

# IS THE PUSH TO FEDERAL ACTIONS UNDER THE PSLRA AND SLUSA THE BEST WAY TO HANDLE SECURITIES CLASS ACTION CASES?<sup>1</sup>

BRIAN ELZWEIG\*

## I. INTRODUCTION

In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA)<sup>2</sup>. The primary justification of the PSLRA was to prevent abusive class-action securities litigation. The main form of abuse that Congress intended to prevent plaintiff's filing strike suits, a class-action lawsuit where a company feels forced to settle a case regardless of actual wrongdoing in lieu of fighting a lengthy and expensive case.<sup>3</sup> The PSLRA however did not have the desired effect. The Securities Act of 1933 (the '33 Act) had a provision which allowed for concurrent jurisdiction for case brought under it to have concurrent jurisdiction in both state and Federal courts.<sup>4</sup> There was no similar provision in the Securities Exchange Act of 1934 (the '34 Act). To avoid less plaintiff friendly provisions of the PSLRA, attorneys found it easier to file claims under the '33 Act and would ignore claims that were similar under the '34 Act in order to litigate the claims in state courts. In 1996, to exacerbate the problem, the Supreme Court decided *Matsushita v. Epstein*.<sup>5</sup> *Matsushita v. Epstein* was a class-action case dealing with a securities fraud. The case only litigated violations of Delaware state law and did not include federal claims at all. The Supreme Court held that when there is a settlement of a class-action lawsuit in state court, and there is a federal action as well, that the state court settlement can have issue preclusive effects on causes of action that have exclusive federal jurisdiction as long as they were from the same transaction or occurrence as the claims brought in state court. This was different than the approach that was taken by several courts of appeal, including the Ninth Circuit in the *Matsushita* case, which only would allow for issue preclusion if the state claims were of the identical factual predicate to the federal action. This further encouraged state court litigation in securities class-action lawsuits.

Congress then in 1998, in a further attempt to limit abuse in class action litigation, amended the '33 Act by passing the Securities Litigation Uniform Standards Act<sup>6</sup> (SLUSA). This amendment to the '33 Act was intended to disallow litigating securities class action-claims in state courts; however the specific language of the statute only disallowed actions "based on the statutory or common law of any State."<sup>7</sup> This left an issue then for courts to decide whether federal issues (specifically cases brought under the '33 Act) could still be brought in both federal and state courts. Then Congress, in 2005, passed the Class Action Fairness Act<sup>8</sup> (CAFA). The intent of this Act was to force class-action litigation that has a national implication into Federal courts by changing the jurisdictional requirements. However, CAFA specifically excluded coverage of class actions that were addressed in the SLUSA, which then still left a question open as to whether the '33 Act claims would still have concurrent jurisdiction in state and federal courts. Courts when interpreting the issue have been split. The Supreme Court, in *Kircher v. Putnam Funds Trust*<sup>9</sup> touched on the issue in its *dicta*, but the issue is still unresolved. This Article examines *Matsushita v. Epstein* to identify the genesis of the problem, and then subsequent case law and statutes examine the question of whether a securities class-action lawsuit based on the '33 Act would have concurrent jurisdiction in both state and federal court.

## II. IDENTIFYING THE PROBLEM

Congress, over the past two decades, has been concerned with the status of class-action litigation.

---

\* J.D., LL.M. Assistant Professor of Business Law, Texas A&M University-Corpus Christi.

Congress' concern was that class-action litigation was serving the class-action plaintiffs lawyers, while not doing much for the plaintiffs themselves. There were many strike suits, which many believed to be extortion of companies. In a strike suit, companies would rather settle a case without litigating the merits of it to avoid the time and costs of litigation. These settlements often include a large fee for the plaintiff's attorneys, but may not include large settlements for the plaintiffs themselves.<sup>10</sup> Congress, as was evident by the passage of the PSLRA (which will be discussed *infra*), was especially concerned with the state of affairs in securities class action litigation. The facts of *Matsushita v. Epstein*, a 1996 Supreme Court decision are illustrative of this problem.

#### A. Class Actions in General

A class action is one of the most frequently used methods for shareholders to enforce their rights against illegal corporate conduct.<sup>11</sup> It has been considered an appropriate mechanism because the alleged misconduct of the directors and officers tends to be the same from the perspective of the shareholders. Secondly, it is an economically viable option when the losses are spread over a large number of shareholders.<sup>12</sup>

For many years, class actions have been considered an effective way to deal with shareholder litigation. It helps many shareholders to litigate their claims while not overburdening the courts with numerous cases based upon a single transaction or occurrence.<sup>13</sup>

In recent years many problems have been surfacing with regard to class actions. Many abuses have been brought into the system by both sides of recent class action suits. Often attorneys can bring large class action suits against a defendant company where the individual harm to each shareholder is minimal.<sup>14</sup> This makes economically viable a lawsuit that would otherwise be worthless. These attorneys often obtain substantial settlements for the claim and thus large attorney's fees for the firm, but the individual class members receive little for the settlement of their claims.<sup>15</sup>

Further abuse that has surfaced in recent years is the "buy off" of plaintiffs' counsel.<sup>16</sup> This entails the defendant company actually paying an early settlement on the case that includes huge attorneys' fees; the plaintiffs' attorneys, then in turn, settle the class action suit for pennies on the dollar. These settlements always include language that release the defendant company from all claims and liabilities from whatever event or transaction in which the litigation arose.<sup>17</sup> Unfortunately, in both cases, the small shareholder always loses, often receiving little or no money from the settlement of the suit. *Matsushita v. Epstein* and similar cases led to Congress taking action to end these abuses.

#### B. *Matsushita v. Epstein*

On February 27, 1996 the United States Supreme Court handed down their decision in *Matsushita v. Epstein*.<sup>18</sup> This was their answer to a case that was on appeal from the Ninth Circuit, which was titled *Epstein v. MCA*.<sup>19</sup> The case held that when there is a settlement of a class-action lawsuit in state court, and there is a federal action as well, that the state court settlement can have issue preclusive effects on causes of action that have exclusive federal jurisdiction. The Supreme Court held that this would be true even if the state claims did not arise under the same set of operative facts, but only need to arise from the same transaction or occurrence. The day after the decision was handed down by the Supreme Court, the general reaction in the press was that this is a big victory for the securities industry.<sup>20</sup> The Court's decision in *Matsushita* enables cases in corporate friendly states, such as Delaware, have the state tribunal decide how federal class-action suits are to be settled, and determine the states "preclusion law in any manner they see fit within constitutional parameters."<sup>21</sup> What this allows for, is the lawyers to hurry a state court settlement in a corporate friendly state forum, and then never give the plaintiff a day in court, with the value of any federal claims already decided by the state court.

