04-0219

United States Court of Appeals
for the
Second Circuit

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, et al.,

Plaintiffs-Appellants,

-against-

MAX E. BOBBITT, ARTHUR ANDERSEN, LLP, CITIGROUP GLOBAL MARKETS, WORLDCOM, INC., BERNARD J. EBBERS, and JAMES C. ALLEN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE SECURITIES INDUSTRY ASSOCIATION AND THE BOND MARKET ASSOCIATION IN SUPPORT OF APPELLEES, SUPPORTING AFFIRMANCE

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The Securities Industry Association ("SIA") and The Bond Market Association ("TBMA") (collectively, "Amici") respectfully submit this brief as *amici curiae* in support of defendants-appellees, in support of affirmance of the district judge's order denying remand. This amicus brief is submitted pursuant to the motion of Amici filed contemporaneously with this brief pursuant to Fed. R. App. P. 29.

STATEMENT OF INTEREST OF THE AMICI CURIAE

Amici represent the leading brokers, dealers, and banks participating in the nation's securities and fixed income markets. Since their inception, Amici have worked with the Securities and Exchange Commission, state regulators, self-regulatory organizations and Congress to foster effective, efficient regulation and to promote the highest levels of professional standards and conduct in their respective segments of the financial markets.

The SIA represents the interests of nearly 600 securities firms, including investment banks, broker-dealers, and mutual fund companies, located throughout the United States. Collectively, the SIA's members participate in all U.S. and foreign markets, employ more than 495,000 people, and directly or indirectly manage the accounts of nearly 93 million investors.

TBMA is a global trade organization that represents approximately 200 securities firms and banks that underwrite, trade, and sell fixed-income securities in the U.S. and international markets. All of the primary dealers of Treasury bonds, notes and bills, as recognized by the Federal Reserve Bank of New York, are members of TBMA, as are other securities dealers.

The pending appeal presents issues that are vitally important to Amici. Amici's members are engaged in the capital raising and formation process. Central to that process is a statutory and contractual scheme under which underwriters secure important rights of contribution and indemnification. The costs and risks associated with securities litigation can significantly increase the costs for companies of accessing the capital markets, particularly in distress or near-distress situations where the failure of a company inevitably spawns a lawsuit – whether or not meritorious. Congress addressed that issue. It created a statutory structure that permits underwriters to efficiently and economically help distressed and near-distressed companies access the capital markets by providing that, in the event an issuer was placed into bankruptcy, securities claims related to the bankruptcy proceeding could be removed to a single federal court overseeing the bankruptcy where the underwriter could pursue a statutory right of contribution.

Moreover, in Chapter 11, the claims of underwriters for contribution and indemnification may have a significant impact on a reorganization plan. Even apart from economic distributions under a plan, the prompt and efficient resolution of securities law claims is often crucial to a reorganizing debtor because of the resource demands upon the debtor and its employees in complying with multiple uncoordinated discovery requests.

Appellants' position—that claims under the Securities Act of 1933 alone among all federal claims may not be removed to federal court under bankruptcy jurisdiction—threatens the fabric of the statutory structure pursuant to which Amici's members have underwritten securities and would impose great costs on the capital formation process at the ultimate expense of the economy as a whole. Claims arising under the Securities Act of 1933 (the "Securities Act") can be brought in any state or federal court in the United States by any purchaser of securities. Thus, under Appellants' reading, a single nationwide issuance of securities on behalf of an issuer who ultimately goes bankrupt could spawn a case against the underwriter in every courthouse. This fact, coupled with the recent trend of plaintiffs choosing to bring such suits in state court, amplifies Amici's concern that reversal of the decision below would disrupt the requisite certainty in the capital raising process. Accordingly, Amici submit this brief to lend a broader market perspective to the issues raised on this appeal.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT SECURITIES ACT CLAIMS ARE REMOVABLE UNDER SECTION 1452

Plaintiffs-Appellants primarily contend that the district court erred in exercising bankruptcy removal jurisdiction over their cases because of a perceived conflict between 28 U.S.C. § 1452(a), the bankruptcy removal statute, which (with exceptions not pertinent here) permits removal of any claim or cause of action over which bankruptcy jurisdiction exists, and Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a) ("Section 22(a)"), a provision granting state courts concurrent jurisdiction with federal courts over claims brought under that Act. Appellants' conclusion that removal of their cases is barred would wreak havoc on the clear policy objectives underlying the two federal statutory schemes at issue in this case—bankruptcy law and securities law. Moreover, as the district judge explained, the plain meaning of the text of those two statutory schemes and settled rules of statutory construction compel the exact opposite result.

