COMMENTS

ARE SECURITIES ACT OF 1933 CLAIMS FILED IN STATE COURT REMOVABLE UNDER THE CLASS ACTION FAIRNESS ACT OF 2005? A PROPOSED RESOLUTION TO A STATUTORY CONFLICT

I. INTRODUCTION ........................................................................................................... 560
II. BACKGROUND ............................................................................................................ 562
   A. THE SECURITIES ACT OF 1933 ................................................................. 562
   B. THE CLASS ACTION FAIRNESS ACT OF 2005 ............................. 562
   C. THE CONFLICTING PROVISIONS ......................................................... 565
   D. CASE LAW ........................................................................................................ 566
      1. LUTHER v. COUNTRYWIDE HOME LOANS SERVICING .......... 566
      2. NEW JERSEY CARPENTERS VACATION FUND v.
         HARBORVIEW MORTGAGE LOANS TRUST .............................. 569
      3. KATZ v. GERARDI ........................................................................ 574
III. ANALYSIS: DRAFT OPINION ................................................................................. 576
   A. BACKGROUND .............................................................................................. 578
   B. DISCUSSION .................................................................................................... 579
      1. REASONING BY ANALOGY ................................................................. 579
         A. CAFA’s Overall Purpose ................................................................. 579
         B. Absence of Limiting Language ....................................................... 580
      2. THE INAPPLICABILITY OF THE “SPECIFIC-GENERAL”
         CANON OF STATUTORY CONSTRUCTION ................................. 581
      3. LACK OF LEGISLATIVE HISTORY BEHIND § 22(A)’S
         ANTI-REMOVAL PROVISION .......................................................... 582
   C. CONCLUSION ................................................................................................. 585
IV. CONCLUSION ......................................................................................................... 585
I. INTRODUCTION

In the midst of the recent mortgage-backed securities crisis, state and federal courts are confronted with a procedural difficulty. A statutory conflict exists pertaining to removal of certain high-dollar securities class actions to federal court. Two federal circuit courts and one federal district court have ruled on the issue, and all three courts have arrived at different conclusions employing different rationales. The varying results create uncertainty in lower federal courts and state courts outside these circuits. When confronted with the same situation, it is unclear which line of reasoning a court will follow.

The conflict is in the anti-removal provision of the Securities Act of 1933 (the Securities Act or the ‘33 Act) and the removal provision of the Class Action Fairness Act of 2005 (CAFA). Section 22(a) of the Securities Act grants concurrent jurisdiction to state and federal courts and mandates that an action brought in a competent state court “shall not be removed” to federal court. The conflict arises when the claim alleged under the Securities Act is a class action. CAFA made sweeping changes to class action jurisdictional requirements, including an express provision that allows removal to federal court if certain requirements are met. As will be discussed, plaintiffs seeking to maintain a state forum under the ‘33 Act, as well as their adversaries seeking to remove pursuant to CAFA, both have compelling arguments.

The United States Ninth Circuit Court of Appeals ruled on the issue in July 2008, in Luther v. Countrywide Home Loans Servicing. David Luther brought a class action suit in state court alleging violations of the Securities Act, and the defendants removed the action to federal court pursuant to CAFA. Once the action was removed to federal court, the plaintiffs moved to remand back to state court. They argued that Section 22(a) of the Securities Act precluded removal of their suit regardless of whether all other requirements for removal were met. The district court granted their

1. See discussion infra Part II.C.
2. See discussion infra Part II.D.1-3.
7. Luther v. Countrywide Home Loans Servicing, 533 F.3d 1031 (9th Cir. 2008).
9. Luther, 533 F.3d at 1033.
10. Id.
motion to remand and the defendants appealed.\textsuperscript{11} In a short opinion, the Ninth Circuit affirmed the district court's ruling in favor of the plaintiffs, holding that Section 22(a) provided an express exception to removal and that the matter should remain in state court.\textsuperscript{12}

Two months later, the same procedural issue came before the United States District Court for the Southern District of New York in \textit{New Jersey Carpenters Vacation Fund v. Harborview Mortgage Loan Trust}.\textsuperscript{13} Once again, the plaintiffs originally brought a class action in state court and the defendants removed the case to federal court.\textsuperscript{14} The court, conducting a more in-depth analysis than the Ninth Circuit, ruled in favor of the defendants and found that the action had been properly removed.\textsuperscript{15} The plaintiffs appealed to the United States Court of Appeals for the Second Circuit\textsuperscript{16} but withdrew the appeal before the Second Circuit ruled.\textsuperscript{17}

In January 2009, the Seventh Circuit addressed the same statutory conflict. Here, the court disagreed with the \textit{Luther} court on whether removal was proper and held that the case should stay in federal court.\textsuperscript{18} This created a conflict among the circuits and left the future of the law unclear.

Part II of this Comment provides the legal background surrounding the propriety of removing Securities Act claims under CAFA, examining the relevant provisions of the statutes to highlight the source of the conflict. Part II also analyzes the reasoning behind the three decisions that squarely address this issue. Because the Second Circuit did not decide the \textit{Harborview} appeal, Part III of this Comment presents a suggested resolution of the conflict in the form of an appellate opinion structured around the withdrawn appeal. Based on a synthesis of the Southern District of New York and the Seventh Circuit rationales, along with a closer look at CAFA's exceptions and Section 22(a)'s lack of legislative history, the opinion argues that the case was properly removed to federal court. Part IV provides a brief conclusion.

\begin{itemize}
\item \textsuperscript{11} \textit{Luther v. Countrywide Home Loans Servicing}, 533 F.3d 1031 (9th Cir. 2008).
\item \textsuperscript{12} \textit{Id.} at 1034.
\item \textsuperscript{14} \textit{Id.} at 582.
\item \textsuperscript{15} \textit{Id.} at 590.
\item \textsuperscript{16} \textit{Union Fund to Appeal Jurisdiction Ruling in Subprime Fraud Suit}, 10, No. 15 ANDREWS CLASS ACTION LITIG. REP. 3 (West), Nov. 20, 2008.
\item \textsuperscript{17} \textit{Stipulation to Dismiss Appeal with Prejudice Pursuant to Fed. R. App. P. 42(b)}, N.J. Carpenters Vacation Fund v. Harborview Mortgage Loan Trust, No. 08-5093 (2nd Cir. Jan. 27, 2009).
\item \textsuperscript{18} \textit{Katz v. Gerardi}, 552 F.3d 558, 562 (7th Cir. 2009).
\end{itemize}
II. BACKGROUND

