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**Kircher et al. v. Putnam Funds Trust et al., No. 05-409 (U.S. June 15, 2006)**

On June 15, 2006, the Supreme Court of the United States decided *Kircher v. Putnam Funds Trust*,<sup>1</sup> holding that orders remanding actions to state court for want of preclusion under the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), 112 Stat. 3227, are subject to 28 U.S.C. § 1447(d) and its general rule of nonappealability.

**I. Background**

The Private Securities Litigation Reform Act of 1995 (“PSLRA”)<sup>2</sup> was created to target “perceived abuses of the class-action vehicle in litigation involving nationally traded securities”<sup>3</sup> and to “put limits on federal securities class actions.”<sup>4</sup> To circumvent these limitations, plaintiffs began to bring class actions under state law in state court. In order to prevent plaintiffs from migrating to state court in order to evade rules for federal securities litigation in the PSLRA, Congress passed SLUSA, which “provides that private state law ‘covered’ class actions<sup>5</sup> alleging untruth or manipulation in connection with the purchase or sale of a ‘covered’ security<sup>6</sup> may not be ‘maintained in any State or Federal court,’ and

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<sup>1</sup> No. 05-409, slip op. (U.S. June 15, 2006).

<sup>2</sup> 109 Stat. 737.

<sup>3</sup> *Kircher*, No. 05-409, slip op. at 1, quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-137, slip op. at 8 (U.S. March 21, 2006).

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

<sup>5</sup> A “covered class action” is a lawsuit in which damages are sought on behalf of more than fifty people. SLUSA, 15 U.S.C. § 77 p(f)(2). SLUSA amends “in substantially identically ways,” *Dabit*, No. 04-137, slip op. at 10 n.6, both the Securities Act of 1933 and the Securities Exchange Act of 1934.

<sup>6</sup> A “covered security” is one traded nationally and listed on a regulated national exchange. SLUSA, 15 U.S.C. § 77 p(f)(3).

authorizes removal to federal district court of “[a]ny covered class action brought in any State court involving a covered security.”<sup>7</sup>

SLUSA was designed to create uniformity in securities litigation by permitting removal of state cases to federal court, where the federal court decides whether SLUSA allows the action. “If the action is precluded, neither the District Court nor the state court may entertain it, and the proper course is to dismiss. If the action is not precluded, the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it.”<sup>8</sup>

Following the enactment of SLUSA, however, issues have arisen with respect to appealability of remands under the Act. As a result, conflicts among the circuits developed.<sup>9</sup> Recently, the Supreme Court addressed this split of authority, holding that a federal court of appeals does not have jurisdiction to review a district court order remanding to state court a lawsuit removed to federal court under SLUSA for lack of subject matter jurisdiction — even if that remand decision is plainly wrong.

## II. FACTS AND PROCEDURAL HISTORY

Eight groups of investors holding mutual fund shares filed separate state court actions in Madison County, Illinois, each seeking to represent a class of investors allegedly injured by devaluation of their mutual fund holdings by defendants (mutual funds, investment advisors and an insurance company; collectively, the “funds”). The investors were said to have been injured as “holders” of mutual fund shares, not as purchasers or sellers. The complaints asserted state-law claims only, including negligence and breach of fiduciary duty.

The funds filed notices of removal to the District Court for the Southern District of Illinois, claiming that the actions were removable under and precluded by SLUSA. The investors filed motions to remand the actions to state court. The District Court held that SLUSA did not block the suits because plaintiffs were “injured as ‘holders’ of mutual fund shares not purchasers or sellers” and, therefore, their “claims did not satisfy the ‘in connection with the purchase or sale’ requirement of the Act’s preclusion provision.”<sup>10</sup> The District Court ruled that it lacked subject matter jurisdiction on removal because SLUSA did not preclude the investors’ claims, and remanded the actions back to state court.

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<sup>7</sup> *Kircher*, No. 05-409, slip op. at 2; 15 U.S.C. §§ 77(b) and (c).

<sup>8</sup> *Id.* at 9-10.