A. Section 1452(a) Permits The Removal Of Claims Under The Securities Act Of 1933.

1. The Plain Meaning Of Section 1452 Permits Removal

Section 1452, enacted in 1984, provides in broad terms: "A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452(a) (emphasis added). Section 1334, in turn, provides for bankruptcy jurisdiction over all civil proceedings arising under the bankruptcy laws, or that arise in or are related to a federal bankruptcy case. 28 U.S.C. § 1334(b).

Under the plain meaning of Section 1452(a), then, all bankruptcy-related claims are removable with only two exceptions not present here. There is clearly no basis in the statutory language for carving out Securities Act claims when Congress uses the inclusive word "any." See Dep't of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("As we have explained, 'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'") (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)).

As the district court noted, Congress did not add a third exception to the two set forth in Section 1452(a) for claims arising under the Securities Act. See In re WorldCom, Inc. Sec. Litig., 293 B.R. 308, 328-29 (S.D.N.Y. 2003) (reasoning that "the absence of such an exclusion leads to the conclusion that Section 1452(a) removal may apply to the securities claims at issue here" and citing United States v. Tappin, 205 F.3d 536, 540 (2d Cir. 2000)); see also Norman J. Singer, Statutes and Statutory Construction §§ 47:23 – 47:25, at 317 (6th ed. 2000) ("The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded."); cf. FCC v. Nextwave Pers. Communications Inc., 537 U.S. 293, 302, 123 S.Ct. 832, 839 (2003) (refusing to read in regulatory exceptions to provisions of the Bankruptcy Code that were not expressly provided).

2. Section 22(a) Can Be Easily Reconciled With Section 1452 By Construing That Section To Preclude General Removal Jurisdiction Only

Invoking the rule of statutory interpretation that a specific statute controls over a more general statute, Appellants argue that the jurisdiction conferred by Section 1452(a) is withdrawn by Section 22(a). (Supp. Opening Br. at 5-6; Mand. Pet. at 25-26.)[1] That argument presupposes a conflict between the statutes that does not exist.

Section 22(a) provides, in pertinent part:

> 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 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. . . Except as provided in section 77p(c) 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.

[1] Appellants have incorporated into their papers by reference their prior mandamus petition. See Supp. Opening Br. at 1 n.1

15 U.S.C. § 77v(a).

Thus, Section 22(a) arguably precludes removal under the general removal statute, codified at 28 U.S.C. § 1441. That provision confers jurisdiction over federal question cases except where otherwise expressly provided by Act of Congress. It states in pertinent part: "Except as otherwise expressly 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." 28 U.S.C. § 1441(a). Assuming, as Appellants argue, that Section 22(a) is an Act of Congress that expressly prohibits removal, that would only bar removal under the general removal provision; it would be one of the statutes referred to in Section 1441(a)'s "[e]xcept as otherwise expressly provided by Act of Congress."[2]

But Congress did not provide in the expansive bankruptcy removal provision, as it did in Section 1441(a), an exception for claims arising under an Act of Congress that otherwise explicitly prohibits removal. As indicated above, it made "any" claim or cause of action removable, subject to two narrow exceptions not present here. This omission confirms that Congress did not intend for Section

[2] This case does not present the question of whether Section 22(a) bars removal under Section 1441(a) in all circumstances.