The facts of the *Matsushita* case are very important. The facts are particularly illustrative of showing how this decision can hurt a small plaintiff. The case settled in state court, with the plaintiff's receiving a very small amount of money, but the plaintiff's attorneys receiving a significant amount (which would have been more if it had not been reduced by the court). In exchange for their settlement the plaintiffs were forced to give up their right to pursue the federal court action that was already pending. At this time the plaintiffs were given the chance to opt-out of the class, but unless there were a whole other subclass that could be certified as a class themselves who wanted to opt-out and pursue the federal claims, the individual plaintiffs could not do this for lack of economic sense. They were then precluded from pursuing exclusively federal claims, the value of which was not included in the state-court

settlement. The settlement agreement was judicially approved in the Delaware Chancery Court, and affirmed by the Delaware Supreme Court. If so, then the individual plaintiffs in this case will receive between two and three cents per share and the value of the federal claims will never be taken into the value of the settlement.<sup>22</sup>

#### The Facts of Matsushita

In 1990, MCA Inc. was acquired by Matsushita Electrical Co. Ltd. ("Matsushita") for \$6.1 billion. Matsushita made a tender offer of the \$71 per share for MCA common stock. This \$71 per share consisted of \$66 in cash and \$5 worth of stock in a MCA spinoff television station known as WWOR-T.V.

Lew Wasserman was MCA's chief executive officer and chairman. He owned 4,953,927 common shares of MCA stock. At \$71 per share this is a value of \$351,728,817.<sup>23</sup> Wasserman did not wish to tender his shares at the tender offer price since his tax basis in each share was only 3 cents per share. In an attempt to circumvent the capital gains aspect of the Internal Revenue Code, Wasserman engaged in a separate agreement entitled the "Capital Contribution and Loan Agreement" with Matsushita.<sup>24</sup>

This agreement would allow Wasserman to engage in a tax free exchange<sup>25</sup> of his stock for preferred stock in a subsidiary that is wholly owned by Matsushita called "MEA Holdings."<sup>26</sup> The agreement further recited that Matsushita would contribute 106% of the tender price multiplied by 4,953,927 shares of stock to fund MEA Holdings.<sup>27</sup> This would guarantee that the preferred stock that Wasserman held in MEA Holdings would pay a dividend of 8.75% annually. All of this was secured by letters of credit. The stock would be redeemable either by the death of Mr. or Mrs. Wasserman but not before at least five years had passed from the date of the transaction. At the date of the transaction Wasserman was already 77 years old.<sup>28</sup> Upon the death of Mr. or Mrs. Wasserman, their basis in the stock would step up to fair market value.<sup>29</sup>

At the time of the tender offer, Sidney Sheinberg was MCA's chief operating officer. He was the owner of 1,178,635 shares of common stock in MCA. He exchanged all his shares at the tender offer. He received \$71 per share totaling approximately \$83,754,085.<sup>30</sup>

Sheinberg was given an additional \$21 million dollars by Matsushita two days after the tender offer was completed. Sheinberg and Matsushita claim it was in exchange for Sheinberg's unexercised stock options.<sup>31</sup>

### 1. The Federal Law

In 1986 the Securities Exchange Commission promulgated Rule 14d-10 in order to help clarify that Section 14(d)(7) of the Williams Act Amendments to the Securities Exchange Act of 1934 contains a best price requirement that applies to all holders. The relevant part of the Rule 14d-10 provides:

(A) No bidder shall make a tender offer unless:

(1) the tender offer is open to all security holders of the class of securities subject to the tender offer; and

(2) the consideration paid to any security holder pursuant to tender offer is the highest consideration paid to any other security holder during such tender offer.

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, provided that:

(1) security holders are afforded equal rights to elect among each of the types of consideration offered; and

(2) the highest consideration of each type paid to any holder is paid to any other security holder receiving that type of consideration.

### 2. The Wasserman Transaction

In 1990, Matsushita contacted MCA's financial advisor expressing an interest in a friendly takeover of MCA and further expressing a desire to retain Wasserman and Sheinberg for at least five years.<sup>32</sup> Wasserman and Matsushita entered into the Capital Contribution and Loan Agreement on November 26, 1990. Matsushita agreed to create a subsidy called "MEA Holdings" and Wasserman agreed to exchange his stock in MCA for preferred stock in MEA Holdings.<sup>33</sup>

The Wasserman transaction was an intricate part of Matsushita's tender offer for several reasons. This subjects the agreement to Rule 14d-10, because it gives him a greater value for his stock than the other shareholders in the following ways. Initially, if the conditions of the tender offer were not satisfied, then both Wasserman and

Matsushita could back out of the agreement.<sup>34</sup> Second, the timing of the performance of the agreement was controlled by the tender offer. The agreement went into effect immediately after the tender offer.<sup>35</sup> Third, the price of the tender offer controlled how much Matsushita would contribute to MEA Holdings. The agreement stated that Matsushita would contribute 106% of highest price paid...times the number of Wasserman stock.<sup>36</sup> Finally, the tender price controlled the redemption price of Wasserman's stock used in the agreement.<sup>37</sup>

On November 26, 1990, Matsushita announced its tender offer of \$71 per share. The tender offer was open until 12:01 a.m. December 29, 1990. Ninety-one percent of the common stock was tendered and by 12:05 a.m. December 29, 1990 Matsushita paid for the stock and closed the tender offer. At 1:25 a.m. on December 29, 1990, Matsushita and Wasserman executed the Capital Contribution and Loan Agreement.<sup>38</sup> On January 3, 1991, MCA was totally merged into Matsushita.<sup>39</sup>

The question is whether Wasserman received greater compensation for his shares during the tender offer or whether he received a form of compensation not offered to other share holders during the tender offer.<sup>40</sup>

It is clear that Wasserman received compensation that was different than that offered to other shareholders. Since it was of a different type of consideration, there is a strong possibility that it was greater in value than the consideration offered other shareholders.

### 3. The Sheinberg Payment of Twenty One Million Dollars

Sheinberg was MCA's chief operating officer. He tendered his 1,179,635 shares for seventy one dollars per share. If the tender offer succeeded, Matsushita would instruct MCA to pay Sheinberg \$21 million.<sup>41</sup> The tender offer did succeed and Sheinberg received the \$21 million dollar payment.<sup>42</sup>

The other shareholders contend that it was a premium of \$17.80 per share over what they were offered per share. Matsushita claims that it was a purchase of Sheinberg's stock options and to compensate Sheinberg for changing his employment contract with MCA.<sup>43</sup> Unfortunately, there is no evidence that Sheinberg possessed any stock options or that he was in line to receive any stock options before November 25, 1990, the evening of the tender offer.<sup>44</sup>

### 4. Shareholders Claim a Violation of Delaware Law

The plaintiff shareholders made several claim that Wasserman and Sheinberg violated the Delaware State Law. They contend that Wasserman and Sheinberg violated their fiduciary duty of care.<sup>45</sup> They claim that the fiduciary duty of care was violated when the directors failed to maximize shareholder value upon the change of corporate control.