A. THE SECURITIES ACT OF 1933

Prior to the passage of the Securities Act of 1933, there was no federal regulation of securities.\(^\text{19}\) In 1911 Kansas became the first state to enact a “blue sky” law\(^\text{20}\) and, prior to the passage of the ’33 Act, securities regulation was “the exclusive province of the states.”\(^\text{21}\) Individual states had varying degrees of regulation, including registration of securities, registration of persons in the business of selling securities, antifraud provisions, or some combination of these regulations.\(^\text{22}\)

After the market crash of 1929 and subsequent economic depression, confidence in securities and securities markets was shaken; it was a confidence that only “strong and workable federal legislation” could restore.\(^\text{23}\) Two schools of thought emerged as to what the nature of the regulation should be: (1) regulation that would go to “the intrinsic merit of securities as potentially profitable investments”; and (2) regulation that “simply require[d] the kind of disclosure sufficient to enable an investor to make his or her own informed decision” as to the worth of a security.\(^\text{24}\)

The view requiring disclosure ultimately prevailed and is embodied in the Securities Act.\(^\text{25}\) The Securities Act’s purpose was not to “guarantee the present soundness or the future value of any security”; rather, it sought to allow an investor to “select the security which he deem[ed] appropriate for investment.”\(^\text{26}\) Congress achieved this objective of full disclosure by requiring an issuer of securities to file a registration statement containing “pertinent information regarding the issuer, the offered securities and the offering.”\(^\text{27}\)

B. THE CLASS ACTION FAIRNESS ACT OF 2005

CAFA was the result of congressional efforts beginning in 1997\(^\text{28}\)

---

20. Id. at 2 n.3. The title “blue sky” law comes from the language of a 1917 United States Supreme Court case that upheld state legislation regulating “speculative schemes which have no more basis than so many feet of ‘blue sky.’” Hall v. Geiger-Jones, 242 U.S. 539, 550 (1917).
22. Fed. Sec. Act of 1933, supra note 19, § 1.01.
23. Id.
24. Id.
25. Id. § 1.02.
27. Fed. Sec. Act of 1933, supra note 19, § 1.02.
Removal and the Securities Act of 1933

aimed at curbing what Congress viewed as a developing problem: abuse of the class action tool. The root of the problem was an increase in the filing of class action suits in what lawmakers referred to as “magnet” or “magic” state court jurisdictions that were “known for certifying even the most speculative class action suits . . . .” In response, CAFA significantly modified federal class action procedure in three ways: it provided for a “consumer class action bill of rights”; it expanded federal diversity jurisdiction to cover class actions that met its qualifications; and it relaxed the requirements for removal to federal court by class action defendants. With certain exceptions, CAFA allows for federal court jurisdiction over class actions “with 100 or more class members in which more than $5 million is in controversy after aggregating class members’ claims” and where there is minimal diversity.

Although CAFA’s comprehensive scheme appears to create federal jurisdiction for virtually every large class action, there are some exceptions. For example, CAFA does not apply to any class action where “the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.” Also, CAFA provides for “home state” and “local controversy” exceptions. These exceptions direct federal district courts to decline jurisdiction over any class action “in which two-thirds or more of the members of the plaintiff class, and all of the primary defendants, are citizens of the state in which the action was originally filed” or where “more than two-thirds of the members of the plaintiff class, and at least one defendant, are citizens of the state in which the action was originally filed.” Additionally, the “local controversy” exception requires that (1) the in-state defendant is one from whom “significant relief” is sought; (2) the alleged conduct of the in-state defendant must form a “significant basis” for

30. Id.
32. See generally 28 U.S.C. 1332(d) (2006). Minimal diversity is found when: (1) any member of a plaintiff class has state citizenship different from any defendant; (2) any member of a plaintiff class is a foreign state or has citizenship of a foreign state and any defendant is a citizen of a State; or (3) any member of a plaintiff class is a citizen of a State and any defendant is a foreign state or has citizenship of a foreign state. See id. Minimal diversity is a departure from the traditional requirement of complete diversity to invoke federal diversity jurisdiction, first announced in Strawbridge v. Curtis, 3 Cranch 267 (1806).
34. See id. § 1332(d)(4)(B).
35. See id. § 1332(d)(4)(A).
36. See id. § 1332(d)(4)(A)-(B).
the claims alleged; (3) the principal injuries resulting from the alleged conduct of the in-state defendant, or from any related conduct of any defendant, took place in the state where the plaintiffs originally filed; and (4) during the three-year period prior to filing, no other class action was filed “asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.”

CAFA also carved out exceptions for three securities and corporate governance-based claims. 28 U.S.C. § 1332(d)(9) provides that:

Paragraph (2) shall not apply to any class action that solely involves a claim—


(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

CAFA includes other discretionary avenues to decline jurisdiction. For example, CAFA provides that:

a district court may, in the interests of justice and looking at the totality

---

38. Paragraph (2) contains CAFA’s grant of original jurisdiction. § 1332(d)(2).
   (A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities); (B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or (C) is a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).
of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.\(^{40}\)

C. THE CONFLICTING PROVISIONS

Although lawmakers penned the '33 Act more than seventy years before CAFA and the two laws seem entirely unrelated, they do share a common—perhaps unstable—ground. Section 22(a) of the Securities Act of 1933 provides for concurrent jurisdiction in state and federal courts:

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the [Securities Exchange] Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.\(^{41}\)

This section also contains the Securities Act's anti-removal provision, which states: "Except as provided in section 77p(c)\(^{42}\) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."\(^{43}\)

The '33 Act's anti-removal provision explicitly mandates that "no case . . . shall be removed,"\(^{44}\) and thus stands in direct conflict with CAFA's removal provision, which states:

A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without consent of

---


\(^{42}\) 15 U.S.C. § 77p(c) (2006). Section 77p(c) provides: "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending . . . ." Id. See supra note 39 for the definition of a covered security.


\(^{44}\) Id.
D. CASE LAW

The conflict between the anti-removal provision of the Securities Act and the authority to remove a case under CAFA was explored in three recent federal cases. In these three cases, treated in detail below, the courts arrived at different conclusions based on very different reasoning and it remains uncertain which view will prevail.

1. LUTHER V. COUNTRYWIDE HOME LOANS SERVICING

David Luther filed a class action lawsuit in California state court alleging violations of sections 11, 12(a)(2), and 15 of the Securities Act. Luther alleged that the defendants issued "false and misleading registration statements and prospectus supplements for the mortgage pass-through certificates." He claimed that the credit worthiness of the mortgage borrowers was omitted and misstated in the registration statements and prospectus supplements, thereby misrepresenting the risk of the investment. According to Luther, the value of his investment declined substantially when "many of the underlying mortgages became uncollectible."

