1, 2016, Circuit Judge Flaum was selected by a random procedure to replace him."<sup>36</sup>

Since the Seventh Circuit's decision in *Brown* was decided on November 10, 2011 – just two months *before* argument in *Goldberg* – one might assume that *Brown* would have played a significant part in its decision. The *per curiam* opinion in *Goldberg*, however, does not cite *Brown*. Instead, relying on *Holtz*, an opinion also written by Judge Easterbrook, the *per curiam* in *Goldberg* notes that while the plaintiff "maintains that his action rests on state contract law and state fiduciary duty law, not securities law," "[t]his line of argument, too, is addressed and rejected in *Holtz*, which holds that if a claim could be pursued under federal securities law, then it is covered by the Litigation Act even if it also could be pursued under state contract or fiduciary law."<sup>37</sup> Judge Sykes, a member of the *Brown* panel, also was a member of the *Holtz* panel.

In adopting what appears to be a new SLUSA standard – while not expressly overruling or distinguishing *Brown* – Judge Easterbrook's opinion in *Holtz* suggests that if a contract claim has an analog somewhere in the annals of federal securities law, the claim is

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<sup>36</sup> *Goldberg*, 846 F.3d at 914-915, n.\*.

<sup>37</sup> *Goldberg*, 846 F.3d at 916.

barred under SLUSA.<sup>38</sup> His citation of *United States v. Naftalin*, an appeal of a securities fraud conviction of a short seller who failed to deliver the securities he promised to deliver, supports this. As Judge Easterbrook reasoned, the felon's failure to deliver the securities was not only a violation of federal securities laws, it was also a breach of contract.<sup>39</sup>

Judge Easterbrook also wrote that "a fiduciary that makes a securities trade without disclosing a conflict of interest violates federal securities law."<sup>40</sup> To support this assertion, Judge Easterbrook cited a fairly obscure Securities and Exchange Commission decision, *In re E. F. Hutton & Co.*<sup>41</sup> and a review of the *E.F. Hutton* decision illustrates the broad reach of his holding. In that case, the Commission affirmed an NASD determination that a broker failed to "observe high standards of commercial honor and just and equitable principles of trade" when it failed to give a customer's limit sales order priority over its own proprietary position by accepting the order while not disclosing that the broker might sell its own stock first.<sup>42</sup> Indeed, in affirming the NASD's determination, the Commission applied standard agency principles to "give effect to

the reasonable expectations of the parties to the relationship" because "[w]here there is no explicit agreement to the contrary and the relationship is a fiduciary one, the law governing fiduciary duties provides presumptive definition for such expectations."<sup>43</sup>

Judge Easterbrook's formulation of the issue, and his citation to *E.F. Hutton*, seem to imply that *any* fiduciary duty claim that is in any way related to a securities transaction fall within the reach of SLUSA. This is so even if the conduct or the non-disclosure were not committed with *scienter*. Nor would it appear to matter that the claim could not succeed under federal law and could only succeed under state law; since "the Litigation Act would be ineffectual if it covered only winning securities claims," it must cover losing securities claims too.<sup>44</sup> As he held, "[t]o protect defendants from weak or abusive claims of wrongdoing in connection with securities transactions, it is essential to block those that fail under federal law as well as those that could succeed."<sup>45</sup>

While admitting in principle that "[f]ederal law often permits genuine contract claims to survive preemption,"<sup>46</sup> Judge Easterbrook

<sup>38</sup> *Holtz*, 846 F.3d at 932 (citing *United States v. Naftalin*, 441 U.S. 768 (1979)).

<sup>39</sup> *Holtz*, 846 F.3d at 932.

<sup>40</sup> *Id.*

<sup>41</sup> Securities Exchange Act Release No. 25887, 49 S.E.C. 829 (July 6, 1988).

<sup>42</sup> *E. F. Hutton & Co.*, 49 S.E.C. at 830 (quoting Art. III, § NASD Rules of Fair Practice).

<sup>43</sup> *Id.* at 832.

<sup>44</sup> *Holtz*, 846 F.3d at 933.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 931.



identified only two ways that *Holtz* could have pursued a contract claim under SLUSA: (1) if the contractual promise had been broken, unintentionally or by mistake, or (2) if JPMorgan created the incentive to favor its own funds *after* the plaintiff had invested her money and thus breached agreement after it was entered into.<sup>47</sup> Nonetheless, because SLUSA preempts all contract claims “that allege misrepresentations or omissions,”<sup>48</sup> the only way *Holtz* or *Goldberg* could litigate such claims was to do so individually or on behalf of 48 other persons – and thus remain under the SLUSA 50 member limit.