The shareholders further claim that the directors breached their duty of candor.<sup>46</sup> They claim the directors breached this duty by failing to disclose the merger packages offered to the Wasserman and Sheinberg.<sup>47</sup>

The final state law claim made by the plaintiffs is that the directors breached their duty of loyalty by making preferential deals for themselves as part of the tender offer to the detriment of the other shareholders.<sup>48</sup>

### 5. The Difference between the Federal Law and the Delaware Law

Delaware law, unlike the federal law, does not prohibit control premiums during a tender offer.<sup>49</sup> A control premium will permit one shareholder to receive more or different consideration during a tender offer than another shareholder. In fact "Rule 14d-10 was promulgated precisely to prohibit practices that Delaware permits."<sup>50</sup> It should be noted that in the Ninth Circuit "Matsushita makes no attempt to argue that any of the [federal] claims of the...plaintiffs share any predicate facts in common with the claims that formed the basis of the Delaware class action. Instead, Matsushita rests its preclusion argument solely on the fact that the claims arose out of the same transaction--Matsushita's acquisition of MCA."<sup>51</sup> The legal theory underlying the federal claim is that Matsushita breached a duty to shareholders that is imposed on tender offerors by federal securities laws. The relevant factual inquiry is whether Wasserman and Sheinberg received greater consideration than other MCA shareholders during the tender offer.

The gravamen of the state class action is that MCA directors breached their fiduciary of care to MCA as imposed by Delaware law....*The question[s] [of] whether the MCA directors took the steps...to assure maximum shareholder value[,] and whether or not the directors breached their*

*fiduciary duty [of candor] by failing to make disclosures, [are] completely distinct from the question [of] whether Matsushita violated the Williams Act by extending preferential treatment to some of the shareholders in making the tender offer.*<sup>52</sup>

This is vitally important, because this is where the split in the circuits was created, and why the Supreme Court decided to grant *certiori*.<sup>53</sup>

In previous cases where the Circuit Courts have allowed a state court settlement to release exclusive federal claims, they were claims that not only arose from the same transaction as the state claims, but arose from the same factual predicate as well. The First Circuit dealt with this precise issue in *Nottingham Partners v. Translux*.<sup>54</sup> This was another case dealing with both federal and Delaware securities laws violations, and then a Delaware settlement. In *Nottingham Partners*, a claim was brought under §14a-9 of the Securities Exchange Act of 1934 for failure to disclose negotiations for sale of many of its holdings of theaters in a proxy solicitation.<sup>55</sup>

State claims were later filed in Delaware state court which included, *inter alia*, a failure to disclose claim for the same negotiation on the same proxy solicitation.<sup>56</sup> This case settled in the Delaware state court action, and part of the settlement order authorized the release all of the federal claims.<sup>57</sup> In this case, however, the claims that were released arose from the identical factual predicate. In other words, the preclusive effect of the settlement included facts that were actually before the tribunal. This is instead of assigning value to a federal claim when deciding if the settlement terms are fair, that is not a factual matter that is actually before the court.

The Third Circuit also dealt with this issue in *Grimes v. Vitalink Communications Corp.*<sup>58</sup> This case was brought originally in the Eastern District of Pennsylvania after yet another Delaware settlement. The federal claims involved the "breach of fiduciary duty, [violations of the] Securities and Exchange Act, and Fraud [which] were claims released in the Delaware settlement."<sup>59</sup> The District Court approved the settlement stating that it was proper "where, as here, the federal securities claims in the release stemmed from the same nucleus of operative fact, the release could validly be used as a defense to the former in federal court."<sup>60</sup> The Third Circuit then affirmed this judgment without mentioning the identical factual predicate.

The split in the Circuit because of the Ninth Circuit "fashioned a test [in *Epstein v. MCA*], where the preclusive force of a state settlement judgment is limited to those claims 'that could...have been extinguished by the issue preclusive effect of an adjudication of the state claims.'"<sup>61</sup>

## 6. Moving Through the Courts

On September 26, 1990, actions were commenced in Delaware Court claiming MCA's board of directors had failed to properly discharge the duties that they owed to the shareholders. Obviously, because there would have been no jurisdiction, no federal claims were alleged in state court.

On December 3, 1990, in response to information gained through the required SEC filing, which was dated November 30, 1990, Epstein filed a class action suit against Matsushita in the District Court for the Central District of California.<sup>62</sup> Epstein held shares of MCA's stock in an individual retirement account at the time of the tender offer.<sup>63</sup>

This was the first time that anyone challenged the tender offer under the federal laws and the first time that the petitioners name appeared as parties in any litigation relating to the transaction. The federal complaint alleged that Matsushita violated Rules 14d-10 and 10b-13.<sup>64</sup> The plaintiffs assert Matsushita violated the Rules by treating Wasserman and Sheinberg in a preferential way during a tender offer. This type of preferential treatment violates the "all-holder best-price" Rule by not treating all the shareholders the same.<sup>65</sup>

These federal claims came exclusively under the jurisdiction of the federal court.<sup>66</sup> Epstein sought to have the class certified so that he could have a class action in the federal court and thus represent all of MCA's shareholders.<sup>67</sup>

A few days after the federal class made an attempt at certification, the Delaware plaintiffs added Matsushita as a defendant. They also included additional claims against MCA and its directors. These claims alleged that corporate assets were wasted by exposing the corporation to liability by violating rules 10b-13 and 14d-10, and thereby exposed them to liability.<sup>68</sup> The plaintiffs also claimed that MCA failed to make disclosures about the takeover and that directors Wasserman and Sheinberg breached their duties as directors through insider trading and by negotiating deals with Matsushita.<sup>69</sup> It was further alleged that the directors conspired, aided and abetted with Matsushita in connection with the merger, in direct violation of the Delaware laws prohibiting such behavior.<sup>70</sup>

On December 17, 1990, the Delaware parties proposed an agreed upon settlement to the Delaware Vice-Chancellor. The agreement provided for a payment of \$1,000,000 to counsel, a modification in the corporate charter, and a release of all federal and state claims arising out of the tender offer.<sup>71</sup>

On April 22, 1991, the settlement was rejected by the Vice-Chancellor because there was no monetary benefit at all to the class members and the value of the federal claims were proposed in the release. Also, the "generous payment" of counsel fees amounting to almost \$1,000,000 "conferred no benefits on the members of the class."<sup>72</sup> The Vice-Chancellor stated that the state law claims were "at best, extremely weak and, therefore, of little or no value."<sup>73</sup> "The only claims which have any substantial merit are the claims...in the California Federal suit that were not asserted in this action."<sup>74</sup> Once the settlement was rejected for more than a year, the Delaware lawsuit lay dormant for longer than one year.

