

## Class Suit Alleging Bank Breached Duties Is Barred by SLUSA, Sixth Circuit Decides

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State law class claims that defendant Fifth Third Bank breached its fiduciary obligations to the beneficiaries of its trust, estate, and other fiduciary accounts are based on securities transactions and thus are barred by the Securities Litigation Uniform Standards Act, the U.S. Court of Appeals for the Sixth Circuit affirmed Sept. 19 (*Segal v. Fifth Third Bank NA*, 6th Cir., No. 08-3576, 9/17/09).

The suit challenged the bank's practices with respect to the fiduciary accounts -- including its alleged policy of investing client assets in its own mutual funds.

"The question under **SLUSA** is not whether the complaint uses the prohibited words: 'an untrue statement or omission of a material fact' or a 'manipulative or deceptive device or contrivance.' It is whether the complaint covers the prohibited theories, no matter what words are used (or disclaimed) in explaining them," Judge Jeffrey S. Sutton said for the court.

Enacted to close a loophole in the 1995 Private Securities Litigation Reform Act that allowed plaintiffs suing in state courts to avoid PSLRA's heightened securities fraud pleading requirements, **SLUSA** provides generally for federal preemption -- removal, followed by dismissal -- of state law class actions alleging "misrepresentations in connection with the purchase or sale of a covered security."

### **Trust Investing.**

According to the court, plaintiff Daniel Segal, a beneficiary of trust accounts, alleged that between 2001 and 2007, the bank placed its clients' assets in its own mutual funds instead of competitors' "superior" funds. He also asserted that despite promises of individual attention the bank provided "standardized and largely automated" services. Segal further claimed that the bank's mutual funds overly invested in low yield investments so that they could meet short-term obligations, the court said.

Granting Fifth Third's motion to dismiss, the district court held that Segal's claims were barred by **SLUSA**, which precludes class actions of 50 or more individuals from pursuing state law claims that allege "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or the use of "manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security."

The parties agreed that the suit was a covered class action under **SLUSA**, that it alleged state law claims, and that the mutual funds were covered securities. However, they disputed whether the complaint alleged an untrue statement/omission of material fact in connection with the purchase or sale of the mutual funds or that the bank used a manipulative or deceptive device or contrivance, the court said.

### **Disclaimer.**

## Class Suit Alleging Bank Breached Duties Is Barred by SLUSA, Sixth Circuit Decides (Continued)

For his part, Segal argued that the district court ignored the statement included in his amended complaint disclaiming that the causes of action were based on misrepresentations of failures to disclose material facts. Rejecting this disclaimer-based theory, the court said that "a claimant can no more elude **SLUSA's** prohibitions by editing out covered words from the complaint than by disclaiming their presence."

The court also rejected Segal's assertion that the wording of his complaint "magically transform[ed]" his claims from 'garden-variety' state-law claims into federal securities claims." The "procedural restriction" on filing state law claims if a class action consists of more than 50 people, does not include a mechanism for converting the plaintiffs' state law claims into federal ones, the court said.

Further, Segal's argument that his claims were not dependent upon misrepresentations or manipulation were also "unavailing," the court said. If the complaint includes this type of allegation, the court said, "we have no license to draw a line between **SLUSA**-covered claims that must be dismissed and **SLUSA**-covered claims that must not be."

David A.P. Brower, New York, represented Segal.

Patrick F. Fischer, Joseph M. Callow, Jr., Rachael A. Rowe, Brian P. Muething, Keating Muething & Klekamp PLL, Cincinnati, represented the Fifth Third defendants.

*The text of the court's opinion is available from <http://www.ca6.uscourts.gov/opinions/opinion.php>.*