The Countrywide defendants removed the case to the United States District Court for the Central District of California under CAFA. After the case was removed, Luther filed a motion to remand the case back to state court, arguing that Section 22(a) of the Securities Act prohibited removal of claims filed in state court under the '33 Act. The Countrywide defendants opposed the motion to remand, arguing that "§ 22(a)'s removal bar does not prevent removal under CAFA and that none of CAFA's exceptions applie[d]."

The district court granted the motion to remand. The court held that

47. Luther v. Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1033 (9th Cir. 2008).
48. Id.
49. Id.
50. Luther named as defendants a number of other parties but it was the Countrywide defendants that removed the action to federal court.
51. Luther, 533 F.3d at 1033.
52. Id.
53. Luther v. Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1033 (9th Cir. 2008).
the two provisions could not "mutually coexist" and that "the specific bar against removal in the Securities Act of 1933 trumps CAFA's general grant of diversity and removal jurisdiction."\textsuperscript{55} The Countrywide defendants appealed the order remanding the case to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit began its discussion of the case by looking generally at the Securities Act and CAFA.\textsuperscript{56} The court noted that the Securities Act contained a grant of concurrent jurisdiction and a bar against removal of cases brought in state court.\textsuperscript{57} The court then discussed CAFA's changes to federal diversity jurisdiction—requiring an amount in controversy of more than five million dollars and minimal diversity—and CAFA's provision that such class actions are removable to federal court.\textsuperscript{58}

Looking to Supreme Court precedent, the court expressed the legal principle that removal statutes are generally construed against removal.\textsuperscript{59} Further, a defendant seeking to remove a case to federal court has the burden of establishing the propriety of removal; any doubts are resolved against removal.\textsuperscript{60} However, the court explained, a plaintiff who seeks to remand an action to state court "has the burden to prove that an express exception to removal exists."\textsuperscript{61}

In the Ninth Circuit's view, Section 22(a) of the Securities Act provided the express exception required.\textsuperscript{62} "CAFA's general grant of the right of removal of high-dollar class actions does not trump § 22(a)'s specific bar to removal of cases arising under the Securities Act of 1933."\textsuperscript{63} The court relied on the United States Supreme Court case of \textit{Radzanower v. Touche Ross & Co.},\textsuperscript{64} for the proposition that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted

\textsuperscript{55.} Luther, 533 F.3d at 1033.
\textsuperscript{56.} Id.
\textsuperscript{57.} Id. at 1034.
\textsuperscript{58.} Id. at 1033-34.
\textsuperscript{59.} Id. at 1034. \textit{See Shamrock Oil & Gas Corp. v. Sheets}, 313 U.S. 100, 108-09 (1941) (strictly construing removal statute to not allow removal by noncitizen plaintiff after defendant filed a counterclaim).
\textsuperscript{60.} Luther v. Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008). \textit{See Gaus v. Miles, Inc.}, 980 F.2d 564, 566 (9th Cir. 1992) (holding defendant's unsupported allegation that the amount in controversy was not met did not overcome strong presumption against removal).
\textsuperscript{61.} Luther, 533 F.3d at 1034. \textit{See Breuer v. Jim's Concrete of Brevard, Inc.}, 538 U.S. 691, 698 (2003).
\textsuperscript{62.} Luther, 533 F.3d at 1034.
\textsuperscript{63.} Luther v. Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008).
statute covering a more generalized spectrum.\textsuperscript{65}

The court reasoned that the Securities Act was the more specific statute, applying only to "the narrow subject of securities cases" and that Section 22(a) more specifically applied only to claims arising under the '33 Act.\textsuperscript{66} The court, using language from \textit{Radzanower}, described CAFA as applying to a "generalized spectrum" of class actions.\textsuperscript{67} Despite the \textit{Luther} court's firm reliance on the "specific-general" canon of statutory construction, its applicability remains uncertain. Other courts considering this conflict have disagreed with the Ninth Circuit's view or have mentioned \textit{Radzanower} only in passing.\textsuperscript{68}

The court distinguished \textit{Estate of Pew v. Cardarelli},\textsuperscript{69} a Second Circuit case relied on by the defendants.\textsuperscript{70} The court found that the case was not controlling because it did not squarely address the "interplay between CAFA and § 22(a)."\textsuperscript{71} \textit{Pew} involved claims under a state consumer protection statute seeking damages for the fraudulent concealment of insolvency by an issuer of money market certificates.\textsuperscript{72} Because the claims arose under state law and not under the Securities Act, the \textit{Luther} court reasoned that "§ 22(a) did not apply on its terms."\textsuperscript{73} After distinguishing \textit{Pew}, the court in \textit{Luther} held that under Section 22(a) of the Securities Act, Luther's class action was not removable and, subsequently, the court granted the motion to remand.\textsuperscript{74} Although the \textit{Luther} court placed

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{65} Luther v. Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008) (quoting \textit{Radzanower}, 426 U.S. at 153).
\item \textsuperscript{66} \textit{Id}.
\item \textsuperscript{67} \textit{Id} (quoting \textit{Radzanower}, 426 U.S. at 153).
\item \textsuperscript{68} See discussion infra Part II.D.2-3 of other courts' treatment of the "specific-general" canon of statutory construction.
\item \textsuperscript{69} Estate of Pew v. Cardarelli, 527 F.3d 25 (2d Cir. 2008).
\item \textsuperscript{70} \textit{Luther}, 533 F.3d at 1034.
\item \textsuperscript{71} Pew, 527 F.3d at 26.
\item \textsuperscript{72} \textit{Pew}, 527 F.3d at 26.
\item \textsuperscript{73} \textit{Luther}, 533 F.3d at 1034.
\item \textsuperscript{74} \textit{Id}. Interestingly, almost two years after the original state court action, the same parties were again in a California federal district court in a separate but related action. \textit{Luther v. Countrywide Fin. Corp.}, No. 09-06162, 2009 WL 3271368 (C.D. Cal. Aug. 24, 2009). After the original case was remanded to state court, a new jurisdictional question under SLUSA was raised. Complaint for Declaratory Relief, \textit{Luther v. Countrywide Fin. Corp.}, No. 09-06162 (C.D. Cal Aug. 24, 2009). Judge Elias, the California state court judge, suggested a second removal. \textit{Id}. Because removal may have been procedurally unavailable, Judge Elias entered an order staying the state court proceeding and directing the plaintiffs to file a separate federal court action to resolve the SLUSA jurisdictional issue. \textit{Id}. Acknowledging, but ultimately avoiding, a number of constitutional issues, the court stated it was exercising its discretion to dismiss the declaratory judgment action after determining it would "serve no useful purpose" under the Declaratory Judgment Act. \textit{Luther}, 2009 WL 3271368 at *3 (citing Wilton v. Seven Falls, 515 U.S. 277, 286 (1995)).
\end{enumerate}
\end{footnotesize}
no reliance on Pew, primarily because the claims were not pled under the '33 Act, the Southern District of New York would soon utilize Pew as part of a series of analogous reasoning.