The federal litigation was actively pursued within the months from April 1991 to September 1992. This is evidenced by over 300 docket entries.<sup>75</sup> In the Delaware case there were no docket entries within the same time frame. In separate rulings, the Epstein plaintiffs were first denied by the district court in a motion for class certification and then, subsequently, in a motion for partial summary judgment. On April 15, 1992, a final judgment was entered by the district court. The district court dismissed the complaint.<sup>76</sup> Epstein appealed to the Ninth Circuit Court of Appeals.

After the notice for appeal was filed, a second settlement agreement was proposed by Matsushita and the Delaware parties. This agreement of October 22, 1992 stated that a \$2,000,000 settlement fund would be afforded for the shareholders. This would be approximately 2 to 3 cents per share before the payment of legal fees and court related costs. Counsel for the Delaware class requested \$691,000 in legal fees. For this meager amount the class plaintiffs would agree to release "all claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, and any rules or regulations promulgated thereunder, or otherwise)...in connection with or that arise now or hereafter out of [tender offer]...including without limitation the claims asserted in the California Federal Actions...."<sup>77</sup>

The second proposal included an opt-out provision which encouraged the Vice-Chancellor approve the settlement.<sup>78</sup> He stated "[i]t is in the best interest of the class to settle this litigation and the terms of the settlement are fair and reasonable--although the value of the benefit to the class is meager."<sup>79</sup> The recovery of 2 to 3 cents per share was considered adequate even if only barely to be found to be consideration for a proposed settlement. Since the federal claims were dismissed in the District Court, the Vice-Chancellor felt they would now have almost no economic value and if the shareholders felt there was value in the federal claims then the second agreement had an opt-out provision for such a shareholder.<sup>80</sup> The Vice-Chancellor stated that "suspicions abound" but "objectors have offered no evidence of any collusion" so he declined to reject the settlement on mere suspicions of collusion.<sup>81</sup> He did decide to reduce the counsel fees from \$691,000 to \$250,000.<sup>82</sup>

In a very brief opinion the Delaware Supreme Court affirmed the Court of Chancery. After the appeal was filed, and before the Ninth Circuit made a decision the Delaware parties entered into the negotiated settlement. A notice was sent to the shareholders stating that the settlement would include substantial monetary benefits to former MCA shareholders.<sup>83</sup>

The Ninth Circuit then listened to arguments from Matsushita that the Delaware class action settlement barred any federal claims Epstein had. The Court of Appeals held that the state courts lacked plenary power to extinguish exclusively federal claims.<sup>84</sup> Only if there was "identical factual predicate" between the federal and state claims could the state court subsume the federal claim whose exclusivity rests in the federal court.<sup>85</sup> The same transaction test that was urged by Matsushita was not enough to change the Ninth Circuits view. The state claims and the federal securities claims turned on different operative facts; thus they could not have been extinguished by the issue preclusive effect of the Delaware settlement.<sup>86</sup> The Ninth Circuit then declared that the Delaware decree "exceeded the jurisdiction of the state court and, therefore, is not entitled to full faith and credit."<sup>87</sup>

The Ninth Circuit further held that to redress rule 14d-10 violations, a private right of action may be maintained. The court reversed the district court's disposition of dismissing the matter finding that Matsushita violated rule 14d-10 by not offering to other shareholders that which was paid to Wasserman. The Ninth Circuit held summary judgment on liability for the plaintiffs and remanded for a determination of damages. Regarding the Sheinberg payment of \$21,000,000, the Ninth Circuit vacated Matsushita's summary judgment and remanded to the district court for a determination on whether the payment was solely for Sheinberg to tender his shares.<sup>88</sup>

The "Full Faith and Credit Instruction", as the court indicates, requires the forum to decide whether the preclusive effect of the judgment rendered would be effective in the rendering court.<sup>89</sup> The Ninth Circuit did not

evaluate whether the Delaware judgment had preclusive effect through Delaware state's preclusion law. The Supreme Court remanded the case to decide that issue.<sup>90</sup>

The requirements of the Fourteenth Amendment's Due Process Clause are the yardstick by which we measure the state law's preclusiveness of judgments. "A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment."<sup>91</sup>

In *Matsushita* the preclusive effect of the Delaware settlement was challenged because it was argued that the constitutionally required representation was inadequate and the Vice-Chancellor never inquired into the adequacy of representation. The Epstein plaintiffs state that the Delaware counsel did not vigorously press their interests or the interests of the class in negotiating the meager settlement. They feel the Delaware representatives undervalued the federal claims only to acquire a fast settlement awarding high attorney fees. These federal claims could only be settled in the Delaware Court, but not properly litigated there. The Epstein plaintiffs claim that it was not their burden of proof to produce evidence to prove the charges of collusion even though suspicions of collusion were abound. Although the Ninth Circuit addressed the merits of the Epstein plaintiff's contentions, the Supreme Court would not. The Supreme Court claims that these arguments may be aired upon remand. Justice Stevens stresses the importance of procedural due process protection through adequate representation in class action lawsuits. That includes those class action lawsuits that are resolved by settlement.

### 7. Full Faith and Credit Arguments

The Full Faith and Credit Act mandates "judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States...as they have by law or usage in the courts of such state...from which they are taken."<sup>92</sup> Unless a state court judgment satisfies the requirements of the Fourteenth Amendment's due process clause, the state court judgment will not be entitled to full faith and credit.<sup>93</sup> Adequate representation is one of the most important due process ingredients that must be supplied in a class action setting to bind absent class members.<sup>94</sup>

*Marrese v. American Academy of Orthopedic Surgeons*<sup>95</sup> shows a framework for deciding whether a state court judgment can preclude an exclusively federal action. A federal court must first look to the rendering state's law and ascertain whether the judgment would bar the claim or issue in that state court system. If so, then the federal court must decide whether "as an exception to Section 1738, it should refuse to give preclusive effect to the state court judgment."<sup>96</sup> "When a state court settlement of a class action releases all claims which arise out of the challenged transaction and is determined to be fair and to have met all due process requirements, the class members are bound by the release or [by] the doctrine of issue preclusion. Class members cannot subsequently litigate again the claims barred by the settlement in the federal court."<sup>97</sup>

The Supreme Court assumed that the Delaware settlement was "fair, reasonable, and adequate and in the best interest of...the settlement class and that notice to the class was in full compliance with...the requirements of due process."<sup>98</sup> Since the Delaware Chancery Court approved of the settlement, and the Delaware Supreme Court affirmed it, the Supreme Court felt the Delaware settlement complied with due process requirements. The court was also persuaded that the due process requirements were adhered to because the Chancery Court rejected the first settlement proposal, partially because it did not contain an opt-out provision. The Chancery Court stated that it rejected the settlement proposal because it felt that it was grossly unfair and a great deprivation of due process.<sup>99</sup>

