UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

# Ellen Jane Kutten, individually and on behalf of her daughters; Mary Ann Arnold; and Elise Mahler Scharff, on behalf of themselves and all others similarly situated v. Bank of America, N.A. and Bank of America Corporation

No. 07-3565 · No. No. 07-3565 · Decided June 16, 2008

## SUMMARY

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of class-action claims against Bank of America as preempted by the Securities Litigation Uniform Standards Act of 1998. The court held that, despite the plaintiffs' characterization of their claims as fiduciary-duty and related state-law claims, the substance of the allegations involved deceptive or misleading conduct concerning the handling of trust assets and therefore fell within SLUSA preemption.

## CASE DETAILS

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| COURT | United States Court of Appeals for the Eighth Circuit |
| WRITING FOR THE COURT | Shepherd, Circuit Judge; Murphy, Circuit Judge; Bye, Circuit Judge |
| JURISDICTION | Federal |
| DECIDED | June 16, 2008 |
| DOCKET | No. 07-3565 |
| DISPOSITION | affirmed |
| PROCEDURAL POSTURE | Plaintiffs appealed the Eastern District of Missouri's dismissal of their class action claims as preempted by the Securities Litigation Uniform Standards Act of 1998. |
| STANDARD OF REVIEW | De novo review of a district court dismissal based on SLUSA preemption, treated as a dismissal for failure to state a claim. |
| PRECEDENTIAL VALUE | published precedential opinion |
| PARTIES | Ellen Jane Kutten, individually and on behalf of her daughters, Mary Ann Arnold, Elise Mahler Scharff, on behalf of themselves and all others similarly situated v. Bank of America, N.A., Bank of America Corporation |

### TOPICS

class actions · motions to dismiss · civil procedure · appellate procedure · commercial litigation

### PRACTICE AREAS

civil procedure · securities litigation · trusts · commercial litigation · appellate procedure

### QUESTIONS PRESENTED

1. Whether SLUSA preempted the plaintiffs' state-law class action claims based on the substance of the allegations rather than the labels attached to the causes of action.
2. Whether the plaintiffs' complaint was materially distinguishable from the complaint in Siepel because it characterized the Bank's conduct as a failure to disclose or be candid rather than as misrepresentation or omission.

### HOLDINGS

1. SLUSA preempts the plaintiffs' class action claims because, fairly read, the claims alleged deceptive or misleading conduct involving material omissions or nondisclosures in connection with the purchase or sale of covered securities.
2. The plaintiffs' complaint was not materially distinguishable from the complaint in Siepel; changing the characterization from deception or omission to failure to disclose, candor, or honesty did not avoid SLUSA preemption.

### KEY QUOTATIONS

> *"SLUSA preemption is based on the conduct alleged, not the words used to describe the conduct."* (-3-)

> *"Whatever the distinction between "deceiving" and "failing to be honest," or between "omitting a material fact" and "failing to disclose," it does not bear on whether SLUSA preempts the claim containing those allegations."* (-3-)

### FACTUAL BACKGROUND

The plaintiffs challenged Bank of America's alleged plan to transfer trust assets into a mutual fund substantially owned by the Bank. Their amended complaint asserted twelve class action claims, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, breach of contract, statutory violations, and violations of prudent-investor laws. Although the plaintiffs characterized the conduct as self-dealing, failure to disclose, and breach of fiduciary duty rather than misrepresentation or omission, the court found that the allegations involved the same deceptive and misleading conduct at issue in Siepel.

### PROCEDURAL HISTORY

The district court dismissed all of the plaintiffs' class action claims under SLUSA, finding the case nearly identical to Siepel v. Bank of America, N.A. The Eighth Circuit had previously affirmed the dismissal in Siepel and affirmed the judgment here as well.

## DISPOSITION

affirmed

## CASES CITED

- Siepel v. Bank of America, N.A., Nos. 07-1899/07-1906, 2008 U.S. App. LEXIS 10667 (8th Cir. May 19, 2008)
- Sofonia v. Principal Life Ins. Co., 465 F.3d 873, 879-80 (8th Cir. 2006)
- Dudek v. Prudential Sec., Inc., 295 F.3d 875, 879-80 (8th Cir. 2002)