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The Curious Case Of Ripple's Removal

By **Douglas Pepe** (August 17, 2018, 12:18 PM EDT)

Douglas Pepe

Coffey v. Ripple Labs Inc. is a much-anticipated case in the cryptocurrency and blockchain space. At its core, the suit squarely presents the question whether Ripple is a "security" within the meaning of the securities laws.[1]

A recent decision in the Ripple case, however, addressed an important procedural question of more general applicability to commercial litigators: Do the anti-removal provisions of the Securities Act of 1933 bar removal of a state court suit under the Class Action Fairness Act of 2005, where the plaintiff brought claims under both the Securities Act of 1933 and state law? The Ripple court held that removal under these circumstances was permitted. This article addresses the statutory background and the basis for the Ripple court's decision.

Statutory Background

The sphere of influence of state court suits in securities cases shrank dramatically following passage of the Securities Litigation Uniform Standards Act of 1998.[2] SLUSA mandates the removal and dismissal of run-of-the-mill securities fraud class actions alleging state law claims.[3] SLUSA removal, however, is unavailable in class actions asserting 1933 Act claims. In Cyan Inc. v. Beaver County Employees Retirement Fund, the Supreme Court held that "SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations."[4] Under Cyan, state court class actions brought exclusively under the 1933 Act are not subject to removal to federal court under SLUSA.

The same holds true for the general removal statute, 28 U.S.C. § 1441(a). Even though 1933 Act cases are within federal question jurisdiction, 28 U.S.C. § 1441(a) only permits removal "[e]xcept as otherwise provided by Act of Congress." The 1933 Act itself explicitly bars removal of 1933 Act cases in 15 U.S.C. § 77v(a), which states: "Except as provided in [SLUSA], no case arising under [the 1933 Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States."[5] Taken together, these provisions mean that the general removal statute is unavailable to remove a 1933 Act case.

If SLUSA and the general removal statute cannot be used to remove state court 1933 Act class actions, is removal available under CAFA? These kinds of cases are, after all, typically class actions with an amount in controversy greater than $5 million, and at least one class member and one defendant are from different states. CAFA supplies a basis for federal jurisdiction; the CAFA removal statute supplies a basis for

removal; and CAFA has no exception for other acts of Congress like the general removal statute.[6] Should removal apply?

Possibly, but there are two caveats. First, CAFA removal is not available in securities class actions "concerning a covered security" within SLUSA — i.e., securities traded on a national securities exchange. Removal in those cases is left within SLUSA's purview, not CAFA's, by statute.[7]

Second, there is a split in authority on the question whether 1933 Act cases can be removed under CAFA, in light of the statutory bar in 15 U.S.C. § 77v(a). In Luther v. Countrywide Home Loans, the Ninth Circuit held that "CAFA's general grant of the right of removal of high-dollar class actions does not trump the [15 U.S.C. § 77v(a)'s] specific bar to removal of cases arising under the [1933 Act]."[8] The Seventh Circuit disagreed in Katz v. Gerardi, holding that securities class actions covered by CAFA are removable, even if they assert 1933 Act claims.[9]

In summary, if a class action involves a security traded on a national exchange, it is subject to potential removal under SLUSA, but not CAFA, unless it involves exclusively 1933 Act claims. If a class action does not involve a security traded on a national exchange, it may be subject to removal under CAFA (depending on the jurisdiction), but not SLUSA. All of this leaves one key category of cases unaddressed. What about 1933 Act class actions that do not involve nationally traded securities, but do involve state law and 1933 Act claims in the same complaint? This was the issue in Ripple.

The Ripple Case

RippleNet is an ecosystem designed to facilitate payments over a blockchain-based network, using a digital currency called XRP.[10] RippleNet's founders allegedly generated 100 billion XRP at its inception in 2013, distributing 20 billion to the individual founders themselves and the remaining 80 billion to the company Open Coin Inc. (which later became Ripple Labs Inc.).[11] A fraction of the original 100 billion XRP have been sold to purchasers, and are traded on multiple cryptocurrency exchanges both in the U.S. and abroad.

In May 2018, an individual who lost $580 on a purchase and sale of XRP during a two-week period brought a putative class action in California state court on behalf of all XRP purchasers from 2013 to present against Ripple Labs and other defendants. The complaint alleges that the defendants' sales of XRP to the public were sales of unregistered securities in violation of the 1933 Act and state securities laws.[12]

The defendants removed the action to the U.S. District Court for the Northern District of California under CAFA.[13] The defendants did not attempt to remove under SLUSA. While XRP has become a popular cryptocurrency trading on cryptocurrency exchanges throughout the world, those exchanges are not national securities exchanges. This means that, while the question whether XRP is a security remains to be resolved in the case, XRP is not a "covered security" within the meaning of SLUSA. Removal was available under CAFA, or not at all.

