

Has the Private Securities Litigation Reform Act of 1995 fulfilled its purpose? Or has it merely rechanneled securities class actions?

# Significant Developments Since Passage of Securities Reform Legislation

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As we approach the five-year anniversary of the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA), it seems appropriate to review what has occurred on the securities litigation front since its passage, including whether or not the PSLRA has had the impact intended by Congress or whether the law of unintended consequences has conspired to undermine its effectiveness.

The PSLRA was enacted by Congress on December 22, 1995, over the veto of President Clinton, after aggressive lobbying by the corporate (and primarily, the high-tech) lobby and the professionals who worked with such companies (primarily, the accountants). The ostensible purpose of the PSLRA was to reduce the filing of what many perceived as “abusive and meritless” securities class actions under the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act). Congress believed that many companies and their managers needed relief from the “harassing” tactics of plaintiffs’ counsel.

The typical pre-PSLRA securities class action began with a plaintiff’s lawyer identifying a company whose stock had experienced a sudden drop in value, usually following the disclosure of some negative news (e.g., reduced earnings or loss of major contracts). The lawyer would assume — without investigation — that such drop was the

result of securities fraud. The lawyer would then produce a securities class action complaint, by inserting into a complaint form on his or her word processor the name of one of several professional plaintiffs the lawyer called on for these cases.

The lawyer would then race other plaintiffs' counsel to the courthouse to see who could get there first. The winner would typically become the lead plaintiff. The lead plaintiff would then attempt to settle the action for an amount that would result in an attorney's fee that rarely had any relation to the amount of time expended by counsel and rarely had anything to do with the interests of the shareholders.

The PSLRA consisted of a series of procedural and substantive provisions designed to make it more difficult for plaintiffs to bring and sustain a securities class action. This article will examine these provisions to see if the goals of Congress in enacting the PSLRA have, in fact, been met.

## Background

Under the Exchange Act, investors who purchase stock of a company on the open market are entitled to receive damages if the company or its directors and officers issued materially false information with scienter (i.e., a requisite state of mind deemed unlawful).<sup>1</sup> ("Scienter" may be defined as "to knowingly transact a fraudulent securities deal.")

In order to prevail on a securities fraud claim, plaintiffs must generally plead and then prove that the defendants:

1. made misstatements or omissions;
2. of material fact;
3. with scienter;
4. in connection with the purchase or sale of securities;
5. upon which plaintiff relied (or that the "fraud-on-the-market" theory is applicable); and
6. such reliance proximately caused the plaintiff's injury.<sup>2</sup>

## Two General Rules

There are two general rules of pleading that apply to all complaints filed in the federal courts:

- First, the complaint must set forth factual allegations with sufficient particularity that such factual issues can thereby be identified. Fed. R. Civ. P. 9(b).
- Second, the factual allegations must, if proven true, give rise to a claim for which relief may be granted (e.g., the facts show that a legal duty has been violated). Fed. R. Civ. P. 12(b).

Typically, a dismissal motion is brought under both rules.<sup>3</sup>

## Proving Scienter

Prior to the PSLRA, federal courts tended to construe Rule 9(b) more strictly in federal securities class actions than in other actions. The courts, in connection with a Rule 12(b) motion to dismiss, would frequently consider the entirety of all documents to which the complaint referred as well as all other filings made with the Securities

Exchange Commission (SEC) by the subject corporation and find that circumstances constituting fraud were not stated with sufficient particularity.<sup>4</sup>

As noted above, in a securities fraud action, a plaintiff must allege and prove “scienter,” the required state of mind for which a defendant may be liable. The question of what must be pled in a complaint and then proven at trial to establish scienter on the part of the defendants became (and remains) a divisive issue among the various U.S. Court of Appeals Circuits. The Supreme Court summarily addressed the issue in a footnote, noting that the “required state of mind” to plead a violation of Section 10(b) of the Exchange Act is a “mental state embracing intent to deceive, manipulate or defraud.”<sup>5</sup> The Supreme Court expressly left open the question of whether, in some circumstances, reckless behavior is sufficient for civil liability under Section 10(b) of the Exchange Act.