22(a) to operate when removal is effected pursuant to Section 1452(a), even if it does operate when removal is effected pursuant to Section 1441(a). Cf. Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but it omits in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

Rather, Section 1452(a) "supplements the general removal statute, which allows for a broad range of exceptions 'otherwise expressly provided by Act of Congress,' by adding a specific authorization to remove any action within the bankruptcy jurisdiction." See Hesselman v. Arthur Andersen, LLP (In re Global Crossing, Ltd. Sec. Litig.), Nos. 02 Civ. 910, 02 Civ. 10199, 2003 WL 21659360, at *2 (S.D.N.Y. July 15, 2003).

Indeed, Appellants' reading to the contrary would make the language "Except as otherwise expressly provided by Act of Congress" into surplusage, contrary to the cardinal rule that every word in a statute should be given meaning. See, e.g., Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc., 447 U.S. 102, 108-109 (1980) (directing that statutory language be the starting point for construction); Morton v. Mancari, 417 U.S. 535, 551 (1974) (instructing that statutory schemes should be reconciled whenever possible); United States v. Menasche, 348 U.S. 528, 538-39 (1955) (articulating these canons of statutory construction). In essence, Appellants argue that by expressly but generally providing that removal of Securities Act cases was not permitted in Section 22(a), Congress intended to preclude removal not only under Section 1441(a) but also under Section 1452(a). But if that were so, Congress would not have needed to include in Section 1441(a) the language "Except as otherwise expressly provided by Act of Congress." Under Appellants' interpretation, whenever Congress expressly provided that removal was not permitted, removal would not be permitted under any statute. Interpretations of statutes that render whole provisions surplusage are disfavored. See, e.g., Duncan v. Walker, 533 U.S. 167, 174 (2001); U.S. v. Blasius, 397 F.2d 203, 207 n.9 (2d Cir. 1968).

As the district judge explained, the effect of Section 22(a) on removal "is best understood in the context of the larger federal scheme for jurisdiction over actions arising under federal law and for the removal of such actions to federal court." 293 B.R. at 327; see also Holloway v. U.S., 526 U.S. 1, 6 (1999) (directing that courts look to the context of the statutory scheme); Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (same); U.S. v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000) (same). Once the interrelation between the removal statutes and Section 22(a) is understood by reference to the plain meaning of the governing statutes, the perceived conflict Appellants see between Section 1452(a) and Section 22(a) vanishes and it becomes immediately apparent that the district court properly exercised removal jurisdiction over this case.

B. Appellants' Purported Application Of Section 22(a) To Prevent Removals Under Section 1452 Is Also Contrary To Legislative Intent And Would Create Perverse Results

1. Congress Intended That Bankruptcy Jurisdiction Be Broad In Scope

Appellants' constricted reading of Section 1452(a) would also create perverse results, contrary to the underlying purpose of the Bankruptcy Code generally and the removal statute specifically. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (noting that "interpretations of a statute which would produce absurd results are to be avoided"); Natural Res. Defense Council v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001) (same).

In interpreting the existing Bankruptcy Code, the Supreme Court has noted that, "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (citation omitted and emphasis added); see also In re S.G. Phillips Constructors, Inc., 45 F.3d 702, 705 (2d Cir. 1995), cited in the decision below, 293 B.R. at 329. To that end, Congress set out to enact a broad provision for bankruptcy removal authority in Section 1452. "Congress, when it added § 1452 . . . meant to enlarge, not to reign in, federal trial court removal/remand authority for claims related to bankruptcy cases." Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 131-32 (1995) (Ginsburg, J., concurring).

Indeed, by declining to include the language of Section 1441(a) excepting claims elsewhere made nonremovable, Congress evinced its intent that statutory provisions designed to respect a plaintiff's forum choice in the ordinary case are not triggered when a case is removed pursuant to Section 1452(a); rather, in those extraordinary instances, such provisions must yield to the more powerful interest present in bankruptcy-related cases: the efficient reorganization of the bankrupt's estate.

