SECURITIES NEWS

Volume 12, No. 3, Fall 2002

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CIRCUMVENTING INTENT

by Gary L. Sasso and John L. Badalamenti[1]

Introduction

Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"),[2] to preempt class actions brought under state law challenging misrepresentations or deceptive devices used in connection with the purchase or sale of securities. As the name of the law suggests, it was Congress' intent to ensure that "uniform" federal standards apply to claims of this nature.

This would be pointless, of course, if federal and state law already imposed identical standards for recovery. So it should not be surprising that federal and state law often differ in material respects. In fact, federal law imposes a number of distinct hurdles in securities actions brought to challenge misrepresentations or the use of deceptive devices. One well-established prerequisite to recovery under federal law is proof of scienter for certain types of claims alleging misrepresentations or omissions. Specifically, in 1976, the United States Supreme Court held in *Ernst & Ernst v. Hochfelder*[3] that, to obtain recovery under Section 10(b) of the Securities Exchange Act of 1934[4] and Rule 10b-5[5] promulgated under that provision, a plaintiff must demonstrate that the defendant has acted with scienter - - i.e., sometimes described as intent to defraud. Put another way, a plaintiff may *not* demonstrate liability for material misrepresentations under the federal securities laws based upon a showing of negligence alone.[6] Much more is required. This rigorous standard helps prevent or reduce the second-guessing of the adequacy of securities disclosures based on hindsight.[7]

In a number of recent cases, plaintiffs have brought class actions to challenge alleged misrepresentations or omissions of material fact, or other allegedly deceptive practices under state law relying upon state statutory or common law theories of recovery that do *not* require proof of intent.[8] These cases have given rise to the question whether state law claims that do not depend upon proof of scienter should be preempted under SLUSA. The answer is they should be preempted, keeping in mind that the point of SLUSA is to ensure that securities class actions are tested under uniform federal standards rather than the under disparate and often more lenient standards of the fifty states.

Legislative Background

During the last decade, Congress acted to raise the standards for bringing securities class actions in recognition of the fact that, even when these cases are meritless, they are expensive and disruptive to defend, and they have the ability to coerce settlements that may not be in the best interest of shareholders overall. In this connection, Congress enacted the Private Securities Litigation Reform Act of 1995 (the "PSLRA")[9] which includes, among other requirements, a rigorous standard for pleading intent and a provision for staying discovery pending the disposition of motions to dismiss.[10] Congress' purpose in enacting the PSLRA was to prevent or reduce "strike suits" insubstantial securities claims brought to coerce settlements.[11] The Joint Explanation Statement of the Committee Conference further explained the driving force behind the PSLRA:

> The House and Senate Committees heard evidence that abusive practices committed in private securities

litigation include (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action, (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability, (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle, and (4) the manipulation by class action lawyers of the clients whom they purportedly represent These serious injuries to innocent parties are compounded by the reluctance of many judges to impose sanctions under Federal Rule of Civil Procedure 11, except in those cases involving truly outrageous misconduct At the same time, the investing public and the entire U.S economy have been injured by the unwillingness of the best qualified persons to serve on boards of directors and of issuers to discuss publicly their future prospects, because of fear of baseless and extortionate securities lawsuits

In these and other examples of abusive and manipulative securities litigation, innocent parties are often forced to pay exorbitant "settlements" When an insurer must pay lawyers' fees, make settlement payments, and expend management and employee resources in defending a meritless suit, the issuers' own investors suffer Investors always are the ultimate losers when extortionate "settlements" are extracted from issuers [12]

Plaintiffs responded by moving their class action lawsuits from federal to state court, circumventing the strictures of federal law This did not go unnoticed In 1998, Congress enacted SLUSA to block this end-run around strict federal standards.[13] The language and legislative history of SLUSA makes clear that Congress was concerned that plaintiffs were attempting to avoid the heightened requirements of federal law by suing in state court under more favorable state statutory or common law theories of recovery SLUSA explicitly sets forth Congress' findings that "(1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits, (2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts, (3) this shift has prevented that Act from fully achieving its objectives ."[14] Although federal securities class actions declined in number after enactment of the PSLRA, this was accompanied by a commensurate increase in state court filings [15] Congress perceived this as a "disturbing trend" and expressed concern about the resulting "dangers of maintaining *differing federal and state standards of liability* for nationally traded securities "[16] As Congress explained