<sup>9</sup> *Id.* at 5, n.6 (comparing the Seventh Circuit’s determination on the issue with that of the Second, Ninth, and Eleventh Circuit).

<sup>10</sup> *Id.* at 3.

On appeal, the Seventh Circuit reversed the District Court's remand orders. The Court of Appeals acknowledged that 28 U.S.C. § 1447(d) bars review of district court orders remanding for lack of subject matter jurisdiction, but held that the SLUSA preclusion issue was distinct from the issue of subject matter jurisdiction, holding that orders remanding properly removed suits as not precluded by the Act are substantive and thus reviewable subject to appellate jurisdiction in the normal course.<sup>11</sup>

The Supreme Court granted *certiorari* to resolve the conflict among the circuits as to whether § 1447(d) bars review of remand orders in cases removed under SLUSA.

### III. RATIONALE OF THE COURT

#### A. The Opinion of the Court (per Souter, J.)

Congress intended to avoid interruption of litigation of the merits of a removed action by prolonged litigation over jurisdictional questions by enacting statutes that limited the power of federal appellate courts to review orders remanding removed cases. Currently, 28 U.S.C. § 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title [civil rights cases] shall be reviewable by appeal or otherwise."<sup>12</sup>

In *Kircher*, the Court resolved the issue of whether the court of appeals possessed appellate jurisdiction to correct manifest error in a district court's remand decision when the district court purported to base its decision on lack of jurisdiction. The Court concluded that "where the order is based on one of the [grounds enumerated in 28 U.S.C. § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand."<sup>13</sup>

The Supreme Court also addressed the Seventh Circuit's theory that SLUSA gives federal courts exclusive jurisdiction to determine the preclusion issue, so that "a remand order based on a finding that the action is not precluded would arguably be immune from review."<sup>14</sup> The Court found that SLUSA does not create such exclusive jurisdiction and on remand the state court would be "perfectly free to reject the remanding court's reasoning" and, instead could issue its own decision on preclusion.<sup>15</sup> "In this case,

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<sup>11</sup> *Id.* at 4.

<sup>12</sup> Section 1447(d) applies only to remands based on the grounds specified in § 1447(c), that is, a defect in removal procedure or lack of subject matter jurisdiction. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343-45 (1976).

<sup>13</sup> *Kircher*, No. 05-409, slip op. at 7, quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14, n.13 (1977).

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.* at 13.

the funds can presently argue the significance of *Dabit* and ask for dismissal on grounds of preclusion when they return to the state court.”<sup>16</sup> The Court found that collateral estoppel (or issue preclusion) should not be a bar to revisitation of the preclusion issue because the absence of appellate review militates against application of that doctrine. Furthermore, the Supreme Court could ultimately review any error in that decision.

**B. The Concurring Opinion of Justice Scalia**

Justice Scalia concurred in part and in the judgment of the Court. He took issue with the Opinion of the Court because it evaluated the correctness of the District Court’s remand order. Justice Scalia believed that if the District Court’s decision was purported to be a jurisdictional determination, then that is the end of the inquiry. The Court should not look beyond the face of the remand order. Justice Scalia disagreed with the Court’s reasoning “because it holds only that the Court of Appeals’ recharacterization was incorrect” rather than being “categorically forbidden.”<sup>17</sup>

**IV. SIGNIFICANCE OF DECISION**

Appealability of remand decisions under SLUSA has been a matter of debate and confusion as evidenced by the split of authority among the circuits. In *Kircher*, the Court makes clear that federal appeals courts have no jurisdiction to review lower court remand decisions based on lack of subject matter jurisdiction, even if clearly erroneous. The Court’s recognition of concurrent jurisdiction in state and federal courts over preclusion decisions may give rise to an interesting by-play in the interpretation of SLUSA.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Charles A. Gilman at (212) 701-3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Jonathan I. Mark at (212) 701-3100; or [jmark@cahill.com](mailto:jmark@cahill.com) or John Schuster at (212) 701-3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com).

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<sup>16</sup> *Id.* at 12.

<sup>17</sup> *Id.* at 1 (Scalia, J., concurring).