Appellants seek to carve out claims under the Securities Act from all other claims that could be removed pursuant to a federal court's jurisdiction over a bankrupt issuer. But no reason can be imputed as to why Congress would have carved out Securities Act claims from all other claims that are removable under Section 1452: Claims brought under the Securities Act have as much—or more—potential to interfere with the administration of a bankruptcy estate as any other claims held to be removable. Indeed, in any given case, the full amount of damages sought under Securities Act claims could conceivably be the basis for a claim against the estate.

Appellants' narrow view of removal jurisdiction thus not only ignores the very nature of indemnification and contribution claims, it is also anathema to one of the primary goals of the federal bankruptcy scheme: providing federal courts with broad jurisdiction so that they might deal effectively with all matters affecting a debtor's estate. This includes not only the fair and efficient resolution of disputes relating to bankruptcy proceedings, but consistency in result. Particularly where a bankrupt seeks to reorganize, its plan of reorganization must acknowledge and resolve all lawfully pending liabilities, and to do so must marshal and allocate all lawful assets. Neither is possible where obligations as potentially broad as debts to bondholders (Appellants here) or allocation rights among underwriters remain outstanding and (absent federal jurisdiction) potentially subject to conflicting outcomes in multiple state courts.

The debtor also has an interest in not being subjected to multiple uncoordinated discovery requests and repetitive pretrial depositions of key employees. And, as was the case with WorldCom, the debtor might have a need to reach closure with governmental authorities pursuing claims similar to those raised by private litigants. Congress's provision of a federal forum thus also protects the debtor in these endeavors—a goal that would be thwarted under Appellants' constricted reading of the very statutes intended to provide that protection.

2. <u>Recent Congressional Enactments Evince A Preference For Concentrating Securities Litigation In Federal Courts</u>

Appellants point to SLUSA as somehow supporting their position, but it is inconceivable that SLUSA intended to withdraw bankruptcy removal jurisdiction. SLUSA was enacted to close a loophole in the P.S.L.R.A., whereby class action plaintiffs were evading its stringent procedural reforms by bringing suit in state rather than federal court. To that end, SLUSA made federal court the exclusive venue for certain class action securities suits, and amended Section 22(a) to exclude such class actions from its provisions. See 15 U.S.C. §§ 77p(b), 77p(c) & 77v(a). In so doing, SLUSA carved out state pension funds from its definition of "class actions." See 15 U.S.C. § 77p(d)(2)(A). The narrow scope of this carve-out did not purport to interfere with bankruptcy removal jurisdiction under Section 1334 and 1452 of the Judicial Code; nor was it related to any policy animating Section 22. Rather, the pension plan exception was simply to further define what Congress, in SLUSA, meant to include within the ambit of a "class action" and what it did not. The carve out itself makes this perfectly clear by specifically providing that "nothing in this section may be construed to preclude . . . a State pension plan from bringing an action involving a covered security on its own behalf." 15 U.S.C. § 77p(d)(2)(A) (emphasis added). Thus, as other courts have noted, SLUSA "was intended to address only what Congress perceived to be pressing unsolved problems relating to securities class actions, and does not reflect a 'recent indication of congressional intent'" on removal jurisdiction. In re Global Crossing, Ltd. Sec. Litig., 2003 WL 21659360, at *3.

Indeed, as noted above, SLUSA evinces Congressional intent that securities claims are a matter of particular federal concern. It is among a number of recent federal enactments seeking to unify standards under the securities laws and to concentrate such litigation in the federal courts. See SLUSA; National Securities Markets Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, 110 Stat. 3416 (1996); P.S.L.R.A. To argue that SLUSA favors state court litigation of federal securities claims would be to turn this considered series of legislation on its head. Or, as Judge Lynch put it: "It would be ironic indeed to read this provision of SLUSA, which was passed for the purpose of expanding federal jurisdiction (albeit in a specific, narrow way) to permit greater coordination of overlapping securities actions in federal courts, as implicitly contracting federal jurisdiction. . . ." In re Global Crossing, Ltd. Sec. Litig., 2003 WL 21659360, at *3.