> At a time when we are increasingly experiencing and encouraging national and international securities offerings and listings, and expending great effort to rationalize and streamline our securities markets, this fragmentation of investor remedies potentially imposes costs

that outweigh the benefits. Rather than permit or foster fragmentation of our national system of securities litigation, we should give due consideration to the benefits flowing to investors from a uniform national approach [17]

The Conference Committee report emphasized

The purpose of this title is to prevent plaintiffs from seeking to evade the *protections that Federal law provides* against abusive litigation by filing suit in State, rather than in Federal court. The legislation is designed to protect the interests of shareholders and employees of public companies that are the target of meritless "strike" suits The purpose of these strike suits is to extract a sizeable settlement from companies that are forced to settle, regardless of merits of the suit, simply to avoid the potentially bankrupting expense of litigating [18]

Against this background, Congress enacted SLUSA, broadly preempting state class actions brought to challenge alleged misrepresentations or deceptive devices [19] SLUSA forces all such cases into federal court,[20] foreclosing the prosecution of state law claims even in a federal forum, and providing only limited express exemptions for state class claims that may still proceed [21] In pertinent part, SLUSA provides

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 private parties 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 [22]

SLUSA defines a "covered class action" very broadly as including

any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; <u>or</u>

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members [23]

Interpreting the language and legislative history of SLUSA, the courts have recognized that the purpose of the statute was to "close a loophole in the 1995 Private Securities Litigation Reform Act."[24] As the court in *McCullagh* observed

> After the passage of the PSLRA, many Plaintiffs attempted to avoid the pleading requirements by bringing securities claims in state courts alleging state law causes of action . . Congress passed SLUSA to prevent this, and to bring securities cases back into federal courts and close the loophole [25]

The Significance of Scienter

Foreclosed from avoiding stringent federal standards by the simple act of pleading state causes of action, the battleground has shifted to discussion about the *type* of state law claim that the plaintiff is asserting [26] Specifically, plaintiffs have argued that SLUSA mirrors the language of Section 10(b) and Rule 10b-5 and thus must be construed to preempt only state law claims that require proof of scienter under *state* law.[27] The premise of this argument, however, is only partly correct.

It is true that SLUSA preempts class actions brought under state statutory or common law alleging "an untrue statement or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security "[28] Similarly, Section 10(b) proscribes the use of any "manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security,[29] and Rule 10b-5 states that it is unlawful for any person to make an "untrue statement of material fact or to omit to state a material fact" in connection with the purchase or sale of a security [30] From this, we might safely conclude that claims brought to challenge misrepresentations and omissions may *not* be asserted under state law and *might* be asserted under Section 10(b) or Rule 10b-5, assuming the plaintiff can satisfy all the requirements of federal law But it does not logically follow that a plaintiff should be free to proceed under a more lenient body of state law in the event that the plaintiff is *unable* to satisfy the strictures of federal law That would stand the purpose of SLUSA on its head. As we have described, Congress adopted SLUSA for the very purpose of forestalling plaintiffs from circumventing more *stringent* federal law standards of recovery by resorting to state law causes of action that erected lower barriers to recovery and for the purpose of ensuring that *uniform* federal standards governed such claims, including the heightened requirements for pleading the requisite state of mind under the PSLRA