In contrast to their reliance on cases like *E.F. Hutton* and *Naftalin*, the *Goldberg* and *Holtz* opinions are also noteworthy for decisions that they do *not* cite. Neither *Goldberg* nor *Holtz* refers to the Ninth Circuit’s decision in *Freeman Investments, L.P. v. Pacific Life Ins. Co.*,<sup>49</sup> decided after oral argument in *Goldberg*, in which Judge Kozinski applied the “Intermediate Approach” to allow breach of contract claims to proceed. Nor did the *per curiam* in *Goldberg* or the majority opinion in *Holtz* refer to the Second Circuit’s more recent opinion in *In re Kingate Mgmt. Ltd.*,<sup>50</sup> a decision which reversed the dismissal of claims for fees related

to securities purchases under SLUSA, while affirming the dismissal of other claims in the same complaint under SLUSA preemption.

### 1. Judge Flaum’s concurring opinion in *Goldberg*

In contrast to the *per curiam* opinion in *Goldberg*, Judge Flaum, a member of the panel in *Brown*, cited that case extensively in his concurring opinion.<sup>51</sup> Noting *Brown*’s emphasis on the risk that a plaintiff might reinsert fraud allegations later, Judge Flaum reiterated *Brown*’s “concern with the Ninth Circuit’s approach” and examined the plaintiff’s amended complaint with this reinsertion risk in mind.<sup>52</sup> Using this lens, Judge Flaum first applied the literalist Sixth Circuit Approach – which asks whether the complaint can reasonably be interpreted as alleging a misrepresentation or a material omission – and concluded that *Goldberg*’s complaint could be reasonably so read and thus should be dismissed under that standard.<sup>53</sup> Then applying the looser Third Circuit approach – which asks whether proof of the misrepresentation or omission is essential as a necessary element of the cause of action or is otherwise

<sup>47</sup> *Id.*

<sup>48</sup> *Goldberg*, 846 F.3d at 920.

<sup>49</sup> 704 F.3d 1110 (9th Cir. 2013).

<sup>50</sup> 784 F.3d 128 (2d Cir. 2015).

<sup>51</sup> *Goldberg*, 846 F.3d at 917-920 (Flaum, J., concurring).

<sup>52</sup> *Id.* at 918-919.

<sup>53</sup> *Id.* at 919.

critical to the case – Judge Flaum concluded that the complaint should be dismissed on this standard as well because Goldberg’s claims rested on these omissions.<sup>54</sup>

Judge Flaum then reviewed the original state court complaint in *Goldberg* and concluded that the assertions made in that pleading, though since superseded, raised the reinsertion risk on a potential remand sufficiently to require dismissal under *Brown*.<sup>55</sup> In particular, Judge Flaum concluded that the risk that the plaintiff:

may “reinsert” these original allegations in a future state-court proceeding is amplified by the fact that his amended claim is inseparably intertwined with a material misrepresentations or omission. As such [the plaintiff’s] fiduciary duty claim triggered SLUSA preemption.<sup>56</sup>

While the risk that a *state* court might allow a plaintiff to reinsert these allegations is a critical element of this analysis, it is worth noting that this risk would not appear to have been present in *Goldberg*. Since the plaintiff invoked federal jurisdiction under CAFA in the

amended complaint, and since the defendants removed under CAFA, it is not apparent how this case could ever have been remanded to state court. The critical reinsertion risk question would then appear not to be a state court issue, but whether it would be likely that any *federal* district court reporting directly to the Seventh Circuit would allow such allegations to be reinserted in a subsequent complaint or litigated at trial. Even though the reinsertion risk would appear to be nil in *Goldberg*, the concurrence does not address this issue.

Finally, referring to *Holtz*’s conclusion that SLUSA does not preempt all contract claims, Judge Flaum noted that he did not read the examples Judge Easterbrook identified of potential claims that would pass SLUSA muster to be exhaustive.<sup>57</sup> Judge Flaum thus suggested that a contract claim might survive SLUSA if, for example, the plaintiff pleaded that the Bank reduced the “returns” the parties agreed the plaintiff would receive.<sup>58</sup>

## 2. Judge Hamilton’s dissent

Formally dissenting in *Goldberg* and effectively dissenting in *Holtz*, Judge Hamilton’s opinion begins by quoting Judge Kozinski in *Freeman Investments*:

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citations omitted).

<sup>57</sup> *Id.* at 920.