Prior to the PSLRA, the Second Circuit standard was both the most prevalent and the strictest standard for pleading and establishing a “mental state embracing intent to deceive, manipulate or defraud.” Under the Second Circuit standard, the plaintiff had to plead and prove facts that:

- either showed that the defendant had both the motive and the opportunity to commit fraud; or
- constituted strong circumstantial evidence of conscious misbehavior or recklessness.<sup>6</sup>

A considerably weaker standard was articulated by the Ninth Circuit, which applied the generic Rule 9(b) standard to pleadings and, therefore, allowed “state of mind” to be pled with conclusive allegations.<sup>7</sup>

## Heightened Pleading Standards

One of the purposes of the PSLRA was to conform pleadings in federal securities class actions to a uniform standard. It imposed a heightened pleading standard by requiring that a complaint “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind” with respect to each alleged act or omission.<sup>8</sup> Congress, however, left open to interpretation what exactly it meant by scienter. Without question, this created one of the most hotly contested issues of the past year, as courts in many jurisdictions focused on the issues of heightened pleading standards and the requisite proof of scienter required under the PSLRA.

## Divergent Courts

During 1999, the U.S. Court of Appeals for the Ninth Circuit, as well as the Second, Third, Sixth, and Eleventh Circuits, all opined on what must be pled and ultimately proven with respect to scienter.<sup>9</sup> Despite the aim of a uniform pleading standard and because the PSLRA failed to define scienter, the results of the Circuit Courts were divergent, raising the possibility of Supreme Court intervention. This also raised the level of uncertainty for directors and officers, for directors and officers liability (D&O) insurers, and, of course, for litigants embroiled in class action securities fraud cases.

Basically, three lines of cases have emerged. A complaint must plead (and the plaintiff must eventually prove) particular facts giving rise to a strong inference that:

1. the defendants had the “motive and opportunity” to commit fraud;

2. the defendants engaged in activities with a deliberate and conscious intent to defraud;  
or
3. the defendants were “deliberately reckless,” requiring something more than the first enumerated standard, but something less than the second enumerated standard.

These lines of cases are noted below.

#### Silicon Graphics

The Ninth Circuit put forth its interpretation in *In re Silicon Graphics*. The courts holdings are as follows:

1. The PSLRA elevated the level of scienter required to be shown in securities fraud actions above the Second Circuit’s “motive and opportunity/conscious misbehavior or simple recklessness” standard. The required level of scienter is “deliberate recklessness,” which comes closer to demonstrating intent, as opposed to mere motive and opportunity.
2. The PSLRA heightened the pleading requirement so that a private securities plaintiff must plead “in great detail” facts that constitute strong circumstantial evidence of “deliberate recklessness.”

The significance of this decision can perhaps be best illustrated by the factual allegations and legal argument presented in the case itself. *Silicon Graphics* arose out of a fairly typical fact pattern for securities class actions. Plaintiffs alleged that in the early fourth quarter of 1995, the defendants realized that the company would not meet its projected 40 percent annual revenue growth rate. During the class period, the defendants allegedly made reassurances to the market via statements to securities analysts and press releases. These reassurances purportedly inflated the stock price while the defendants “took advantage” of the increase to sell more than 300,000 shares for over \$13 million during the class period. When revenues were announced on January 2, 1996, the stock dropped to \$21-1/8 from a class high of \$37 per share.

Plaintiffs advanced two primary grounds for their “information and belief” that the facts and circumstances alleged in the complaint raised a strong inference of intent to defraud:

1. the existence of internal company reports that contradicted positive public statements made by the defendant officers; and
2. the unusual sale of a massive amount of company stock by the officers.

The trial court dismissed the complaint for failing to state a claim under Fed. R. Civ. P. 12(b)(6) and for failing to satisfy the PSLRA pleading requirements. The district court also granted summary judgment to four individual defendants on the issue of misrepresentation.

The Ninth Circuit affirmed the dismissal and summary judgment. Although the complaint raised some inference of intent, it lacked sufficient detail and foundation necessary to meet either the particularity or strong inference requirements of the PSLRA.

For example, the complaint failed to state facts regarding the internal reports — their specific contents, authors, source from which the information was obtained and recipients, etc. Generic allegations of inconsistent reports are insufficient. Likewise, the

sale of stock was not so suspicious to create a strong inference of fraudulent intent. The Court affirmed the district's court review of SEC filings (Forms 3 and 4) to determine the amount and percentage of insider sales, the timing of the sales, and whether the sales were consistent with the insiders' prior trading history. Virtually all of the shares sold were originally vested stock options that were immediately sold after conversion. Collectively, the officers retained 90 percent of their holdings and traded in a manner consistent with past practices.