2. NEW JERSEY CARPENTERS VACATION FUND V. HARBORVIEW MORTGAGE LOANS TRUST

The plaintiffs, the New Jersey Carpenters Vacation Fund, filed a class action suit in New York State Supreme Court alleging violations of sections 11, 12, and 15 of the Securities Act. The plaintiffs alleged that the prospectuses and registration statements associated with the issuance of Harborview Mortgage Loan Pass-Through Certificates contained misrepresentations. The defendants removed the case to the United States District Court for the Southern District of New York pursuant to CAFA. The plaintiffs moved to remand the action back to state court, arguing they had a right to choose their own forum based on Section 22(a). They cited Luther in further support of their contention that removal was improper.

The court recognized the "direct conflict" between the Securities Act anti-removal provision and CAFA's removal provision and briefly outlined each statute and its purpose. The court discussed Section 22(a)'s concurrent jurisdiction and removal provisions in the context of removal jurisdiction in the federal system. The court focused on the general removal statute in the federal system found in 28 U.S.C § 1441, which provides:

*Except as otherwise provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.*

According to the court, the Securities Act, as an Act of Congress,

---

75. See generally Luther, 2009 WL 3271368 at *3 (citing Wilton v. Seven Falls, 515 U.S. 277, 286 (1995)).
77. Id.
78. Id.
79. Id.
80. Id. See also Union Fund to Appeal Jurisdiction Ruling in Subprime Fraud Suit, supra note 16.
81. Harborview, 581 F. Supp. 2d. at 583.
would clearly fit the enumerated exception and would override the general removal provision.84 However, the case was not removed under the general removal statute; the removal was pursuant to CAFA, which specifically allowed for removal in this situation.85

The court discussed CAFA in detail, beginning with its grant of original federal jurisdiction and removal.86 As noted above, CAFA “expanded diversity jurisdiction by establishing original jurisdiction in the federal courts for certain class actions that are national or international in scope” and made such cases removable.87 A class action need only meet CAFA’s amount in controversy and minimal diversity requirements to be removed.88 The court also acknowledged CAFA’s limited set of enumerated exceptions—“home state,” “local controversy,” and securities and corporate-governance-based lawsuits—and deduced that “by its clear language, CAFA creates original jurisdiction for and removability of all class actions that meet the minimal requirements and do not fall under one of the limited exceptions.”89

The court next examined CAFA’s purpose, finding that “CAFA was enacted to restore the intent of the framers by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction.”90 Based on statements from members of Congress, including Senator Herb Kohl, an original sponsor of the bill, the court determined that Congress enacted CAFA in response to a “‘gaming of the system’ through which plaintiff’s attorneys sought to avoid federal jurisdiction.”91

85. Id. at 582.
86. Id. at 583. For a discussion of CAFA’s jurisdiction and removal provisions, see supra Part II.B.
87. Id. at 583-84.
88. Id. at 584.
89. Id. For a discussion of CAFA’s enumerated exceptions, see supra Part II.B.
91. Id. Judge Lee Rosenthal, a federal district judge in the Southern District of Texas, then-Chair of the Advisory Committee on Civil Rules, and former Chair of its Subcommittee on Class Actions said this of the incentive for plaintiffs to file class actions in certain state court jurisdictions:

A so-called magnet forum referred to courts that would be most friendly to the plaintiffs in a case, both in terms of liability and damages, even if that required ignoring the applicable laws of other states that would lead to different substantive outcomes. The term later came to refer as well to courts that would be the most “class action-friendly,” willing to apply loose certification standards in approving nationwide or multi-state classes in disputes with little, if any, connection to the forum, even if that required applying the law of a single forum
The court then considered whether CAFA overrode the Securities Act anti-removal provision. The plaintiffs argued that CAFA did not trump the anti-removal provision, and even if CAFA did trump, the case fell into one of CAFA's exceptions. The defendants argued that CAFA should control under the Rule of Recency—the more recent law prevails because it reflects the true intent of Congress.

The court seemed to disregard the defendant's assertion of the Rule of Recency and instead addressed the Ninth Circuit's holding in Luther. The court reiterated Luther's reliance on Radzanower and, although it recognized Luther's holding that Section 22(a) could not be overridden by CAFA, the court sought to make its own determination of exactly what effect CAFA had on the anti-removal provision of the '33 Act.

It was actually the rejection of one of the plaintiffs' arguments that led the court to an answer. The plaintiffs argued that, under Breuer v. Jim's Concrete of Brevard, Inc., they had "an absolute right to sue in state court regardless of what CAFA says." The court rejected the plaintiffs' interpretation of Breuer. The court interpreted Breuer as holding that "the Fair Labor Standards Act, a federal statute that is silent on removal, was distinguishable from other statutes, like the Securities Act of 1933, which explicitly barred removal to federal court of cases arising under the Act." In further support of its rejection of the plaintiffs' absolute choice of forum argument under Breuer, the court recognized that the Second Circuit "has explicitly found that cases pled under the 1933 Act can be removed even if brought in State court."

Uncertain which statute controlled and unconvinced by the arguments advanced by the parties, the court found guidance in Second Circuit precedent. In California Public Employees Retirement Systems v...
*WorldCom, Inc.*, the Second Circuit considered a similar conflict between removal provisions in the Bankruptcy Code and the anti-removal provision of the Securities Act. In June 2002, WorldCom announced that it had “improperly treated $3.8 billion in ordinary costs as capital expenditures.” This announcement led to numerous securities class actions around the country that were eventually consolidated in the Southern District of New York by the Judicial Panel on Multidistrict Litigation.

In *WorldCom*, state and private pension funds that had purchased WorldCom bonds pled individual claims exclusively under the Securities Act of 1933 in an attempt to avoid federal jurisdiction and, ultimately, to avoid having their actions consolidated. This attempt failed, however, after WorldCom filed bankruptcy and the claims became removable under 28 U.S.C. § 1452(a), which allowed removal of claims that fell within the bankruptcy jurisdiction of federal courts, including actions “‘related to’ a bankruptcy.”