This is confirmed by the fact that the legislative history of SLUSA suggests that Congress undertook to provide for preemption of claims involving certain *actions*, namely the making of false statements or the use of deceptive practices, leaving to the federal courts the continuing development of the substantive *federal* standard concerning the *state of mind* that must be proven to establish liability for such actions At the time that SLUSA was enacted, the federal standard for scienter was still evolving Thus, the committee reports acknowledge that the Supreme Court's decision in *Ernst & Ernst* "left open the question of whether conduct that was not intentional was sufficient for liability under the Federal securities laws," specifically reserving "the question of whether reckless behavior is sufficient for civil liability under section 10(b) and Rule 10b-5 "[31] While the PSLRA provides that plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," neither the PSLRA nor SLUSA "makes any attempt to define that state of mind "[32]

This makes plain that we may not appropriately determine what type of state law claims are preempted by SLUSA by determining first whether the *federal* standard of culpability parallels the *state law* standard for establishing liability under the state law claims asserted This would be futile because neither SLUSA nor the PSLRA purported to fix the federal standard of culpability in stone, and the standard was still involving after *Ernst & Ernst* was decided [33] What SLUSA does make clear is that Congress intended that *federal* courts ultimately determine the substantive standards that govern liability for defendants dealing in nationally traded securities sued in class actions brought to challenge *actions* specified in the statute, namely, material misstatements or omissions of material fact or other deceptive devices. The statute's core purpose was to shut down the "resort to state court to avoid the new, more stringent requirements of *federal cases* "[34]

Equally important, SLUSA amended not only the Securities Exchange Act of 1934, which includes Section 10(b) and contemplates proof of scienter SLUSA also amended the Securities Act of 1933, which includes both Sections 11 and 12—provisions that do *not* contemplate proof of scienter in the same sense that this term is conventionally used in Section 10(b) litigation.[35] The language of SLUSA parallels the language of Sections 11 and 12 of the 1933 Act, just as it does the language of Section 10(b) and Rule 10b-5

Specifically, Section 11 of the 1933 Act creates liability in the event of a registration statement that "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein to make the statements therein not misleading" at the time the statement became effective [36] Similarly, Section 12 of the 1933 Act creates liability for persons who sell or offer a security by means of a prospectus or oral communication "which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading "[37] Thus, in broadly preempting state class actions claims that allege misrepresentations and omissions of material fact, SLUSA expressly reaches conduct that is governed by certain provisions of federal law that may require proof of scienter and others that may not There is no sturdy support for the notion, therefore, that state law claims that do not require proof of scienter should somehow escape SLUSA's very expansive reach

The Eleventh Circuit recently held quite emphatically that SLUSA does in fact preempt state class actions based on state-law theories that do not require proof of intent In *Riley v Merrill Lynch, Pierce, Fenner & Smith, Inc* ,[38] the court rejected the plaintiff's contention that "SLUSA does not apply to state law claims that lack the scienter requirement of the federal securities laws "[39] In support of this contention, the plaintiff insisted that "Congress did not intend to bar claims pursuant to state laws that are *stricter* than federal securities laws "[40] In rejecting this argument, the court reasoned that "SLUSA amends both the 1933 Act . . and the 1934 Act preempting claims brought under both of those statutes Thus, SLUSA preempts *some* claims—namely, those brought under §11 or 12(a)(2) of the 1933 Act—that lack a scienter requirement "[41]

In *Behlen v Merrill Lynch*,[42] the same court rejected an attempt to circumvent SLUSA by artful repleading The plaintiff filed a putative class action against a

brokerage firm and fund manager in state court, alleging various state law claims including breach of contract, breach of implied covenants and duties, breach of fiduciary duty, unjust enrichment, suppression, misrepresentation, and negligence or wantonness The defendants removed the case to federal court and moved to dismiss the complaint, whereupon plaintiff filed an amended complaint deleting the claims for misrepresentation and suppression and adding claims for money had and received and for an accounting The plaintiff also removed all explicit references to any fraudulent activity by the defendants Having made these changes to the complaint, the plaintiff contended that SLUSA no longer applied to the case, and he filed a motion to remand the case to state court The court rejected the plaintiff's position, reasoning that the plaintiff "implicitly alleged that the defendants failed to disclose material facts about which class shares were sold to him and the class" Because the plaintiff alleged in the amended complaint that the defendants "misstated or omitted material facts 'in connection with' the purchase and sale of the growth fund shares, it, too, fell within the scope of the SLUSA and the district court did not err when it denied [plaintiff's] motion to remand the case to state court"[43]