#### Summary of Other Circuits

Other Circuits have, in the last few months, also addressed the issue of scienter. The following is a brief summary of some of their findings:

- *First Circuit*: The First Circuit has stated that the "motive and opportunity" test is alone sufficient to plead and establish scienter. *Maldonado v. Dominguez*, 137 F.3d 1, 10n.6 (1st Cir. 1998).
- *Second Circuit*: The Second Circuit has stated that the pre-PSLRA standards of the Second Circuit remain the post-PSLRA standards. *Press v. Chemical Investment Services Corp.*, 166 F.3d 529 (2d Cir. 1999).
- *Third Circuit*: The Third Circuit stated that the PSLRA standard for pleading and proving scienter is "approximately equal in stringency to that of the Second Circuit." *In re Advanta Corp.*, Sec. Litig., No. 98-1846, 1999 WL 395997 (3d Cir. June 17, 1999).
- *Fifth Circuit*: The Fifth Circuit stated that the PSLRA adopted the Second Circuit standard of scienter, but raised the pleading requirement above the Second Circuit standard by requiring particularized facts that give rise to a strong inference of either motive and opportunity, conscious misbehavior, or simple recklessness. *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997).
- *Sixth Circuit*: The Sixth Circuit stated that a plaintiff in a securities fraud case must plead facts giving rise to a strong inference of scienter, but that the level of scienter remains unchanged — which would require something more than a "bare pleading of motive and opportunity." *In re Comshare, Inc. Securities Litig.*, Sec. Litig. No. 97-2098, 1999 WL 460917 (6th Cir. July 8, 1999).

The Ninth Circuit has amended both the majority and concurring/dissenting opinions in *Silicon Graphics* to incorporate a brief discussion of the *Advanta* and *Comshare* opinions noted above. A petition for rehearing and rehearing *en banc* has been filed in *Silicon Graphics*, but it is viewed as "unlikely" that the Ninth Circuit will grant such petition. A ruling on the petition is expected to occur at or about year-end.

#### Where Is It All Heading?

In *Silicon Graphics*, the Ninth Circuit relied heavily on the legislative history of the PSLRA and, in particular, the Conference Committee Report and President Clinton's veto message. The Ninth Circuit concluded that the plaintiff's proceeding under the PLSRA "can no longer aver intent in general terms of mere 'motive and opportunity' or 'recklessness', but rather must state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent."

The apparent elevating of the requisite level of scienter conflicts with the Second, Third, Fifth, and Sixth Circuits. Moreover, the Ninth Circuit's use of the legislative history of the PSLRA is an approach that was analyzed and rejected by the Third and Sixth Circuits on the basis that the legislative history is inconclusive, while the statutory language is unambiguous.

To the U.S. Supreme Court?

The Ninth Circuit decision was decided by a three-judge panel on a 2-1 vote. A petition for rehearing *en banc* has been filed and is pending. Since the decision conflicts with the Second, Third, Fifth, and Sixth Circuits, if the decision is not reversed, there is a considerable likelihood that either *Silicon Graphics* or some other securities class action pending in the Second, Third, Fifth, Sixth, or Ninth Circuit may reach review by the U.S. Supreme Court to resolve the conflict among the Circuits.

While the heightened pleading standards may or may not have deterred some plaintiffs from filing frivolous suits, this uncertainty over the scienter standard has slowed down the settlement process, as parties wait to see how this issue will ultimately be decided. Other parties, particularly defendants, have used *Silicon Graphics* as part of their defense strategy in order to enhance their position in motions and settlements.

Forum Shopping?

One unintended effect of the heightened pleading standard has been a shift in the frequency of filing from West to East. Whether it is because plaintiffs are increasingly engaging in "forum shopping" or for some other reason or reasons, the fact remains that more suits have been filed in the Southern District of New York over the last two years than in the less plaintiff-friendly Northern District of California, which is in the Ninth Circuit.<sup>10</sup>

In other words, it appears that Silicon Alley has been replacing Silicon Valley as the focus of securities class action litigation. Thus, it remains unclear whether the goals of Congress will be advanced by the heightened pleading standards and will remain that way until the uncertainty is resolved by the Supreme Court — or Congress itself.

Most Adequate Plaintiff

The PSLRA requires the court to appoint the class member most able to represent the interests of the other class members. The law creates a rebuttable presumption that the so-called "Most Adequate Plaintiff" is the investor with the largest financial interest in the potential damages. Congress believed that this provision would get more institutional investors directly involved in the process, thereby taking the focus of the litigation away from the plaintiffs' law firm and putting it into the hands of the investors who would direct outcomes to inure to the benefit of the investors rather than the law firm.