The pension funds moved to remand their actions back to state court, arguing that Section 22(a) of the ’33 Act gave them an absolute choice of forum. After the district court denied the motions, the funds filed an interlocutory appeal to the Second Circuit challenging the denial of the motion to remand. The court examined the conflict, beginning with the bankruptcy removal provision. Based on reports from the House and the Senate, the *WorldCom* court determined that the broad jurisdictional scheme laid out in the Bankruptcy Reform Act of 1978 was intended to “greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system . . . .” After understanding the federal jurisdictional scheme in relation to

---


102. Id. at 90.
103. Id. at 91.
104. Id.
105. Id. The other securities class actions that had been consolidated in the multi-district litigation pled claims under the Securities Exchange Act of 1934 (Exchange Act). Importantly, the Exchange Act does not contain an express anti-removal provision.
106. Id. at 92.
108. Id. at 93.
109. Id. at 96.
110. Id. at 97 (quoting H.R. REP. NO. 95-595, at 36 (1977)). A plurality of the Supreme Court found § 1471(c) unconstitutional in N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S.
bankruptcy, the court moved to an analysis of the jurisdiction and anti-removal provisions in Section 22(a) of the Securities Act of 1933.111

The WorldCom court examined the Securities Act as amended by the Securities Litigation Uniform Standards Act (SLUSA),112 which "did not touch § 22(a)'s bar on removal of individual Securities Act claims, [but] did make federal court the exclusive venue for class actions alleging fraud in the sale of covered securities."113 After surmising that the bankruptcy code sought to centralize bankruptcy litigation in a federal forum, the court determined that this purpose "overrode the anti-removal provision for the securities claim, thereby precluding remand."114

In further support of its decision, the WorldCom court compared the general removal provision found in 28 U.S.C. § 1441(a) and the bankruptcy removal provision found in 28 U.S.C. § 1452(a).115 The court noted that the general removal provision contained the language “except as otherwise expressly provided by Act of Congress,” while the bankruptcy removal provision contained no such limiting language.116 The court interpreted Congress’s decision not to include this language as creating a presumption that Congress intended the two provisions to be treated differently; the general removal provision would be limited by other Acts of Congress and the bankruptcy removal provision would be “sweeping” in scope.117 The Harborview court extended WorldCom’s reasoning to CAFA:

Similarly, here, one could argue that CAFA, which targets only diversity cases that are class actions, also has sweeping removal power and like the bankruptcy removal provisions, CAFA’s sole limitations are those exclusively listed in the defined exceptions such as Home State, Local Controversies, and the three securities and corporate governance exceptions. Had Congress wanted to treat CAFA like the general removal statute of § 1441(a) and leave intact other statutory

50 (1984), because it impermissibly transferred fundamental characteristics of judicial power from Article III judges to bankruptcy courts. Subsequently, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. “Although the statute revamped the relationship between Article III judges and Article I bankruptcy judges, it did not materially alter the jurisdictional scheme set forth in the Reform Act.” WorldCom, 368 F.3d at 97 n.12.

111. WorldCom, 368 F.3d at 97-98. For a discussion of Section 22(a) of the Securities Act, see supra Part II.A.


114. Id. at 587 (citing WorldCom, 368 F.3d at 103, 105-06).

115. WorldCom, 368 F.3d at 105-06.

116. Id. at 106.

117. See id. at 103-04. See also Harborview, 581 F. Supp. 2d. at 587.
regimes, it could have easily done so. ¹¹⁸

The *Harborview* court also looked to *Estate of Pew v. Cardarelli*,¹¹⁹ wherein the Second Circuit compared CAFA and SLUSA in the context of federal jurisdiction and removal.¹²⁰ In *Pew*, the Second Circuit found an “overall design to assure that the federal courts are available for all securities cases that have national impact . . . without impairing the ability of state courts to decide cases of chiefly local import or that concern traditional statute regulation of the state’s corporate creatures.”¹²¹ Therefore, subject only to CAFA’s enumerated exceptions,¹²² “diversity jurisdiction is created under CAFA for all large, non-local securities class actions.”¹²³

The Ninth Circuit distinguished *Pew* as not addressing the “interplay between CAFA and § 22(a).”¹²⁴ Although *Pew* was not directly on point, it did assist the *Harborview* court in determining CAFA’s “overall design” and was one piece in a larger fabric of *Harborview’s* analogous reasoning.¹²⁵

The *Harborview* court ultimately concluded that CAFA did override the anti-removal provision of the Securities Act of 1933.¹²⁶ The court identified *Harborview* as “exactly the type of case CAFA was concerned about- a large, non-local securities class action dealing with a matter of national importance, the mortgage-backed securities crisis that is currently wreaking havoc with the national and international economy.”¹²⁷

3. KATZ V. GERARDI

Near the time the Southern District of New York handed down its decision in *Harborview*, the Northern District of Illinois was considering the same problem in *Katz v. Gerardi*.¹²⁸ The plaintiff, Jack Katz, sought to represent a class of people that contributed real property, or an interest in

¹¹⁹ *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008).
¹²⁰ *Harborview*, 581 F. Supp. 2d. at 587.
¹²¹ Pew, 527 F.3d at 32.
¹²² For a discussion of CAFA’s enumerated exceptions, see supra Part II.B.
¹²³ Pew, 527 F.3d at 32.
¹²⁴ Luther v. Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008).
¹²⁵ *Harborview*, 581 F. Supp. at 587. For a discussion of *Harborview*, see supra Part II.D.2. But see *Luther*, 533 F.3d 1031 (holding that Pew was not controlling as it did not squarely address the issue before the court). For a discussion of *Luther*, see discussion supra Part II.D.1.
¹²⁶ *Harborview*, 581 F. Supp. 2d. at 588.
¹²⁷ *Id.* at 587-88.
real property, to Archstone, a real estate investment trust, in exchange for “A-1 Units” in the trust. In 2007 the trust merged into the Tishman-Lehman Partnership, and holders of the original A-1 Units had the option to receive a cash payment or take Series O Preferred Units in the new entity.

Katz alleged that the merger violated the terms of the A-1 Units because neither cash nor the Series O Units offered the same tax benefits as the A-1 Units. After a majority of investors approved the merger, Katz took the cash payment and filed suit in Illinois state court. The defendant removed the case to federal court under CAFA. The district court remanded the case back to state court after it determined that removal was improper because of Section 22(a)’s anti-removal provision. The district court held that Section 22(a) was the more specific statute: “§ 22(a) deals only with securities litigation, while the 2005 Act covers class actions in many substantive fields.” The defendants appealed the remand order to the United States Court of Appeals for the Seventh Circuit.