Put differently, the expense, delay, and conflicting outcomes that inevitably would result from litigating this same matter in multiple courts across the country undermine not only the compelling federal bankruptcy interests, but also the strong federal interest in maintaining uniformity and integrity in the interpretation and application of the federal securities laws. Permitting Appellants (and others like them) to pursue their claims in various state courts would create real potential for inconsistent rulings on law and fact, thereby undermining the statutory and contractual risk allocation mechanisms relied upon in the capital formation process. Furthermore, it would exponentially increase litigation costs, as securities industry participants would be forced to defend sprawling litigation in multiple state jurisdictions around the country. In short, a reversal of the district court's order would fundamentally alter the risks and costs associated with underwriting a national securities offering.

3. Construing Section 22(a) To Preclude Removal Under Section <u>1452 Would Lead To Absurd Results</u>

The perversity of the result urged by Appellants is even more apparent when one considers that Appellants' argument does nothing to serve the goals it purports to achieve. Appellants, citing <u>Ret. Sys. of Ala. v. Merrill Lynch</u>, 209 F. Supp. 2d 1257, 1269 (M.D. Ala. 2002) ("<u>RSA I</u>"), argue that the provisions of SLUSA clearly evince a policy of special respect for the forum choices of state pension plans with regard to securities claims. (Mand. Pet. at 22-23 n.4). But its argument here is not limited to state pension plans; rather, if accepted, <u>no</u> individual claim under the Securities Act would be able to be removed. And, contrary to Appellants' reasoning, barring removal would not protect "the special needs of state governments and pension plans to be able to pursue state law remedies in state courts." (<u>Id.</u> at 23 n.4 (quoting <u>RSA I</u>)). The very same claims brought on the basis of state law (rather than a securities claim alone) would still be subject to removal. Thus, the only effect of Appellants' argument would be to create an inexplicable incentive not to pursue any state remedy but to bring a Securities Act claim alone.

In fact, if, as Appellants argue, Congress intended to protect the special needs of state governments and pension plans by barring removal, those needs would be fully protected without any need to stretch the statutory language by providing that—in the ordinary case, when the claims are not related to a bankruptcy case and the only basis for jurisdiction is general federal question jurisdiction—claims by state pension plans under the Securities Act are not removable under Section 1441(a).

C. The District Court's Decision Is Squarely In Line With Relevant Precedent

In accord with the foregoing analysis, numerous courts have recognized that express statutory bars to removal are limited to removals under Section 1441(a) and do not extend to other removal provisions in Chapter 89. Indeed, it is well-settled that express bars to removal will not apply when removal is effected pursuant to 1441(c), a provision permitting the removal of an entire case in which removable claims are combined with non-removable claims. See, e.g., Gonsalves v. Amoco Shipping Co., 733 F.2d 1020 (2d Cir. 1984). More pointedly, the two other district courts in the Second Circuit that have considered the precise issue raised here have joined the district judge in concluding that Section 22(a) does not prohibit removal under Section 1452(a). See In re Adelphia Comm. Corp.

Sec. & Deriv. Litig., No. 03 MDL 1529, 2003 WL 23018802, at *2 (S.D.N.Y. Dec. 23, 2003); In re Global Crossing Sec. Litig., 2003 WL 21659360, at *2-4. Other district courts are in accord. See Carpenters Pension Trust for S. Cal. v. Ebbers, 299 B.R. 610, 614-15 (C.D. Cal. 2003); Pac. Life Ins. Co. v. J.P. Morgan Chase & Co., No. SA CV 03-813-GLT, 2003 WL 22025158, at *2 (C.D. Cal. June 30, 2003).