The respondents were part of both the state and federal claims and they did not opt-out of the state settlement. They claim that if the settlement adhered to the due process requirements they would be bound by the judgment and precluded from pursuing further litigation in the federal court as per the agreement. However, the respondents claim that they were inadequately represented and therefore they did not consent to the terms of the agreement and, in fact, they were actually misled about the terms. They claim that due process requires "that the named plaintiff at all times must adequately represent the interests of the absent class members."<sup>100</sup> The respondents further argue that even though they did not opt-out of the settlement class they did not consent to being inadequately being represented and thus did not consent to the terms of the agreement.<sup>101</sup>

The Supreme Court turned a deaf ear to the arguments of the respondents and to the reasoning of the Ninth Circuit and ruled that the judgment would have preclusive effect under Delaware law. The Supreme Court satisfied with this moved to the second step in the *Marrese* analysis. The second step in the analysis is to ask whether the exclusive jurisdiction granted to the federal courts for suits arising under the Exchange Act is overcome by the Full

Faith and Credit Clause as it applies to state court settlement proceedings. If it is, then a state court proceeding may have a preclusive effect upon an exclusively federal claim. Since there is no explicit language of a repeal of Section 1738 by Section 27 then, if there is any modification of the Full Faith and Credit Clause by Section 27, then it must be implied. *Marrese* states "the general question is whether the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied repeal of Section 1738."<sup>102</sup> "Resolution of this question will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action...the primary consideration must be the intent of Congress."<sup>103</sup> In order to find an implied repeal, there must be "irreconcilable conflict" between the two federal statutes.<sup>104</sup>

Section 27 provides that "the district courts of the United States...shall have exclusive jurisdiction...of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."<sup>105</sup> Section 27 and Section 1738 "do not pose an either or proposition."<sup>106</sup> "They can be reconciled by reading Section 1738 to mandate Full Faith and Credit of the state court judgments incorporating global settlements providing the rendering court had jurisdiction over the underlying suit itself and by reading section 27 to prohibit state courts from exercising jurisdiction over suits arising under the Exchange Act."<sup>107</sup> Further, the Court reasoned that "[s]ettlement of state court litigation has been held to defeat a subsequent federal action if the settlement was intended to apply to claims in exclusive federal jurisdiction as well as other claims...These rulings are surely correct."<sup>108</sup>

There is nothing in the wording of Section 27 that "remotely expresses any Congressional intent to contravene the common law rules of preclusion or to repeal the express statutory requirements of...28 U.S.C. § 1738."<sup>109</sup> Congress's intent to provide Exchange Act claims in exclusive federal forum for adjudicating those suits is clear. There is no evidence of any Congressional intent to prevent either individuals or class action litigants from voluntarily releasing Exchange Act claims in a judicially approved settlement. We also can find no evidence that Congress wished to override "the principals of comity and repose embodied in Section 1738" suggested in the language of Section 27.<sup>110</sup>

The Supreme Court in *Matsushita* did presume that Congress intends "to achieve greater uniformity of construction and more effective and expert application of that law" by passing Section 27.<sup>111</sup> By allowing state courts to create settlements and releases of Exchange Act claims neither policy of uniformity or expert application of the law is threatened. The state court judges will only evaluate the overall fairness of the settlements by generally applying its own good business judgment. This will leave the interpretation of the federal security laws to the judges who are experts in the field. "There is no danger that state court judges who are not fully expert in federal security law will say definitely what the Exchange Act means and enforce legal liabilities thereunder."<sup>112</sup>

By satisfying the second step of the *Marrese* analysis the Supreme Court found that Section 1738 was not repealed by Section 27 of the Exchange Act. This further fortified the Supreme Court's position that the Delaware settlement was entitled to full faith and credit in the federal system. This essentially disallowed the plaintiffs to bring pursue their claims in the federal court.

### III. THE FIRST CONGRESSIONAL ACTION THE PSLRA

While the *Matsushita* case was progressing, Congress decided that action needed to be taken. Congress in 1995 passed the PSLRA.<sup>113</sup> The PSLRA was designed to reduce the amount of securities class action litigation, at least in federal court.<sup>114</sup> Congress had three concerns that led to the passage of the PSLRA. First, Congress believed that the system in place to pursue private securities actions made it too easy to file non-meritorious claims and that it was too easy to file securities class actions (even in cases without wrongdoing).<sup>115</sup> There was concern that any drop in securities prices on the market could lead to a class-action lawsuit being brought against the issuer, without examining the merits of the action.<sup>116</sup> Second, Congress was concerned that many non-meritorious claims would be settled only to avoid discovery and trial costs. There was concern that these class actions may be settled out of fear of the "large theoretical damages in open-market securities fraud cases, which exacerbated the reluctance of defendants to risk an adverse jury verdict."<sup>117</sup> Thirdly, Congress was concerned that the threat of class-actions would have a chilling effect on the disclosure of forward-looking information, which is helpful to the investing public.<sup>118</sup>

To remedy these perceived problems Congress, through the PSLRA, attempted to make a more open process in federal securities class actions. Congress made both substantive and procedural changes. "Substantive rights changed by the PSLRA include the requirement that plaintiffs plead scienter with particularity, a provision



extending the safe harbor for forward-looking statements, a limitation on damages, and the elimination of joint and several liability for violations charged under theories of recklessness, negligence, or strict liability in favor of a proportionate liability scheme.”<sup>119</sup> In addition the PSLRA also changed procedural rights for class actions securities. *Inter alia*, it capped attorneys fees to a reasonable percentage of the class recovery, and changed the way settlements were presented to class members, giving them more of a say in the outcome. Perhaps most importantly it also gave a presumption to the courts that the person who has the largest financial stake in the outcome of the legislation should be the lead plaintiff and class representative.<sup>120</sup> This reduces the chances of having a professional plaintiff as the lead plaintiff. A professional plaintiff is one who has a small stake in the outcome, but would work in concert with the counsel to settle a case in terms that may not be as favorable to the rest of the class.

Congress’ obvious intent in passing the PSLRA was to reduce the amount of strike suits and create higher standards for securities related class actions. Congress, however when enacting the PSLRA, did not change the jurisdictional provisions that were provided for in the 1933 Act or in the 1934 Act. The 1933 Act specifically provides that both the state and federal courts have concurrent jurisdiction in actions brought under the act. The 1933 Act provides that “[n]o cases arising under the [1933 Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”<sup>121</sup> No such provision was provided for in the 1934 Act. Not amending the jurisdictional requirements in the PSLRA lead to the unintended consequences. After the PSLRA was enacted, there was a great rise in securities cases brought in state courts instead of federal courts.<sup>122</sup> Plaintiff’s attorneys would couch what could be federal claims in terms of state claims such as breaches of fiduciary duties to avoid the heightened requirements of the PSLRA. Also there was a rise of cases under the 1933 Act that were brought in state courts as well. These claims would be filed in plaintiff friendly states and the preclusive effects of *Matsushita v. Epstein* would still allow for settlements to extinguish 1934 Act claims.<sup>123</sup> The PSLRA ended up having little effect in Congress goal of creating higher standards in Securities Class Actions.