Unintended Consequences

However, the law of unintended consequences has created the anomaly that the same plaintiffs' firms that had dominated the pre-PSLRA lawsuits continue to drive the post-PSLRA lawsuits. These firms now work to piece together large numbers of small investors who have, in the aggregate, the largest financial interest of any other group of investors. The prevailing lead plaintiff group then selects the lead plaintiffs' counsel, inevitably the aggregating law firm.

Interestingly, most institutional investors have shied away from the lead plaintiffs' role, whether because a \$10 million loss in a multibillion dollar portfolio is not material or because the institution simply does not wish to devote resources to a protracted

litigation when such resources could be used for making investment decisions. Additionally, an institutional investor may not be enthusiastic about taking on any additional fiduciary duties as representative of all shareholders or opening itself up to the discovery that a class representative role requires. The one exception to this pattern has been some pension funds, which have been the lead plaintiffs in a variety of actions.

### Automatic Stay of Discovery

The PSLRA imposes an automatic stay of discovery and other proceedings while a motion to dismiss is pending. Congress felt that plaintiffs used securities lawsuits as a way to go fishing through a company's documents in order to find the bases for fraud claims that were rarely properly pled in the original complaint.

### Rationale

Since the discovery process is generally the most costly and time-consuming part of the litigation process, Congress felt that it could control costs by holding off discovery until the court had made a determination on the viability of the complaint. Additionally, plaintiffs had used the discovery process as a way to squeeze early settlements out of companies that did not wish to incur the costs of discovery, even if the claims against the companies and its management were frivolous.

Congress also felt that the stay of discovery would cut down on the number of frivolous suits filed since plaintiffs would no longer have the leverage of costly discovery to force a settlement of such frivolous suits.

### Increase in Pending Cases

Whether frivolous lawsuits have been eliminated still remains to be seen, but what has occurred is an increase in the inventory of pending securities class actions. In 1995, there were 185 cases disposed of by settlement, judgment, or motion. That number has steadily dropped since the passage of the PSLRA, while the number of filings over that same period has actually grown. It appears that companies are less willing to settle matters quickly until they have had their "day in court" on the motion to dismiss. Maybe this was unintended, but it has had an overall positive effect on keeping the costs of companies down. The stay period has also had some positive impact on companies that have recovered during the stay period.

### Ninety-Day Bounce-Back

In securities fraud cases, damages are measured by the difference between the price at which a stock sold and the price at which the stock would have sold absent the alleged misrepresentations or omissions.<sup>11</sup> In a securities fraud class action, the plaintiffs must show the "true value" of the stock during the class period and then calculate damages for each share of stock on the difference between the price paid for the stock and its true value.

The PSLRA provides that damages per share may be mitigated if the price rebounds during a 90-day period following an alleged curative disclosure. This would eliminate those cases in which the full facts surrounding a disclosure come out to soften the impact of the initial bad news. Additionally, if most of the stock drop was simply due to a

temporary down-turn in the stock market, the 90-day window gives the stock the opportunity to recover from the vagaries of the market.

### Bull Market Effects

The realities of the post-PSLRA environment have been that most stocks that fall following bad news do not recover within that 90-day window. In fact, with the run-up of the stock market in the current bull market and with the inflated market capitalizations that result, it has been very difficult for stocks to recover in 90 days after taking a pounding from the market for bad news. Although there has been no independent confirmation that plaintiffs have avoided filing lawsuits against certain companies that have recovered in 90 days, the fact remains that the overall number of suits filed has risen simply on a steady diet of companies with large market-cap losses. At best, we can characterize this provision of the PSLRA as having a neutral effect.

Does this mean that damages have not figured into the post-PSLRA environment? Hardly. Issues concerning the testimony of damages experts have been the subject of several significant judicial decisions over the past several years.

### Use of Expert Testimony

In 1999, the U.S. Supreme Court decided *Kumho Tire Company, Ltd. v. Carmichel*, 119 S. Ct. 1174 (1999), holding that the federal trial court's "gatekeeping" function in determining whether to admit expert testimony under Rule 702 of the Federal Rules of Evidence (FRE) applies not only to "scientific" testimony, but to all expert testimony based on "technical" or "other specialized" knowledge.

The *Kumho* decision is an extension of the principle set forth in *Daubert v. Merrel Dow Pharmaceutical, Inc.*, 113 S.Ct. 2786 (1993), in which the Court held that "scientific" testimony is admissible only if it is both relevant and reliable. The requirement of such a finding, imposes a "gatekeeping" function on the federal trial court. In *Daubert*, the Supreme Court enumerated the following specific factors for the federal trial courts to consider when determining whether scientific testimony is admissible under FRE 702:

- its ability to be tested;
- peer review and publication;
- potential rate of error; and
- general acceptance in the scientific community.