That created an issue for the defendants because of the Ninth Circuit's ruling in Luther, which held that 1933 Act cases are not removable under CAFA. Luther, however, involved claims brought exclusively under the 1933 Act — it did not involve any state law claims. The Ripple court was therefore presented with a novel issue: "Whether the presence of [1933 Act] claims bars a defendant from removing an action pursuant to [CAFA] based on state law claims that independently satisfy CAFA's jurisdictional requirements."[14]

The Ripple court answered in the negative, and declined to order remand. In so holding, the court concluded that the Supreme Court's decision in Cyan was irrelevant because, as a SLUSA case, it has "no bearing on removability under CAFA."[15] The decision then turned to the Ninth Circuit's opinion in Luther, holding that Luther was "dissimilar" because it involved 1933 Act claims only. The Ripple case, by contrast, involved state law claims as well, and the "defendants removed [the] action based on [those] claims, which independently satisfy CAFA's requirements."[16] The court then engaged in an extensive analysis of the various statutes, concluding that the CAFA removal provision has (1) no exception for other acts of Congress like the general removal statute; and (2) a specific list of exceptions of its own, including the exception involving "covered securities" under SLUSA, 28 U.S.C. § 1453(d)(1). For these and other reasons, the court held that removal was proper despite the 1933 Act's removal ban and Luther.

A Most Curious Case

While the Ripple court's opinion may or may not have reached the right outcome, it leaves the law within the Ninth Circuit in a curious state. This is because under Luther, as interpreted by Ripple, a class action involving exclusively federal claims under the 1933 Act is not removable under CAFA, but a class action that adds ancillary state law claims in the complaint is removable. This makes little sense. In passing CAFA, Congress clearly did not intend to leave 1933 Act cases in state court, but provide a federal forum for 1933 Act cases that are combined with ancillary state law claims. Nothing in CAFA's text requires this unusual result.

Unlike most removal issues, CAFA removal decisions are immediately appealable at the discretion of the court of appeals (28 U.S.C. § 1453(c)(1)). Ripple may therefore present the Ninth Circuit with a perfect opportunity to rationalize its law in this field. A clear choice is presented: The Ninth Circuit can (1) abide 15 U.S.C. § 77v(a)'s mandate that "no case arising under" the 1933 Act "shall be removed," or (2) hold that the removal bar in the 1933 Act is subsumed by CAFA's mandate that any case within CAFA's scope, and not within one of its exceptions, is removable. The middle-ground approach, which the Ripple district court was constrained to adopt given Luther, does not serve either statute particularly well.

Douglas J. Pepe is a partner at Joseph Hage Aaronson LLC.

[1] See Complaint, Ryan Coffey v. Ripple Labs Inc., No. 18-cv-03286-PJH (N.D. Cal.) (ECF No. 1, Ex. A) ("Ripple Complaint").

[2] Securities Litigation Uniform Standards Act of 1998, Publ. L. 105-353, 112 Stat. 3227 (Nov. 3, 1998).

[3] See 15 U.S.C. § 77p(b)-(c); 15 U.S.C. § 78bb(f)(1)-(2); Kircher v. Putnam Funds Trust, 547 U.S. 633, 644 (2006) (once covered class action is removed under SLUSA, the "proper course is to dismiss" the action).

[4] Cyan Inc. v. Beaver Cnty. Empl. Ret. Fund, 138 S. Ct. 1061, 1078 (2018).

[5] See 15 U.S.C. § 77v(a).

[6] See 28 U.S.C. § 1332(d)(2); 28 U.S.C. § 1453(b).

[7] See 28 U.S.C. §§ 1332(d)(9)(A), 1453(d)(1) (CAFA jurisdictional and removal carveouts for claims involving "covered security"); 15 U.S.C. § 77p(f)(3) (SLUSA 1933 Act definition of "covered security"); 15 U.S.C. § 78bb(f)(5)(E) (SLUSA 1934 Act definition of "covered security"); 15 U.S.C. § 77r(b)(1)(A)-(B) (defining "covered securities" as securities listed or authorized on the New York Stock Exchange, American Stock Exchange, Nasdaq or other national securities exchanges). CAFA's has two additional exceptions, which are beyond the kin of the typical securities class action case. See 28 U.S.C. §§ 1332(d)(9)(B)-(C), 1453(d)(2)-(3).

[8] Luther v. Countrywide Home Loan Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008).

[9] Katz v. Gerardi, 552 F.3d 558, 562 (7th Cir. 2009).

[10] See https://ripple.com/.

[11] Ripple Complaint ¶¶ 2-3.

[12] Id. ¶¶ 1-9, 131-159.

[13] Notice of Removal, Ryan Coffey v. Ripple Labs Inc., No. 18-cv-03286-PJH (N.D. Cal.) (ECF No. 1).

[14] 2018 WL 3812076, at *1.

[15] Id.

[16] Id.