#### IV. THE SECOND CONGRESSIONAL ACTION THE SLUSA

Congress, soon after, attempted to fix the loophole that it created in the PSLRA by enacting the Securities Litigation Uniform Standards Act of 1998 (SLUSA).<sup>124</sup> Of primary importance the SLUSA provided that:

No covered class action based upon 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--

- (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
- (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.<sup>125</sup>

A covered class action is one where damages are sought by 50 or more people,<sup>126</sup> and a covered security is one that is traded on a national exchange.<sup>127</sup> In addition the SLUSA states that any “covered class action brought in any state court involving a covered security...shall be removable to the Federal district court in which the action is pending.”<sup>128</sup>

These sections, by disallowing state claims of fraud in securities class-actions of 50 or more people, makes the 1934 Act’s fraud provisions the exclusive remedy for claims of fraud of exchange listed securities. Congress’ intent was to prevent state court claims being used to preempt the intent of the PSLRA.<sup>129</sup> This effectively ended factual scenarios similar to the one in *Matsushita v. Epstein*. No longer could a case be brought under a state’s anti-fraud provisions as the plaintiffs did in that case. This ended much of the forum shopping that was going on previous to the SLUSA and also ended a scenario in which a state class-action settlement *brought under a state law claim*, could have a preclusive effect on a concurrent federal claim.

Congress, however, did not completely close the loophole. Congress did not address part of the jurisdictional issue that was provided for in the 1933 Act. While it became clear that securities class actions based on state law claims could no longer be brought in state courts, the concurrent jurisdiction and non-removal provisions that were provided for under the 1933 Act was not addressed. A question was then left open as to whether a *federal law claim*, brought under the 1933 Act, could still be brought in the state courts. This lead to a split in the circuits as to whether all 1933 Act claims must be removed to federal court.<sup>130</sup> The First and Seventh support a narrow interpretation of the law. These courts stated that the SLUSA removal provisions were specific, as to what

was removable to federal court, which the SLUSA specifically states are state claims. Since SLUSA was silent about federal claims that were allowed to be brought in the states courts under the 1933 Act, these claims were allowed to stay in state courts.<sup>131</sup> The Third, Fourth and Sixth Circuits took the opposite approach. These courts interpreted SLUSA's removal provision broadly, "attempting to do what they believe Congress was unable to achieve through statute alone."<sup>132</sup> These courts stated that it was the intent of Congress to have all federal actions be brought forth in Federal court and that SLUSA preempted the provisions of the 1933 Act that allowed for concurrent jurisdiction.<sup>133</sup> The Second, Fifth and Ninth Circuits were inconsistent in their interpretation of the removal provision of SLUSA, sometimes taking the narrow approach and sometimes taking the broad approach to interpretation.<sup>134</sup> The Supreme Court, in *Kricher v. Putnam Funds Trust*<sup>135</sup> noted in *dictum* that it would interpret the provision narrowly, and allow Congress to decide if they wanted to amend the 1933 Act's concurrent jurisdiction. However, since this was in *dictum* some courts have subsequently still use the broad interpretation.<sup>136</sup>

## V. THE THIRD CONGRESSIONAL ACTION THE CAFA

Congress' most recent attempt at major class action reform was the Class Action Fairness Act of 2005 (CAFA).<sup>137</sup> The intent was to "expand federal jurisdiction over class action lawsuits,"<sup>138</sup> and to put class-action lawsuits that have national interest take place in federal courts. While addressing class-action lawsuits that were brought in state court to avoid federal litigation in general, securities class actions were specifically (and curiously) excluded from the provisions of CAFA.<sup>139</sup> Congress did not want "to disturb the carefully crafted framework" of jurisdiction over securities claims established in the SLUSA.<sup>140</sup> However this carefully crafted framework is left unclear as to how this provision should be interpreted, leaving uncertainty as to whether a class action alleging 1933 Act claims could be brought in state courts.<sup>141</sup>

## VI. WOULD THE NINTH CIRCUIT APPROACH UNDER MATSUSHITA V. EPSTEIN OBIATED THE NEED FOR THE CONGRESSIONAL ACTIONS?

Ironically, had the Supreme Court in the *Matsushita v. Epstein* case have adopted the approach that the Ninth Circuit had taken in that case, Congress may not have had to make three attempts to fix the problem of strike suits in securities class action litigation. The Ninth Circuit recommended that state settlements could only have a preclusive effect on federal settlements if the federal and state claims arise from the identical factual predicate. This is instead of the Supreme Court approach which only requires the settlement of the claims that arise out of the same transaction or occurrence. Had the Ninth Circuit test been adopted by the Supreme Court, then strike suits would become less frequent. Plaintiffs would only be able to settle claims that were basically identical to those that were brought in the state court. Federal claims, which were not under the identical factual predicate to the state one, would still be able to be further litigated even if there was a settlement of the state claim.

This is the proper approach for several reasons. First, the federal government by not allowing most securities class actions in state courts eliminates important states rights. Congress seems to assert that only federal courts can be fair and objective in a securities class action lawsuit. The states are not allowed to enforce their own securities and corporate governance laws as they can with other areas. States, however, would still be allowed to enforce state issues through the class action mechanism as that state sees fit under the Ninth Circuit approach. Allowing the states the ability to enforce their rights is an important goal, as the states should be able to protect investors from frauds occurring within their state. It appears that congress has taken the approach, by enacting the PLSRA and the SLUSA, that the *only* way investors and securities companies can have fairness in class action litigation is to have the case proceed in federal court. This is simply not true, and the approaches taken eliminate the rights of the states have an important tool for fighting fraud.

Secondly the Ninth Circuit approach would eliminate many or most strike suits. Plaintiffs' attorneys would no longer try to find weaker state claims and force a settlement on all claims arising under the same occurrence. Since the "occurrence" has been broadly interpreted by the courts, settlements that arise under relatively weaker claims could be used to settle all claims even if there are stronger federal claims yet to be litigated. States could then decide if they wanted to adopt more stringent requirements in allowing securities class-action lawsuits to be filed. The individual states could adopt provisions similar to the provisions of the PSLRA to lessen the chance of strike suits occurring within their jurisdiction. One comment suggests a "sound in fraud standard" for removal to federal courts of 1933 Act claims.<sup>142</sup> The basis of this approach is that if a case is premised on allegations of fraud, then the

1933 Act claim would have to be litigated in federal court. If not it would allow of the claim to remain in state court. Since the most securities class-actions arise out of fraudulent transactions, taking a sound in fraud approach would still disallow most securities class actions to take place in state courts. While this would solve some of the confusion and pleading problems with the 1933 Act claims, it still eliminates the ability of a state to protect its laws through the class action mechanism when it comes to securities. Again, this would be making an assumption that a state court could not fairly hear a securities class action.