In the face of this considered precedent, it is Appellants who stand effectively alone in reaching the contrary conclusion. Although there are a handful of courts reaching the outcome urged by Appellants, none is from this Circuit and none is at all persuasive. The leading case to disagree with the district court, Tenn. Consol. Ret. Sys. v. Citigroup, Inc., No. 3:03-0128, 2003 U.S. Dist. LEXIS 10266 (M.D. Tenn. May 9, 2003) ("TCRS"), ignores the differences in the plain language between Section 1441 and Section 1452 and finds that removal is precluded under either. Moreover, the only case that court cites as supporting this proposition actually never reached the issue (as the court acknowledges), see RSA I, at 1260 n.3, and has in fact been cited to support the opposite conclusion, see Pac. Life Ins. Co., 2003 WL 22025158, at *2. The few other cases just follow TCRS, see City of Birmingham Ret. & Relief Fund v. Citigroup, Inc., No. CV-03-BE-0994-S, 2003 WL 22697225, at *3 (N.D. Ala. Aug. 12, 2003); Ill. Mun. Ret. Fund v. Citigroup, Inc., No. 03-465-GPM, 2003 U.S. Dist. LEXIS 16255, at *6-7 (S.D. Ill. Sept. 9,

2003) or simply make the bare observation that Securities Act claims are not removable under Section 1452 without any analysis, see Ariail Drug Co. v. Lease Partners Corp., No. CIV A. 96-G-0708-S, 1996 WL 1060890, at *4 (N.D. Ala. May 23, 1996). In addition, the sparse statements in these additional cases could be considered dicta, given that each of these courts also decided to remand the case on other grounds. See City of Birmingham, 2003 WL 22697225, at *3-5; Ill. Mun. Ret. Fund, 2003 U.S. Dist. LEXIS 16255, at *7-10; Ariail, 1996 WL 1060890, at *3.

Every case, then, that has undertaken a reasoned analysis of the issues raised here has concluded that Section 22(a) does not prohibit removal under Section 1452(a). Far from clear error then, the order below is in accord with those cases, and moreover, with the Congressional intent those cases honor.

II. THE DISTRICT COURT PROPERLY HELD THAT APPELLANTS' CASES ARE "RELATED TO" THE WORLDCOM BANKRUPTCY PROCEEDINGS

Although not certified for interlocutory appeal, see In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288, 2003 WL 22953644, at *8 (S.D.N.Y. Dec. 16, 2003), Appellants continue to press a last-ditch effort to assail the district court's initial determination that it had federal bankruptcy jurisdiction over their cases under 28 U.S.C. § 1334(b). (Supp. Opening Br. at 6-8.) Consistent with the aforementioned purposes of the bankruptcy code, that section, like Section 1452, contains an intentionally broad grant of jurisdiction: "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). The district court readily acknowledged that under settled precedent in this Circuit, the defendants' statutory rights to contribution from the debtors' estate make Appellants' cases sufficiently "related to" the WorldCom bankruptcy proceedings to confer federal jurisdiction under 28 U.S.C. § 1334(b). Perhaps aware that their argument is a losing proposition in the Second Circuit, Appellants make the unprecedented argument that facts arising subsequent to removal should somehow operate to withdraw the district court's "related to" jurisdiction over their cases. Alternatively, they urge the Court follow their view of another circuit's precedent. Neither is even a persuasive basis for reversal.

A. The District Court Appropriately Focused The Jurisdictional Inquiry On Facts As They Existed At The Time Of Removal

Appellants attempt to make much of the fact that the WorldCom Reorganization Plan accords defendants' contribution and indemnification no value. (Supp. Opening Br. at 7 n.4.) Although softening their prior position that this Plan—confirmed over six months <u>after</u> the decision denying remand—should now divest the court of "related to" jurisdiction (Mand. Pet. at 31-34), Appellants still argue that the subsequently proposed Plan should now be taken as proof that the decision was in error when made. (Supp. Opening Br. at 8.)

Instead, as the district court explained, the proper jurisdictional inquiry here—i.e., whether the outcome of a case could have a conceivable effect on the debtor's estate—is by its very nature antecedent to the later effect those claims have in fact. In re WorldCom, Inc. Sec. Litig., 294 B.R. 553, 556-557 (S.D.N.Y. 2003). And Appellants' argument that a later proposed (and still later confirmed) Plan should now be used as evidence that these claims never had a conceivable effect on the estate even at the time of removal can promptly be disregarded as a speculative exercise that at best invokes hindsight.