Considering whether removal was warranted, the court first addressed the Ninth Circuit’s decision in Luther. The court in Luther relied on Radzanower v. Touche Ross & Co. for the proposition that “an older law maintains its vitality when it is more specific than a newer one.” The Ninth Circuit understood Section 22(a) to cover only securities suits, making it more specific than CAFA, which applied to all civil actions. The district court in Katz was persuaded by the reasoning in Luther and ultimately granted the motion to remand.

The Seventh Circuit illuminated the subtleties of the “specific-general” canon that the Ninth Circuit failed to consider in Luther. The Seventh Circuit explained that “[t]he canon favoring preservation of specific statutes arguably affected by newer, but more general, statutes

129. Katz v. Gerardi, 552 F.3d 558, 559 (7th Cir. 2009).
130. Id.
131. Id. at 559-560.
132. Id. at 560.
133. Id.
136. Id.
137. Id. at 561. For a discussion of Luther v. Countrywide Home Loans Servicing LP, see supra Part II.D.1.
139. Katz, 552 F.3d at 561.
works when one statute is a subset of the other." The court provided an example of this relationship, stating, "[i]f the 2005 Act dealt with all civil suits, then a law applicable only to civil securities actions would be more specific." Section 22(a), however, was not a subset of CAFA; although it covered only securities actions, "it include[d] all securities actions—single-investor suits as well as class actions, small class actions as well as large multi-state ones." The court determined that the question of which statute is more specific could not be answered, making the "specific-general" canon inapplicable.

Instead, the court looked to CAFA's language to see how its removal provisions applied to corporate and securities actions. "[The court in] Luther did not appear to understand that § 1453(d) tells us how the 2005 Act affects securities cases: the ninth circuit [sic] did not analyze this language or even acknowledge its existence." Section 1453(d), however, provides three enumerated exceptions; according to Katz, anything not falling into these exceptions that met the jurisdictional requirements of CAFA was removable.

III. ANALYSIS: DRAFT OPINION

Three federal courts, when presented with the same issue, interpreted the applicable law and came to different conclusions. In Luther, the Ninth Circuit resolved the problem in favor of the plaintiffs and allowed their suit to remain in state court because it found that CAFA did not preclude remand. Contrary to the result reached in Luther, the courts in Harborview and Katz held that removal was proper. The Harborview court relied, among other things, on analogous reasoning from a case wherein the Bankruptcy Code removal provisions conflicted with the Securities Act anti-removal provision. The Katz court rejected

141. Katz v. Gerardi, 552 F.3d 558, 561 (7th Cir. 2009).
142. Id.
143. Id.
144. Id.
145. Id. at 562.
147. Katz v. Gerardi, 552 F.3d 558, 562 (7th Cir. 2009).
148. Luther v. Countrywide Home Loans Servicing, LP, 533 F.3d 1031, 1034 (9th Cir. 2008).
150. Katz v. Gerardi, 552 F.3d 558 (7th Cir. 2009).
application of the "specific-general" canon of statutory construction and relied entirely on CAFA's enumerated exceptions.\footnote{152}

\textit{Harborview} was appealed to the Second Circuit.\footnote{153} However, on January 21, 2009, the plaintiffs in \textit{Harborview} moved to withdraw and, with no objections by the defendants, the court ordered the appeal withdrawn with prejudice.\footnote{154} With the appeal withdrawn and \textit{Harborview} back in the Southern District of New York, a circuit split remains between the Seventh and Ninth Circuits.

To affect an expedient resolution to this conflict, it is helpful to speculate about the result the Second Circuit would have reached had the appeal not been withdrawn. This section will take the posture of the Second Circuit's opinion on whether CAFA's removal provision controls over the anti-removal provision of the Securities Act of 1933. The suggested opinion concludes that the best solution, one that keeps the matter in federal court, is reached by combining three factors: the analogous reasoning used by the Southern District, the Seventh Circuit's treatment of the "specific-general" canon of statutory construction, and an increased emphasis on CAFA's exceptions and Section 22(a)'s lack of legislative history.

\footnotesize{\begin{itemize}
\item \footnote{152} Katz v. Gerardi, 552 F.3d 558, 561-62 (7th Cir. 2009).
\item \footnote{153} Union Fund to Appeal Jurisdiction Ruling in Subprime Fraud Suit, supra note 16.
\item \footnote{154} Stipulation to Dismiss Appeal with Prejudice Pursuant to Fed. R. App. P. 42(b), N.J. Carpenters Vacation Fund v. Harborview Mortgage Loan Trust, No. 08-5093 (2d Cir. Jan. 27, 2009).
\end{itemize}}
NEW JERSEY CARPENTERS VACATION FUND, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED

PLAINTIFF-APPELLANT

v.

HARBORVIEW MORTGAGE LOAN TRUST, ET AL.

DEFENDANT-APPELLEE

United States Court of Appeals,

Second Circuit

Plaintiff-Appellants New Jersey Carpenter’s Vacation Fund (the Fund) appeal from the decision and order entered on September 24, 2008, by Judge Harold Baer, Jr. of the United States District Court for the Southern District of New York. The decision and order denied the Fund’s motion to remand its class action suit back to New York State Supreme Court. Because we conclude that the district court, as a matter of first impression, correctly held that CAFA trumped the anti-removal provision of the Securities Act of 1933, we affirm the denial of the motion to remand. In addition to the analysis employed by the district court, we are persuaded by Katz v. Gerardi, 552 F.3d 558 (7th Cir. 2008), and further by a consideration of CAFA’s exceptions and the legislative history behind the anti-removal provision.

A. BACKGROUND

Investors brought a state court class action for alleged violations of the Securities Act of 1933 against the issuer of mortgage loan pass-through certificates, depositors, investment banks, and credit rating agencies based on alleged misrepresentations in certificates, prospectuses, and registration statements. After defendants removed the action, the investors moved to remand. The District Court, Harold Baer, Jr., J., held that as a matter of first impression, the Class Action Fairness Act (CAFA) overrode the Securities Act’s anti-removal provision to permit removal of case, unless a statutory exception applied.155 We now affirm.

155. This portion of background was taken from New Jersey Carpenters Vacation Fund v.
1. REASONING BY ANALOGY

Confronted with an issue of first impression, the district court looked to precedent within this circuit for guidance. The question of the propriety of removal of a Securities Act claim under CAFA had not been decided by this court; in fact, only one federal circuit had considered the issue. See Luther v. Countrywide Home Loans Servicing, 533 F.3d 1031 (9th Cir. 2008). The district court however, did find instructive the Second Circuit case, California Public Employees Retirement System v. WorldCom, Inc., 368 F.3d 86 (2d Cir. 2004), which ultimately assisted in its reasoning.