## VII. CONCLUSION

Congress has now attempted three separate acts, the PSLRA, SLUSA and CAFA to try to end strike suits in the securities industry. The primary focus of all of these acts was to have heightened pleading requirements and focusing on bringing cases in Federal courts. This was in an attempt to remedy the result of cases such as *Matsushita v. Epstein*, in which suits were brought in state courts that were presumed to be plaintiff friendly, and then force a settlement on all claims. However, it seems that Congress, instead of focusing on eliminating strike suites, instead focused more on how to get securities class action cases into federal court. These acts however left uncertainty as to what cases were removable to federal court, especially in claims brought in state courts under the 1933 Act. They also ignore the rights of the states to use class actions as a mechanism for enforcement of the states securities laws and corporate governance laws. Perhaps the focus of the three acts has been incorrect. Instead of focusing on getting litigants into federal courts, the focus might better have been on not allowing the settlements in the first place. Had the Ninth Circuit approach in *Matsushita v. Epstein* been adopted by the Supreme Court (that settlements in state actions could only be used to settle federal actions where they were of the identical factual predicate), much of the legislation would have been unnecessary. Instead, the Supreme Court allowed for a preclusive effect on the settlement of federal claims by settling state claims if they were from the same transaction or occurrence. The ability to bring a successful strike suit that would settle all claims would be greatly diminished if the federal claims were left intact. Companies would not feel that they needed to settle the minor claims in the state courts and could focus on the claims that were not identical in federal court. Also, plaintiff's attorneys would be less likely to bring these claims if they knew that they did not have the leverage to get a large settlement without having to focus on the more important claims that were not from the identical factual predicate.

---

\*J.D., LL.M. Assistant Professor of Business Law, Texas A&M University-Corpus Christi

<sup>1</sup> This paper was recently accepted for publication in the SOUTHERN LAW JOURNAL. The author would like to thank the journal's editorial staff, especially the Editor in Chief, Dan Ostas, for all of the hard work in regard to the publication.

<sup>2</sup> Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

<sup>3</sup> J. Tyler Butts, *Removal of Covered Class Actions Under SLUSA: The Failure of Plain Meaning and Legislative Intent as Interpretive Devices, and the Supreme Courts Decisive Solution*, 1 WM. & MARY BUS. L. REV. 169,174 (2010).

<sup>4</sup> 15 U.S.C. § 77u(a) (1934).

<sup>5</sup> *Matsushita v. Epstein*, 516 U.S. 367 (1996).

<sup>6</sup> Pub. L. No 105-353, 112 Stat. 3227 (1998) (codified in scattered sections of 15U.S.C.)

<sup>7</sup> 15 U.S.C. § 77p(b) (2000).

<sup>8</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

<sup>9</sup> 547 U.S. 633 (2006).

<sup>10</sup> Butts, *supra* at 174.

<sup>11</sup> Stephen E. Morrissey, *State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multi Jurisdictional Management of Shareholder Litigation*, 95 COLUMBIA L. REV. 1765, 1765 (1995).

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

<sup>13</sup> *Id.*, at 1766.

---

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

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

<sup>16</sup> *Id.* at 1766.

<sup>17</sup> *Id.* at 1767.

<sup>18</sup> *Matsushita v. Epstein*, 516 U.S., at 367.

<sup>19</sup> *Epstein v. MCA*, 50 F.3d 644 (1995). As will be discussed, *infra*, *Matsushita* was added as a defendant late in the process.

<sup>20</sup> For example, see Martha M. Canan, The Bond Buyer, *Justices Say State Court Settlements Can't Be Reopened*, February 28, 1996.

<sup>21</sup> Luther Zeigler and Scott L. Winkelman, Law & Business Insights, *Honoring State Class Action Settlement*, April 1996, p.2.

<sup>22</sup> The settlement occurred in a time when the federal claims were dismissed by the District Court. They were later given new validity on appeal.

<sup>23</sup> *Epstein v. MCA*, 50 F.3d, at 647.

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

<sup>25</sup> Internal Revenue Code § 351(A), 26 U.S.C. § 351 (A) (1994).

<sup>26</sup> *Epstein v. MCA*, 50 F.3d, at 648.

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

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

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

<sup>30</sup> *Epstein v. MCA*, 50 F.3d, at 648.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, at 647-48.

<sup>34</sup> *Id.*, at 648.

<sup>35</sup> *Id.*, at 656.

<sup>36</sup> *Id.*, at 648.

<sup>37</sup> *Id.*, at 656.

<sup>38</sup> *Id.*, at 654.

<sup>39</sup> *Id.*

<sup>40</sup> *Matsushita* claimed that the Wasserman transaction does not fall under the Rule because it was executed after the tender offer was closed. Even though it is not really relevant to the thesis of this paper, the Ninth Circuit's expression of this is surely correct. The statute has been long interpreted to serve the purpose of the Act. In defining the "tender offer period" the court held that "to serve the purposes of the Williams Act, there is a need for flexibility in fashioning a definition of a tender offer." *Epstein v. MCA*, 50 F.3d 644, 656 (9th Cir. 1995).

<sup>41</sup> *Id.*, at 657.

<sup>42</sup> *Id.*

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

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, at 665.

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

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (emphasis added). This shows that the facts were not at issue in the first two state claims. The Ninth Circuit concedes that "The third state claim [for breach of duty of loyalty] by making preferential arrangements for themselves as part of the tender offer, and that *Matsushita* aided and abetted the MCA defendants in this breach. At first glance, this claim appears to be in the same ball park as the Rule 14d-10 claim. However, although this state claim is no doubt artfully drafted to resemble the 14d-10 claim, there is in fact no Delaware statutory or common law rule that prohibits a shareholder from obtaining the best deal for himself as part of a change of corporate control.

---

Thus, adjudication of the claim would not have raised a question of fact whether Wasserman of Sheinberg received preferential treatment from Matsushita. (emphasis added).

<sup>53</sup> Matsushita v. Epstein, 516 U.S., at 373.

<sup>54</sup> Nottingham Partners v. Translux, 17 F.3d 1553 (1st Cir. 1994).

<sup>55</sup> *Id.* at 1554.

<sup>56</sup> *Id.* at 1555.

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

<sup>58</sup> 17 F.3d 1553, (3d Cir. 1994), cert. den. 115 S.Ct. 480 (1994).

<sup>59</sup> Grimes v. Vitalink Communications Corp., 1993 U.S. Dist. LEXIS 3653, (E.D Pa. 1993), at \*8.

<sup>60</sup> *Id.* at \*10.

<sup>61</sup> Matsushita v. Epstein, 516 U.S., at 372, quoting Epstein v. MCA, 50 F.3d, at 665.

<sup>62</sup> Matsushita v. Epstein, 516 U.S., at 373.

<sup>63</sup> Epstein v. MCA, 50 F.3d, at 669.

<sup>64</sup> 17 CFR § 240, 14d-10; 17 CFR § 240.10b-13 (1994).