Other courts have held that state law claims that do *not* require proof of scienter are preempted, while some courts have held that they are not[44] Increasingly, courts are reluctant to allow plaintiffs to circumvent SLUSA by bringing state law claims that, at least *in substance*, attack the making of false statements or the use of deceptive devices—claims that would require pleading and proof of scienter under Section 10(b) and Rule 10b-5 - regardless of the technical elements of the state law causes of actions asserted[45] By the same token, if the *substance* of the state law claim appears actually to concern a problem that is altogether different from the kind of *actions* that *might* have been pursued under federal laws that create liability for misrepresentations or omissions, then the courts have allowed the case to proceed under state law.[46]

For example, in *Lander v Hartford Life & Annuity Ins Co*, the plaintiffs brought a class action on behalf of a class of "persons who purchased an individual deferred variable annuity" from the defendants.[47] The plaintiffs based their claims on various Connecticut law theories, including fraud, breach of fiduciary duty, *negligent* misrepresentation, and the Connecticut Unfair Trade Practices Act.[48] As a central feature of their complaint, the plaintiffs alleged that the defendants had induced them to purchase securities through *false or misleading* statements.[49] The district court held that SLUSA covered the claims and accordingly dismissed the action[50] The Second Circuit affirmed[51]

By comparison, in *Simon v Internet Wire, Inc*,[52] the plaintiffs sued the defendant for publishing a press release written by a third party, which caused the market price of the company's stock to drop, harming its shareholders[53] The plaintiffs alleged that the defendant had negligently failed to verify the accuracy of the press release before publishing it[54] But the plaintiffs did not allege that the defendants had induced them, through false statements, into purchasing securities[55] The court rejected the defendants' contention that SLUSA preempted the plaintiffs' claims[56] In reaching its conclusion, the court reasoned that the issue was not whether the plaintiff had pleaded scienter but instead whether "the substance" of the claim involved deceitful misrepresentation[57]

Likewise, in *Burns v Prudential Securities*,[58] the plaintiffs sued the defendant broker for conversion, breach of contract, breach of fiduciary duty, and negligent supervision[59] All of the claims were founded on the broker's alleged *unauthorized* sale of their clients' securities.[60] The plaintiffs did not allege that they had been induced to purchase or sell securities through false or misleading statements[61] Examining the factual allegations to determine the essential nature of the claims, the court concluded that the plaintiffs had not alleged any facts suggesting the defendant's conduct involved any "element of deception"[62]

In *Green v Ameritrade, Inc*,[63] the plaintiff claimed that customers of the defendant had paid a monthly subscription fee to obtain, but had not received, certain sales information and real-time quotes regarding securities[64] That case did not directly concern false or deceptive misrepresentations by the defendant. Rather, the complaint stated claims for breach of contract based on the failure to provide the promised sales information[65] The court observed that the amended complaint "contain[ed] no allegations that Ameritrade made any misrepresentations or that it engaged in any deceptive practices"[66]

Conclusion

In the final analysis, we must be mindful that, in construing a statute, the context in which statutory language is used and the intent of the statute are critically important In the case of SLUSA, the guiding principle must be Congress' intent to substitute uniform federal standards for disparate, often more lenient, state law standards in class actions alleging that the plaintiffs were induced by false or misleading statements into purchasing or selling securities Accordingly, state law claims brought to circumvent *stricter* federal law standards implicate the core concerns of SLUSA and should be preempted under that statute

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[2] Securities Litigation Uniform Standards Act of 1998, Pub. L. No 105-353, 112 Stat 3227 (codified as amended in scattered sections of 15 U.S C.)

[3] 425 U S. 185 (1976).

[4] 15 U S C § 78j(b).