B. The District Court Correctly Found "Related To" Jurisdiction On The Basis Of Defendants' Contribution Claims

Appellants also continue to argue that the district court erred in finding "related to" jurisdiction on the basis of defendants' contribution claims, and that, although the district judge did not reach the issue, jurisdiction could likewise not be based on defendants' indemnification claims. (Supp. Opening Br. at 6-8.) On the contrary, Section 1334(b), both on its face and as confirmed by settled law in this Circuit, confers "related to" jurisdiction where defendants have contribution rights or indemnification rights against a bankrupt issuer.

The prevailing test for "related to" jurisdiction in the Second Circuit (and elsewhere) is whether the outcome of a case "might have any 'conceivable effect'" on a debtor's estate. See In re Cuyahoga Equip. Corp., 980 F.2d 110, 114 (2d Cir. 1992) (citing In re Turner, 724 F.2d 338, 340-41 (2d Cir. 1983)). The effect need not be certain or immediate; indeed, as the district court noted, in order to meet the Second Circuit's test, defendants need only show that their indemnification or contribution claims have a "reasonable legal basis." See, 293 B.R. at 318-19 (collecting cases in this Circuit and circuit cases elsewhere). This purposely expansive test is, like the statutory language itself, reflective of Congress' intent "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." Celotex Corp., 514 U.S. at 308 (citation omitted).

Appellants' cases here arise out of WorldCom's sale of debt securities though nationwide securities offerings. Under the terms of the respective underwriting agreements with respect to those offerings, underwriters are entitled to indemnification from WorldCom for attorneys' fees, litigation costs and liability incurred in connection with the WorldCom securities offerings they underwrite. This is typical throughout the capital formation market place. And apart from privately bargained for risk allocation protections, Congress also protects underwriters from disproportionate liability through a statutory right to contribution. See 15 U.S.C. § 77k(f). Separately, and together, these rights to contribution and indemnification have a "reasonable legal basis." Indeed, the right to rely on these risk allocation measures is basic to, and universally accepted in, the underwriting process.

As thoroughly discussed by the district court, 293 B.R. 317-324, such rights have repeatedly supported "related to" jurisdiction in this Circuit and elsewhere, and the district court was itself simply following the weight of authority in so holding. Indeed, a number of other courts have found "related to" jurisdiction on virtually identical facts to those present here. See, e.g. In re Adelphia Comm. Corp. Sec. & Deriv. Litig., 2003 WL 23018802, at *2; In re Global Crossing, Ltd. Sec. Litig., 2003 WL 21659360, at *1; Carpenters Pension Trust for S. Cal., 299 B.R. at 613; Pac. Life Ins. Co. v. J.P. Morgan Chase & Co., 2003 WL 22025158, at *1-2; Tenn. Consol. Ret. Sys. v. Citigroup, Inc., 2003 U.S. Dist. LEXIS 10266, at *5-6; Am. Nat'l Ins. Co. v. J.P. Morgan Chase & Co., Nos. H-01-3624, G-02-0299, 2002 WL 32107216, at *7-8 (S.D. Tex. Aug. 12, 2002); see also Conn. Res. Recovery Auth. v. Lay, 292 B.R. 464 (D. Conn. 2003) (following the decision below on procedurally analogous facts).

* * *

This case, then, sits at the intersection of two key federal statutory schemes: federal securities law and federal bankruptcy law. These statutory regimes have nationwide effect, and were designed with specific, national policy goals in mind. If federal courts were to deny removal jurisdiction in this case and in similar cases, it would present untenable variations and inconsistency in federal securities law and federal bankruptcy law. From a market perspective, this result plays particular havoc on the utility of risk allocation measures—which, to be effective, must enjoy some measure of predictability. Amici respectfully submit that this broader market perspective be taken into account on this appeal.

CONCLUSION

For the foregoing reasons, the Amici respectfully request that the decision of the district court be affirmed.

Dated: New York, New York
February 12, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,240 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point Times New Roman.

Dated: New York, New York
February 12, 2004

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