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

<sup>66</sup> 15 U.S.C. § 78aa.

<sup>67</sup> Epstein v. MCA, 50 F.3d, at 668.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

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

<sup>71</sup> *Id.* at 669.

<sup>72</sup> *In Re MCA, Inc. Shareholders Litigation*, 598 A.2d 687, 695 (Del. Ch. 1991).

<sup>73</sup> *Id.* at 694.

<sup>74</sup> *Id.* at 696.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Matsushita v. Epstein, 516 U.S., at 371-372 (original citations omitted).

<sup>78</sup> The fact that the settlement now had an opt-out provision seemed to be as important to the Vice-Chancellor as the fact that there was money added to the settlement, as this was an objective test of the Due Process burden, and not a subjective one, like valuation of the claim. The original settlement might have been approved if it had the opt-out, without giving any monetary gain to the class members at all.

<sup>79</sup> *In Re MCA, Inc. Shareholders Litigation*, 598 A.2d 687, 687 (Del. Ch. 1991).

<sup>80</sup> Epstein v. MCA, 50 F.3d, at 560.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Matsushita v. Epstein, 516 U.S., at 371.

<sup>84</sup> Epstein v. MCA, 50 F.3d, at 662.

<sup>85</sup> *Id.*

<sup>86</sup> See discussion involving Nottingham Partners v. Translux, and Grimes v. Vitalink, *supra* §§ II. B. 5. and II. B. 6.

<sup>87</sup> Matsushita v. Epstein, 50 F.3d, at 665.

<sup>88</sup> *Id.*

<sup>89</sup> See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982); and *see also Marrese*, 470 U.S. 373, 381 (1985).

<sup>90</sup> See *Marrese* 470 U.S., at 386-387 and *see also Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75,87, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984) ("Prudence...dictates that it is the District Court, in the first instance, not this Court, that should interpret Ohio preclusion law and apply it.")

<sup>91</sup> *Kremer v. Chemical Construction Corp.*, 456 U.S., at 482.

<sup>92</sup> 28 U.S.C. § 1738.

<sup>93</sup> *Kremer v. Chemical Construction Co.*, 456 U.S., at 482-483.

<sup>94</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S., at 808-812.; *Prezant v. De Angelis*, 636 A.2d, at 922-924.

<sup>95</sup> 470 U.S. 373 (1985).

<sup>96</sup> *Id.* at 383.

- 
- <sup>97</sup> In Re MCA, Inc. Shareholder Litigation, 598 A.2d 687, 691 (1991).
- <sup>98</sup> In Re MCA, Inc., Shareholders Litigation, C.A. No. 11740 (Feb. 22, 1993).
- <sup>99</sup> See In Re MCA, Inc. Shareholder Litigation, 598 A.2d 687, 692.
- <sup>100</sup> Phillips Petroleum Co. v. Shutts, 472 U.S., at 812.
- <sup>101</sup> Matsushita v. Epstein, 516 U.S., at 371.
- <sup>102</sup> Marrese v. American Academy of Orthopedic Surgeons, 470 U.S., at 386.
- <sup>103</sup> *Id.*
- <sup>104</sup> Kremer v. Chemical Construction Corp., 456 U.S., at 468 (*quoting* Radzanower v. Touche Ross & Co., 426 U.S. 148 (1978)).
- <sup>105</sup> 15 U.S.C. § 78aa.
- <sup>106</sup> Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992).
- <sup>107</sup> Matsushita v. Epstein, 516 U.S., at 385.
- <sup>108</sup> *Id.*, citing CHARLES A. WRIGHT, ARTHUR R. MILLER, AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4470 at 688-689 (1981).
- <sup>109</sup> Allen v. McCurry, 449 U.S. 90, 97-98 (1980).
- <sup>110</sup> Kremer v. Chemical Constr. Corp., 456 U.S., at 463.
- <sup>111</sup> Murphy v. Gallagher, 761 F.2d 878, 885 (2d Cir. 1985).
- <sup>112</sup> Epstein v. MCA, 50 F.3d, at 674.; See also Polk v. Good, 507 A.2d 531, 535 (Del. 1986).
- <sup>113</sup> Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).
- <sup>114</sup> Michael A. Perino, *Fraud and Federalism: Preempting State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998).
- <sup>115</sup> *Id.* at 290.
- <sup>116</sup> *Id.*
- <sup>117</sup> *Id.* at 291.
- <sup>118</sup> *Id.* at 292.
- <sup>119</sup> Eugene Zelensky, *New Bully on the Class Action Block: Analysis of Restrictions on Securities Class Actions Imposed by the Private Securities Litigation Reform Act of 1995*, 73 NOTRE DAME L. REV. 1135, 1136 (1998) (original citations omitted).
- <sup>120</sup> *Id.*, at 1137.
- <sup>121</sup> 15 U.S.C. § 77u(a) (1934).
- <sup>122</sup> See in general, Michael A. Perino, *Fraud and Federalism: Preempting State Securities Fraud Causes of Action*, *supra* note 113.
- <sup>123</sup> *Id.*
- <sup>124</sup> Pub. L. No 105-353, 112 Stat. 3227 (1998) (codified in scattered sections of 15U.S.C.)
- <sup>125</sup> 15 U.S.C. § 77p (b) and 15 U.S.C. §78bb(f)(3).
- <sup>126</sup> 15 U.S.C. §78bb(f)(5)(B).
- <sup>127</sup> 15 U.S.C. § 77r(b).
- <sup>128</sup> 15 U.S.C. §77p(c).
- <sup>129</sup> Matthew O'Brien, *Choice of Forum in Securities Class Actions: Confronting "Reform" of the Securities Act of 1933*, 28 REV. LITIG. 845 (2009).
- <sup>130</sup> For a full analysis of how the circuits courts approached the 1933 Act claims after the enactment of the SULSA, see in general, J. Tyler Butts, *Removal of Covered Class Actions Under SLUSA: The Failure of Plain Meaning and Legislative Intent as Interpretive Devices, and the Supreme Courts Decisive Solution*, *supra* note 2.
- <sup>131</sup> *Id.*
- <sup>132</sup> *Id.*, at 176.
- <sup>133</sup> *Id.*, at 176-178.
- <sup>134</sup> *Id.*, at 178-182.
- <sup>135</sup> Kricher v. Putnam Funds Trust 547 U.S. 633 (2006).
- <sup>136</sup> *Id.*, at 194-196.
- <sup>137</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

---

<sup>138</sup> Jeffery T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 622 (2006).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 625, citing S. Rep. No.1109-14, at 50 (2005) (citation in original).

<sup>141</sup> There is controversy as to whether CAFA would cover any security class actions that did not meet the definition of a covered security under the SLUSA and CAFA. For a detailed analysis of this *see* O'Brien, *supra* note 128.

<sup>142</sup> Cook, *supra* note 137 at 679.