[5] 17 C F R § 240.10b-5(b)

[6] See Ernst & Ernst, 425 U S at 215

[7] *See In re Silicon Graphics Inc Sec Litig*, 183 F 3d 970, 988 (9th Cir 1999) (noting that the purpose of the heightened pleading requirement was to eliminate abusive securities litigation and to put an end to the practice of pleading "fraud by hindsight"), *see In re The Vantive Corp. Sec Litig*, 283 F 3d 1079, 1084-85 (9th Cir 2002) (same)

[8] *See, e g, Patenuaude v Equitable Life Assurance Soc of the United States*, 229 F 3d 1020 (9th Cir 2002), *In re Hartmax Sec Litig*, 2002 WL 653892 (N.D Ill April 19, 2002), *Zoren v Genesis Energy, L P*, 195 F Supp 2d 598 (D. Del 2002); *The Kenneth Rothschild Trust v Morgan Stanley Dean Witter*, 199 F Supp.2d 993 (C D Cal 2002)

[9] 15 U S C § 78a et seq

[10] 15 U S C §§ 77z-1(b), 78u-4(b)(3)(B)

[11] *See* H.R CONF REP NO 105-803, 105th Cong., 2d Sess. (1998)

[12] *See* H R CONF REP. NO. 104-369, 104th Cong., 2d Sess at 13 (1995)

[13] H.R. CONF. REP NO. 105-803, 105th Cong , 2d Sess., available at 1998 WL 703964 at *13-14 (1998); *see also Lander v Hartford Life & Annuity Ins Co* , 251 F 3d 101, 107-108 (2d Cir. 2001).

[14] Pub. L No 105-353 § 2

[15] *See* H R. CONF REP NO. 105-803, 105th Cong , 2d Sess , available at 1998 WL 703964 at *15 (1998)

[16] S. REP. NO. 105-182, 105th Cong , 2d Sess , available at 1998 WL 226714 at *3

[17] *See* H R. CONF REP NO. 105-803, 105th Cong , 2d Sess., available at 1998 WL 703964 at *15 (1998), S. REP. NO. 182, 105th Cong , 2d Sess , available at 1998 WL 226714 at *3

[18] H.R CONF. REP NO 106-803, 105th Cong , 2d Sess , available at 1998 WL 703964 at * 13.

[19] *Id*

[20] SLUSA also provides for the removal of state-law-based class action complaints alleging misrepresentations in connection with the purchase or sale of a covered to federal court, making federal court the exclusive venue such class action complaints 15 U S C. § 77p(c)

[21] *See* 15 U S.C § 77p(b)

[22] *Id*

[23] 15 U S C § 77p(f)(2)(A)

[24] *McCullagh v Merrill Lynch & Co* , 2002 WL 362774, *2 (S D N Y March 6, 2002), *Green v Ameritrade, Inc* , 279 F 3d 590, 595 (8th Cir 2002)("[W]e believe that Congress designed SLUSA to close a perceived loophole in the pleading requirements of the [PSLRA]"); *Lander v Hartford Life & Annuity Ins Co* , 251 F.3d 101, 108 (2d Cir. 2001) ("SLUSA was passed in 1998 primarily to close this loophole in PSLRA. It did this by making federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and by mandating that such class actions be governed exclusively by federal law ").

[25] *Id*

[26] *See, e g , Patenuaude v Equitable Life Assurance Soc. of the United States*, 2290 F 3d 1020 (9th Cir. 2002); *In re Hartmax Sec Litig* , 2002 WL 653892 (N D Ill. April 19, 2002), *Zoren v Genesis Energy, L P* , 195 F. Supp.2d 598 (D Del 2002); *The Kenneth Rothschild Trust v Morgan Stanley Dean Witter*, 199 F. Supp 2d 993 (C D. Cal 2002).

[27] *See, e g , Riley v Merrill Lynch, Pierce, Fenner & Smith*, 292 F 3d 1334, 1345-46 (11th Cir. 2002) (*citing Green v Ameritrade, Inc* , 120 F Supp 2d 795 (D Neb 2000), *aff'd*, 289 F.3d 590 (2002), *Burns v Prudential Sec.*, 116 F Supp 2d 917 (N D Ohio 2000)).

