Concurrent Jurisdiction Found For Covered Class Actions

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In 1997, I testified at an oversight hearing before the United States Senate Banking, Housing & Urban Affairs Committee regarding securities litigation abuses. At the time, Congress was considering whether to enact legislation to stop plaintiffs from filing securities class actions in state court in order to avoid stricter federal standards applicable to class action lawsuits. Both the Securities and Exchange Commission and the North American Securities Administrators Association (NASAA) were urging delay. In my testimony, however, I called on Congress to take prompt action:

> *I strongly disagree with the position of the United States Securities and Exchange Commission and Mark Griffen, the current president of the North American Securities Administrators Association, Inc., that it is too early to consider and make further changes with respect to the 1995 Act. While I acknowledge that it may be too early to count all of the effects of the 1995 Act, it is not too early to conclude that the securities of many issuers trade in what is quintessentially a national securities market. For these national issuers and their stockholders, the litigation standards should be consistent. Consistent standards is a matter of both common sense and fairness.*

A year later, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (aka "SLUSA"). The Senate Banking, Housing & Urban Affairs Committee's report quoted the following from my written statement:

> *It is important to note that companies can not control where their securities are traded after an initial public offering * * *. As a result, companies with publicly-traded securities can not choose to avoid jurisdictions which present unreasonable litigation costs. Thus, a single state can impose the risks and costs of its peculiar litigation system on all national issuers.*

As amended by the SLUSA, the Securities Act of 1933 provides for concurrent jurisdiction of the federal and state courts for '33 Act claims except for certain types of class actions. Yesterday, a California Court of Appeal issued an opinion addressing the scope the exception.

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In Luther v. Countrywide Financial Corp., the trial court had found that state courts did not enjoy concurrent jurisdiction when a class action meeting the definition of a "covered class action" under the SLUSA did not involving a "covered security" as also defined by the SLUSA (the definitions of both these terms can be found in Section 16(f) of the '33 Act). The Court of Appeal reversed, holding that "an intent to prevent certain class actions does not tell us that this class action, or all securities class actions must be brought in federal court."

The holding in *Luther* opens the state courthouse door to class action plaintiffs with '33 Act claims when the securities involved do not meet the definition of "covered securities". It remains to be seen whether plaintiffs will rush in and whether other courts will agree that the door is open.

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