The *Kumho* case extends the principle and "gatekeeping" function to expert testimony by nonscientists. Although both *Daubert* and *Kumho* address the admissibility of expert testimony in product liability actions, the implications for securities class actions are real and significant, particularly in light of a decision made by the U.S. District Court, Southern District of New York, in *In re Executive Telecard, Ltd. Securities Litigation*, 1997 U.S. Dist. LEXIS 16307.

In *Extl*, the defendants in a securities fraud class action brought an application to exclude the proposed testimony of plaintiff's damages expert on the grounds that such testimony was insufficiently reliable to be admissible. The plaintiffs alleged that during a period of approximately three years (the purported class period), the plaintiffs purchased stock of Executive Telecard, Ltd., at a price inflated by stock fraud perpetuated by the defendants. The alleged fraud was that, throughout the class period, the defendants misrepresented or failed to disclose various material facts regarding Executive

Telecard's operations and financial condition and failed to disclose Executive Telecard's entanglement with an incarcerated felon with a history of securities violations.

### Assessing the Experts

Plaintiffs' damage expert sought to testify that the "true value" of Executive Telecard's stock during the class period was, as of the end of the class period, equal to the average price during the 10-day period following the curative disclosure made the day after the end of the class period. The plaintiffs' expert then calculated the true value over the class period by working backwards pursuant to a constant ribbon based on the percentage of stock drop following the curative disclosure with some adjustment to reflect market factors, such as the performance of telecommunication stocks and the market in general. The plaintiffs' expert then determined the aggregate amount of damages pursuant to the "proportional decay model."

In arguing over the motion, both parties invoked the specific factors enumerated in *Daubert*. The Court noted that although *Daubert* did not directly apply (since the proffered testimony on damages was not "scientific," but was "technical"), the requirement that an expert's opinion should have a reliable basis would apply.

In assessing the reliability of the plaintiffs' expert, the *Extl* Court noted that the "negative causation" defense can be broadly categorized into:

1. company risk (i.e., forces and events affecting the particular company); and
2. market risk (i.e., forces and events affecting the price of stock in general).

The former category itself requires that an "event" study be performed to determine whether the stock price was affected by company-specific factors exclusive of the challenged fraud.

In *Extl*, the Court held that the plaintiffs' expert approached the issue of company risk in a rather "cursory fashion." For example, the expert failed to consider the effect on Executive Telecard's stock price occasioned by the proposed spin-off of certain Executive Telecard divisions, even though there was evidence of significant shareholder concern regarding the proposed spin-off during the chosen measuring period. The expert's failure to conduct an event study or similar analysis was found to be sufficient cause to exclude the testimony as not sufficiently reliable within the principles enunciated in *Daubert*.

The *Extl* Court further noted that the expert's report was also vulnerable to criticism because it factored in "market risk factors" exclusively by use of an index comprised of a portfolio of securities that needed to "more precisely correlate" to the stock of Executive Telecard. For example, the proposed index included large-cap companies, even though Executive Telecard was a "small-cap" stock. The Court quoted the defendant's expert report and noted that a "decent estimate is possible if you find traded firms that have roughly the same profitability, risks and growth opportunities as your firm."

The *Kumho* decision offers confirmation that the *Daubert* analysis applies to proffered testimony on damages in securities class actions, giving further validity to the analysis undertaken in *Extl*. In order for a damage analysis (of per-share damages) to be admitted in a federal securities fraud class action, it must contain an event study that apportions the stock drop between tortious and nontortious factors and that adequately takes into account stock fluctuations during the class period based on market forces, or it will not get pass the "gatekeeping" function imposed on federal trial courts. Although not a direct result of the PSLRA, the cases addressing damages issues have been affecting the resolution of securities class actions in the post-PSLRA era.

## The Safe Harbor

The PSLRA provides protection to a company and its directors, officers, and employees for projections and other forward-looking statements, whether written or oral, that later prove to be inaccurate, but only if:

- the forward-looking statement is identified as such and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially;
- the forward-looking statement is immaterial; or
- the plaintiff fails to prove the statement was made with actual knowledge that it was materially false or misleading.<sup>12</sup>

However, there are several exceptions to the Safe Harbor, including those statements made in connection with financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP), those contained in a registration statement, and those made in connection with an initial public offering.