In WorldCom, we considered a similar question: whether the bankruptcy jurisdiction of the federal courts trumped the anti-removal provision of the Securities Act. The district court found our reasoning in WorldCom persuasive and, in deciding which statute should control regarding CAFA’s removal provision and the anti-removal provision of the Securities Act, the district court was guided by the analysis employed in this analogous situation.

A. CAFA’s Overall Purpose

In WorldCom, we placed much emphasis on the purpose of bankruptcy removal jurisdiction and the jurisdictional scheme developed in the Bankruptcy Reform Act and subsequent amendments. The House and Senate reports on the Reform Act made clear that the jurisdictional provisions were broad in scope and designed to concentrate bankruptcy litigation in federal court. See S. REP. NO. 95-989, at 153 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5939; H. R. REP. NO. 95-595, at 46 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6007.

In applying our reasoning from WorldCom, the district court looked at CAFA’s overall purpose and determined it was very clear. It was enacted “to restore the intent of the framers by providing for federal court consideration of interstate cases of national importance. . . .” Harborview, 581 F. Supp. 2d 581, 584; see also Pub. L. No. 109-2, § 2(b)(2). The district court noted that Harborview is precisely such a case. Harborview, 581 F. Supp. 2d at 587-88. The plaintiffs even recognized in their complaint that the claims are directly involved with an issue of national importance—the mortgage-backed securities crisis. See Plaintiffs’ Complaint at 3, 34, 65; N.J. Carpenters Vacation Fund v. Harborview.
In *WorldCom*, we held that the central purpose of the bankruptcy code was to centralize bankruptcy litigation in a federal forum and that purpose overrode the anti-removal provision of the Securities Act, thereby precluding remand. The same reasoning holds true in *Harborview*, as the district court has already ruled, and we affirm the district court's decision denying the motion to remand.

**B. Absence of Limiting Language**


However, where a claim is removed under a statute (like CAFA) that contains no such limiting language, we seriously question whether Section 22(a)’s affirmative denial of a right to removal should be given effect. In *WorldCom*, we held that this affirmative denial should not be given effect and elect to do the same here.

In *WorldCom*, we treated the lack of limiting language as creating a presumption that Congress had full knowledge that the general removal provision and the bankruptcy removal provision would be applied differently. *WorldCom*, 368 F.3d at 105. Thus, the general removal provision would be applied, except as otherwise provided by Congress, while bankruptcy cases would be given across-the-board removal power. Similarly, CAFA was written without the limiting language of the general removal provision and, instead, contains very specific enumerated exceptions: Home State, Local Controversy, and the three securities and corporate governance based exceptions. See 28 U.S.C. § 1332 (d) (4)-(5), (9) (2006). The district court aptly stated that “[h]ad Congress wanted to treat CAFA like the general removal statute of § 1441(a) and leave intact other statutory schemes, it could have easily done so.” *Harborview*, 581 F. Supp. 2d at 587.
2. THE INAPPLICABILITY OF THE "SPECIFIC-GENERAL" CANON OF STATUTORY CONSTRUCTION

Although we can effectively answer the removal question based on our reasoning in *WorldCom*, the Seventh Circuit provided us additional justification for precluding remand that more directly addresses the argument that Section 22(a) should control. See *Katz v. Gerardi*, 552 F.3d 558, 558 (7th Cir. 2004). The Seventh Circuit resolved the removal question in favor of keeping the claims in federal court but it focused primarily on the enumerated exceptions of CAFA, indicating that the exceptions were the only limit on its application. *Id.* at 561.

Espousing this view in *Katz v. Gerardi*, the Seventh Circuit had occasion to question the analysis of the Ninth Circuit in *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008). The *Luther* court relied on *Radzanower v. Touche & Ross Co.*, 426 U.S. 148 (1976), for the proposition that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Luther*, 533 F.3d at 1034 (quoting *Radzanower*, 426 U.S. at 153).

In a claim brought under the Securities Exchange Act of 1934, *Radzanower* involved the question of whether it was proper to apply the broad venue provision of that Act, which allowed suit to be brought in any district where the defendant may be found, or instead the narrow venue provision of the National Bank Act, which allowed a national banking institution to be sued only in the district where it was established. *Radzanower*, 426 U.S. at 150. Applying this "specific-general" canon of statutory construction, the Court held that the specific venue provision of the National Bank Act prevailed over the general venue provision of the Securities Exchange Act of 1934. *Id.* at 158.

The court in *Luther*, applying this canon from *Radzanower*, held that the Securities Act of 1933 was the more specific statute, applying only to the narrow field of securities cases, while CAFA applied to a more generalized spectrum of class action cases. *Luther*, 533 F.3d at 1034. The Seventh Circuit was not persuaded by this examination and application of the "specific-general" canon. See *Katz*, 522 F.3d at 561. The view taken by the court in *Katz* casts doubt on *Luther's* reliance on this canon. Judge Easterbrook reminds us that the "specific-general" canon works when one statute is a subset of the other. *Id.* Easterbrooks asks, "Is the 1933 Act more specific because it deals only with securities law, or is the 2005 Act more specific because it deals only with nationwide class actions?" *Id.* This question, according to Judge Easterbrook, could not be answered, rendering the "specific-general" canon inapplicable. *Id.* at 561-62. This
conclusion led the court in *Katz* to determine that "[c]anons such as ‘the specific prevails over the general’ are just doubt resolvers. . . . The language of the 2005 Act, rather than a canon [of statutory construction], tells us how the new removal rule applies to corporate and securities actions." *Id.* at 562.

3. **LACK OF LEGISLATIVE HISTORY BEHIND § 22(A)'S ANTI- REMOVAL PROVISION**

In further support of CAFA’s prevalence over Section 22(a)’s anti-removal provision, we must note, as numerous commentators have, the absence of any legislative history explaining the jurisdictional approach taken in the ‘33 Act. *See*, e.g., Jeffrey T. Cook, *Recrafting the Jurisdictional Framework For Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 632 (2006); Allan Horwich, *Section 11 of the Securities Act: The Cornerstone needs Some Tuckpointing*, 58 BUS. LAW 1, 40 n.421 (2002) (citing Paul Horton, *Section 17(a) of the 1933 Securities Act—The Wrong Place for a Private Right*, 68 NW. U. L. REV. 44, 56 n.32 (1973). One commentator observed that no reported discussion exists relating to the jurisdictional provisions contained in the bill that ultimately became the Securities Act of 1933. *See* Horton, *supra*, at 56 n.32.