<sup>58</sup> *Id.*

Just as plaintiffs cannot avoid SLUSA through crafty pleading, defendants may not recast contract claims as fraud claims by arguing that they “really” involve deception or misrepresentation.<sup>59</sup>

Noting that both *Freeman* and *In re Kingate*<sup>60</sup> were decided after the 2012 argument in *Goldberg*, Judge Hamilton’s conclusion is simple: the Seventh Circuit should apply Second, Third and Ninth Circuit precedent “which allows class actions under state contract and fiduciary law where plaintiffs can prevail on their claims without proving the defendants engaged in deceptive misrepresentations or omissions.”<sup>61</sup>

Judge Hamilton also expressed his belief that *Brown* did not require dismissal of the complaint in *Goldberg*.<sup>62</sup> Instead, he maintained that the plaintiff would be able to avoid *Brown* as the breach of contract claim only required proof that the contract authorized certain fees and that the bank breached the contract by charging additional fees – by retaining the sweep fees it received from the investment

vehicles.<sup>63</sup> Under this analysis, there was no need for fraud to become an issue in the litigation in *Goldberg*, for either the breach of contract or the fiduciary duty claims.<sup>64</sup> Judge Hamilton also argued that *Goldberg* and *Holtz* went beyond *Brown* to create a new standard under which “virtually any breach of contract claim is preempted.”<sup>65</sup>

Finally, Judge Hamilton offered “a few additional thoughts prompted by [his] colleagues’ opinions in this case and in *Holtz*.”<sup>66</sup> In particular, he argued that these opinions take SLUSA’s statutory purpose too far; that their approach fails to give effect to the federalism balance SLUSA struck; that their approach conflicts with the Supreme Court’s approach in *Merrill Lynch, Pierce, Fenner & Smith v. Manning*,<sup>67</sup> which held that federal courts did not have exclusive jurisdiction over a state law claim that mentions federal securities law; and that the Second, Third and Ninth Circuits’ rule is easier to administer.<sup>68</sup>

While none of these issues is directly addressed by the other opinions in *Goldberg* and *Holtz*, the failure of the majority opinions to address *Manning* sticks out. A

<sup>59</sup> *Goldberg*, 846 F.3d at 920 (Hamilton, J., dissenting) (citing *Freeman Investments, L.P. v. Pacific Life Ins. Co.*, 704 F.3d 1110, 1116 (9th Cir. 2013)).

<sup>60</sup> 784 F.3d 128 (2d Cir. 2015).

<sup>61</sup> *Goldberg*, 846 F.3d at 921 (Hamilton, J., dissenting).

<sup>62</sup> *Id.* at 924.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 925.

<sup>67</sup> 136 S.Ct. 1562 (2016).

<sup>68</sup> *Goldberg*, 846 F.3d at 925-928 (Hamilton, J., dissenting).

unanimous decision, *Manning* expresses significant respect for state courts and state law.<sup>69</sup> Indeed, *Manning* expresses doubt about whether federal courts can even determine if a state court complaint is the product of “artful” pleading designed to avoid exclusive federal jurisdiction:

Merrill Lynch argues that a judge should go behind the face of a complaint to determine whether it is the product of “artful pleading.” ... We have no idea how a court could make that judgment, and get cold comfort from Merrill Lynch’s assurance that the question would arise not in this case but in “the next third, fourth, fifth case down the road.” ... That Merrill Lynch’s [jurisdictional test] threatens to become either a useless drafting rule or a tortuous inquiry into artful pleading is one more good reason to reject it.<sup>70</sup>

The Supreme Court’s very different approach to these issues may give the plaintiffs some hope that it may consider granting their petitions for *certiorari*.

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<sup>69</sup> See e.g. *Manning*, 136 S. Ct. at 1574 (“when a statute mandates, rather than permits, federal jurisdiction – thus depriving state courts of all ability to adjudicate certain

## V. Conclusion

The Seventh Circuit’s twin decisions in *Goldberg* and *Holtz* reach far to bar state law breach of contract and fiduciary duty class claims that have some tangential relationship to securities transactions. Indeed, these decisions may shut the courthouse door to them in Illinois, Indiana and Wisconsin. Judge Hamilton’s dissent in *Goldberg* – and effectively in *Holtz* – raises questions the other opinions in these cases do not answer while citing cases from other circuits and the Supreme Court that they do not address.

In highlighting the splits in authority among the various courts of appeal, and in suggesting that only the Supreme Court can resolve these conflicts, Judge Hamilton invited the petitions for *certiorari* the plaintiffs have recently filed. The Supreme Court declined the invitation, however. As a result, a serious split in the circuits on this issue continues.

claims – our reluctance to endorse ‘broad reading[s]’ ... if anything grows stronger.”).

<sup>70</sup> *Id.* at 1575.