Has this provision cut down on the number of securities class actions filed post-PSLRA? It appears suits alleging misrepresentations in connection with forward-looking statements have decreased, but only to be replaced with a larger number of lawsuits alleging accounting fraud. Whereas the percentage of accounting fraud cases filed hovered between 35 percent and 40 percent of pre-PSLRA securities class actions, that number has risen to between 50 percent and 55 percent of post-PSLRA securities class actions.

## Conclusions

To date, the PSLRA has not had the effect anticipated by Congress in several areas. Most notably, the overall number of federal filings of securities class actions, for the most part, exceeds pre-PSLRA levels.<sup>13</sup> Additionally, there is an ever-growing inventory of securities class actions pending due to the discovery stay and to litigants and courts waiting for guidance on the pleading requirements, specifically scienter.

What we do know is that it is still too early to determine the ultimate effect of the PSLRA — even after nearly five years. We also know that companies and their directors, officers, and employees continue to be named in lawsuits alleging securities fraud and that their potential exposure continues to be significant.

So, what will prevail — the laws of Congress or the law of unintended consequences? Perhaps we will be forced to wait another five years to find out.

## Endnotes

- 1 Section 10-b, Securities Exchange Act of 1934, 15 U.S.C. Section 78 (the “Exchange Act”), and Rule 10b-5 promulgated thereunder, 17 C.F.R. Section 240.10b-5.
- 2 See, e.g., *In re Phillips Petroleum Securities Litigation*, 881 F. 2d 1236, 1244 (3d Cir. 1989).
- 3 As a strategic matter, the Rule 9(b) dismissal motion is generally stronger at the onset of a case, but defendants are well-served to bring a narrowly framed Rule 12(b) motion together with the Rule 9(b) motion. The 12(b) motion allows the Court documents “integral” to the Complaint. It allows the defendants to submit, for example, related press releases and, perhaps, to show relevant stock

holdings, option holdings, and trading data. A broadly framed 12(b) motion, however, could be an ill-timed substitute for a summary judgment motion on issues such as loss causation, etc.

- 4 See e.g., *Kramer v. Time Warner*, 937 F.2d 767, 774 (2d Cir. 1991).
- 5 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976).
- 6 *Shields v. Citytrust Bancorp*, 25 F.3d 1124, 1128 (2d Cir. 1994).
- 7 *In re Glenfed Inc. Securities Litigation*, 42 F.3d 1541, 1545 (9th Cir. 1994).
- 8 15 U.S.C. Section 78u-4(b)(2).
- 9 The cases are, respectively: *In re Silicon Graphics*, 138 F.3d 970 (9th Cir. 1999); *Press v. Chemical Inv. Serv. Corp.*, 166 F. 3d 529 (2d Cir. 1999); *In re Advanta Corp.*, 180 F. 3d 525 (3d Cir. 1999); *In re Comshare, Inc.*, 183 F. 3d 542 (6th Cir. 1999); and *Bryant v. Avado Brands, Inc.*, 187 F. 3d 1271 (11th Cir. 1999).
- 10 Source: Stanford Securities Class Action Clearinghouse.
- 11 *Affiliated Ute Citizens of the State of Utah v. United States*, 406 U.S. 128, 154-155 (1972). The starting place for determining the true value of the stock generally begins with the price of the stock following the curative disclosure with respect to the alleged misrepresentation or omission; however, that portion of the price decline that is the result of forces unrelated to the wrong must be eliminated. See *McMahan & Co. v. Wherehouse Entertainment, Inc.*, 65 F.3d 1044, 1048 (2d Cir. 1995). With respect to alleged violations under the 1933 Securities Act, the "negative causation" defense is actually codified under Section 11(e) thereof. 15 U.S.C. Section 77k(e).
- 12 A statement such as "development of our new product is on schedule" would be a statement of current fact not protected by the Safe Harbor, while a statement such as "we project improving revenues this year" would be protected as long as accompanied by meaningful disclosures.
- 13 Federal securities class actions have been filed as follows: 1991-164, 1992-202, 1993-162, 1994-231, 1995-188, 1996-126, 1997-186, 1998-265, 1999-216. Source: Stanford Securities Class Action Clearinghouse; National Economic Research Associates, Inc. Immediately after the passage of the PSLRA, plaintiffs attempted to circumvent its requirements by filing in state courts under state securities, or "Blue Sky," laws. This tactic was removed from the plaintiffs' arsenal by the passage of the Securities Litigation Uniform Standards Act of 1998, which preempted any such state court Blue Sky actions.

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