As a result of this type of Congressional silence, past courts and commentators have looked at the policies underlying similar measures that prevent removal of federal law claims to federal court. At this point, it is worth noting that, as of yet, no court that has considered the conflict between Section 22(a) and CAFA has examined the absence of a clear justification for the anti-removal provision in the ‘33 Act. We, therefore, take on this task and examine the policies advanced by provisions similar to
Section 22(a). These policies include "reducing the burdens on federal courts, preserving a plaintiff's choice of forum, and preventing 'federalization' of traditional areas of state law." Cook, supra, at 633-34.

Although compelling, these policy interests must give way to CAFA's overall design and purpose. Regarding judicial efficiency, we have difficulty believing that allowing CAFA to control over Section 22(a) would create a burden on federal courts after seven years of debate and compromise resulted in a scheme that readily embraces easier access to federal courts. CAFA's explicit policy goals to make a federal forum more available and to relax requirements on removal demonstrate that Congress was concerned less with the burden on federal courts and more with curbing the pervasive abuse of the class action tool. Therefore, that policy would not be furthered by remanding this case to state court.

Further, a report from the Senate Judiciary Committee rebutted the notion that CAFA would allow removal of nearly all class actions from state court into federal court, contributing to the already overwhelming workload of the federal judiciary. S. REP. NO. 109-14 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 38. A study done in the spring of 2004 of six states with readily available data online showed that more than half of the class actions ruled on in a five-year period would not have been removable under the Class Action Fairness Act of 2005, while over 85% of the class actions brought in Madison County, Illinois, a "magnet" court known for swift certification of classes and rubber-stamp settlements, would have been removable to federal court. John H. Beisner & Jessica Davidson Miller, There will be no Exodus: An Empirical Study of S. 2062's Effects on Class Actions, in 1, No. 9 MEALEY'S TORT REFORM UPDATE 16 (LexisNexis April 2004), available at http://www.weldinginfonetwork.com/tort/04_04_Mealeys.pdf.

Regarding the policy against "federalization" of traditional areas of state law, we do not feel that remanding this case would further that policy. Simply put, the claim arose as the result of an alleged violation of a federal law. The specific posture of the case—a plaintiff class of 100 or more people, minimal diversity, and over five million dollars in dispute—brought the claim within reach of another federal statute designed, in part, to specifically allow removal from state to federal court. It is difficult to see

157. In Pew, the Second Circuit noted that, in the past, there was some skepticism as to the "probative value" of this Senate Report because it was issued after CAFA was enacted into law. Estate of Pew v. Cardarelli, 527 F.3d 25, 32 (2d Cir. 2008). However, the court went on to acknowledge the point made by the Eleventh Circuit that the report was submitted to the Senate during consideration of the bill and the Second Circuit ultimately relied on passages from the report in its decision. Id. at 32-33.
how allowing removal would work to "federalize" a traditional area of state law.

Regarding the policy of preserving of a plaintiff's choice of forum, we are not convinced that the plaintiff's choice should be preserved in this instance. A plaintiff's choice of forum has long been valued in our legal system, see The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913); see also Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 809, n.6 (1986), and removal jurisdiction necessarily places tension on that choice. The drafters of CAFA attempted to ease that tension by carving out discrete classes of cases from its broad removal provision. Two of the exceptions, "local controversy" and "home state" seek to address concerns about removal of cases of chiefly local import or involving parties native to the forum state. These exceptions were designed to alleviate the discomfort of some members of Congress who believed that jurisdiction over local cases between primarily in-state defendants would be stripped away by the federal courts.

Take, for example, the "local controversy" exception. 28 U.S.C. § 1332(d)(4)(A) (2006). Federal courts are given a specific set of criteria calculated to identify "a truly local controversy-a controversy that uniquely affects a particular locality to the exclusion of all others." 151 CONG. REC. H728 (2005). Another example is CAFA's provision for a discretionary totality of the circumstances determination of what sponsors of the bill classified "middle third" cases.

In 2008, 40% of all federal securities class actions had their genesis in the recent financial crisis. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS, 2008: A YEAR IN REVIEW, at 4, available at http://securities.cornerstone.com/pdfs/YIR2008.pdf. Additionally, state courts have seen the number of filings of '33 Act class actions increase partly as a result of plaintiff's lawyers' perception that state courts are more favorable venues. See Kenneth I. Schacter & Mary Gail Gearns, Removing '33 Act Class Actions Under SLUSA and CAFA, N.Y. L. J., Dec. 1, 2008, at S6.

Importantly, Congress has gone to great lengths to identify and protect legitimate interests in maintaining a state court forum. This highlights one common thread that unites the cases addressing the statutory conflict before us: the plaintiffs' failure to articulate any reason, beyond the language of Section 22(a), why their claims should remain in state court. The plaintiffs have no identifiable concern, beyond their reliance on seventy plus years of the existence of an unexplained anti-removal provision and the hope of avoiding federal jurisdiction, as to why removal is improper.
Because these policies, which are traditionally invoked to justify non-removal of federal law claims, would not be furthered by prohibiting removal, we decline to use them as a basis for remanding this case. One policy that we are convinced by, however, is the national policy interest in having these types of cases heard in federal court, guided by a class action system structured to ensure fairness and to prevent abuse.

C. CONCLUSION

Based upon the decision of the district court, and informed by the Seventh Circuit’s decision in Katz, further review of CAFA’s exceptions and the lack of legislative history behind Section 22(a), we affirm the district court’s decision and order denying the Fund’s motion to remand. In resolving this conflict, we hesitate to hold that Section 22(a) controls on the basis of inferred policies which may or may not have been Congress’s intent in 1933, especially when weighed against the explicit policies sought to be achieved by CAFA.

During a time of economic crisis, this court does not see fit to remand a case of this nature back to state court, in contravention of Congress’s efforts in passing CAFA, based on an anti-removal provision that has no apparent justification. We take this opportunity to implore Congress to clarify this issue with legislation consistent with this Court’s opinion. Presently, the circuits remain split and, in the current economic climate, parties caught up in this conflict cannot afford to continue to litigate jurisdictional issues.

IV. CONCLUSION

With federal courts in disagreement about the proper solution to this conflict and the continuing increase in claims under the Securities Act of 1933 being filed in state courts, the issue of removal jurisdiction will continue to be litigated. Because only two circuits have ruled on the issue, the United States Supreme Court may be interested in letting other circuits weigh in before granting review. However, this may be an important enough problem that the Court will choose to address it despite other circuits’ failure to do so. There is also the possibility, perhaps a quicker and more definitive one, that Congress will step in and amend one of the statutes to resolve the conflict.

Trevor M. Cutaiar

* I would like to thank my family for their continued support.