[28] 15 U S.C § 77p(b)

[29] 17 C F R § 240 10b-5 (1997)

[30] *Id*

[31] H R CONF REP 105-803, available at 1998 WL 703964 at *14 (1998)

[32] *Id*

[33] *Id* at *15-16 (emphasizing that "neither the Reform Act nor [SLUSA] makes any attempt to define that state of mind")

[34] *Id* at *14 (emphasis supplied)

[35] Both Sections 11 and 12 require proof of the falsity of statements when the statements

became effective or when they were made and provide for defenses based on good faith See 15 U S C §§ 77k, 77l, 77o

[36] 15 U S.C § 77k(a)

[37] *Id* § 77l(a)

[38] 292 F 3d 1334 (11th Cir 2002)

[39] *Id* at 1345

[40] *Id* (emphasis in original).

[41] *Id* at 1346

[42] 2002 WL 31487586 (11th Cir. 2002).

[43] *Id* at *6

[44] *Compare Burns v Prudential Sec*, 116 F. Supp.2d 917, 926 (N D Ohio 2000) *with Prager v Knight/Trimark Group, Inc*, 124 F Supp 2d 229 (D N J 2000).

[45] *See, e g, Riley v Merrill Lynch, Pierce, Fenner & Smith*, 292 F 3d 1334, 1135-36 (11th Cir 2002), *Patenaude v Equitable Life Assurance Soc of the United States*, 290 F 3d 1020, 1026 (9th Cir 2002), *In re Hartmax Sec Litig*, 2002 WL 653892 (N.D Ill April 19, 2002), *Zoren v Genesis Energy, L P*, 195 F Supp 2d 598 (D Del 2002).

[46] *See, e g, Simon v Internet Wire, Inc*, 2001 WL 688542, *3 (C D Cal April 3, 2001) (denying the plaintiffs' motion to remand to state court for lack of subject matter jurisdiction because their "assertions [did] not give rise to a strong inference that Defendant acted deceitfully, a requirement for securities fraud violations")

[47] 215 F 3d at 104

[48] *Id* at 106

[49] *Id*

[50] *Id* at 106-07

[51] *Id* at 108-09

[52] Available at 2001 WL 688542, *2-3 (C D Cal April 3, 2001)

[53] *Id* at *1

[54] *Id*

[55] *Id* at *3

[56] *Id*

[57] *Id* at *3 (*quoting Prager*, 124 F. Supp 2d 229), *see Korsinsky v Salamon Smith Barney, Inc.*, 2002 WL 27774 (S D.N Y 2002), *Denton v H&R Block Fin Advs, Inc*, 2001 WL 1183292 (N D Ill Oct 4, 2001), *W R. Huff Asset Mgmt Co. v Kohlberg Kravis Roberts & Co*, 2002 WL 31431615 (N D Ala Oct 22, 2002)(state law claims including negligent misrepresentation preempted under SLUSA)

[58] 116 F Supp 2d 917 (N D Ohio 2000).

[59] *Id* at 919

[60] *Id*

[61] *Id*

[62] *Id* at 924 n.2 (*citing Pross v Katz*, 784 F.2d 455, 458 (2d Cir 1986)), *see also Richter v Achs*, 962 F Supp 31, 32-33 (S D N Y 1997) (noting that "allegations of a mere breach of contract or breach of fiduciary duty, without more, do not create a claim under Section 10(b) or Rule 10b-5"), *Bochicchio v Smith Barney, Harris Upham & Co*, 647 F. Supp. 1426, 1430 (S.D N Y 1986) (recognizing that federal courts are loathe "'to extend the reach of the securities laws to every conversion or theft of security,'" *quoting Pross*, 784 F 2d at 459)

[63] 120 F Supp 2d 795 (D. Neb 2000), *aff'd*, 279 F 3d 590 (8th Cir 2002)

[64] 120 F Supp 2d at 796

[65] *Id* at 797

[66] *Id* at 798