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INTRODUCTION

American judges and policymakers are of two minds when it comes to securities fraud litigation. On the one hand, private class action lawsuits to enforce the anti-fraud provisions of the federal securities laws are viewed as a necessary supplement to limited governmental resources in an era of ever-increasing complexity in the financial industry.[1] On the other hand, securities litigation is viewed as parasitic,[2] ineffective at compensating those who have actually suffered harm,[3] and as a cumbersome and expensive tax on publicly traded companies levied by powerful (but not always publicly minded) plaintiff's' securities firms.[4]

Which of these views is right? The unsurprising answer is likely both, to a degree. The clear consequences of our schizophrenic view of securities litigation can be found both in legislation and case law. On

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1. *See Post-Enron America: An SEC Prospective*, 8 FORDHAM J. CORP. & FIN. L. 335, 359 (2003) (opening remarks by Harvey Goldschmid, then-Commissioner of the SEC and currently teaching at Columbia Law School).

2. Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 16 (1980); Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS: CHAP. J.L. & POL'Y 55, 62 (2009–2010) [hereinafter Rapp, *False Claims*].

3. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1545–46 (2006).

4. *See* Demings v. Nationwide Life Ins. Co., 593 F.3d 486, 490 (6th Cir. 2010) (describing reform objectives of the Private Securities Litigation Reform Act (PSLRA) as reigning in "vexatious class-action suits affecting national securities markets"); THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 485 (6th ed. 2009) (explaining that class action strike suits are thought to be brought to obtain "extortionate settlements"); Rapp, *False Claims*, *supra* note 2, at 59 (suggesting that securities lawsuits tax shareholders for the benefit of plaintiffs' counsel).

the legislative side, we embrace new remedies and causes of action in investor-friendly statutes, like Sarbanes-Oxley[5] and Dodd-Frank.[6] But we also curb and restrict private securities litigation under the Private Securities Litigation Reform Act (PSLRA)[7] and Securities Litigation Uniform Standards Act.[8] Inconsistencies can also be found in case law, with plaintiff-empowering decisions like *Basic Inc. v. Levinson*[9] contrasting with pro-defense decisions like *Dura Pharmaceuticals, Inc. v. Broudo*.[10]

Judicial and political ambivalence about the worth of securities fraud litigation manifests itself on an even more granular level. Rule 10b-5, promulgated by the U.S. Securities and Exchange Commission (SEC) pursuant to its authority under section 10(b) of the Securities Exchange Act of 1934, prohibits an act or omission resulting in fraud in connection with the purchase and sale of a security.[11] Although Rule

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5. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C. (2006)). Sarbanes-Oxley sought to expand federal power to protect investors and ensure reliable corporate disclosures. *In re* Sherman, 658 F.3d 1009, 1011 (9th Cir. 2011). To accomplish this goal, it extended the statute of limitations for private securities claims, Lieberman v. Cambridge Partners, LLC, 432 F.3d 482, 485 (3d Cir. 2005), and required new certifications of corporate disclosures, United States v. Panice, 598 F.3d 426, 434 (7th Cir. 2010).

6. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1367 (2010) (codified at 15 U.S.C.A. § 78u-6 (West 2012)). Dodd-Frank is a "sprawling" 2319 page statute. Saunders v. District of Columbia, 789 F. Supp. 2d 48, 52 n.2 (D.D.C. 2011).

7. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C. (2006)). The PSLRA created heightened pleading requirements, 15 U.S.C. § 78u-4(b), and imposed automatic discovery stays in securities lawsuits, 15 U.S.C. § 77z-1(b)(1), 78u-4(b)(3)(B). *See generally* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 924–29 (discussing the PSLRA's heightened pleading and automatic discovery stay provisions).

8. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended in scattered sections of 15 U.S.C. (2006)). The Securities Litigation Uniform Standards Act provided for federal preemption of most aggregate fraud claims involving nationally traded securities. *See generally* Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1 (1998).

9. 485 U.S. 224 (1988).

10. 544 U.S. 336 (2005).

11. Rule 10b-5, in part, reads:

> It shall be unlawful for any person, directly or indirectly, by the use of . . . interstate commerce[,] . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . .

17 C.F.R. § 240.10b-5 (2011). Rule 10b-5 implements section 10(b) of the 1934 Act, which, in part, reads:

> It shall be unlawful for any person, directly or indirectly, by the use of . . . interstate commerce[,] . . . [t]o use or employ, in connection with the purchase or sale of any security[,] . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.").

10b-5 seems clear on its face, courts have engaged in a dizzying back-and-forth dance when trying to interpret and explain its elements.[12]

There is a similar ambivalence about federal enforcement. The SEC is a well-funded agency, at least in a comparative sense, and its enforcement attorneys represent some of the most well-regarded legal talent in the federal ranks.[13] American financial markets are widely viewed as the most transparent in the world, and, as the industry's chief regulator, the SEC certainly is entitled to claim some credit for this achievement. At the same time, scholars and commentators are deeply concerned about the SEC's coziness with the industry it regulates[14] and its capacity to adapt to changes in financial industry practices and products.[15]

While my prior scholarship has suggested a "third way" that involves policy incentives for whistleblowers rather than enforcement through government action or private shareholder fraud claims,[16] it may be time to reconsider more broadly key aspects of securities enforcement and litigation.

I. THE MUDDLED STATE OF SECURITIES FRAUD LITIGATION

Securities regulation in this country works well in two regards. First, it works well in the "green light" area where business conduct is unlikely to lead to shareholder losses and threaten the integrity of the market. Unmeritorious cases can be disposed of with ease thanks to

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15 U.S.C. § 78j(b) (2006).

12. *See* DONNA M. NAGY ET AL., SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS 15 (3d ed. 2012) ("Important issues . . . remained unresolved for years after first being raised, and then left open, by Supreme Court decisions decided on other grounds.").

13. *See* David A. Caragliano, Note, *Administrative Governance as Corporate Governance: A Partial Explanation for the Growth of China's Stock Markets*, 30 MICH. J. INT'L L. 1273, 1284 n.65 (2009); James D. Cox et al., *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 894 (2005).

14. James J. Park, *Rules, Principles and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 127 (2012); Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 138 [hereinafter Rapp, *Mutiny*].

15. *Testimony Concerning the Severe Market Disruption on May 6, 2010, Before the Subcomm. on Capital Mkts., Ins. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. (2010) (statement of Mary L. Schapiro, Chairwoman, SEC), *available at* http://www.sec.gov/news/testimony/2010/ts051110mls.htm (noting that "the technologies used for market oversight and surveillance have not kept pace with the technology and trading patterns of the rapidly evolving and expanding securities markets").

16. Rapp, *Mutiny*, *supra* note 14. My argument has been that policy incentives for whistleblowers would do a better job than private shareholder litigation in bringing fraud to light, both because whistleblowers have better access to information about ongoing fraud and because such litigation could precede, rather than follow, public revelations of fraud. Policies targeting whistleblowers may thus be more effective at supplementing limited enforcement resources.

various procedural devices,[17] and prosecutorial discretion can balance excessive enforcement zeal. Second, securities regulation works well in the "red light" area where dedicated schemers have sought to exploit investors. In the most egregious instances of securities fraud, where defendants are unwilling to settle on terms palatable to federal enforcers and cases go to trial, the SEC has a notably high success rate.[18] It is in the "yellow light" area, however, where the law is least coherent and least effective.

In the area of securities fraud, even mature and seemingly well-understood claims and doctrines remain muddled.[19] Although high-stakes battles have been waged for decades using section 10(b) and Rule 10b-5 as theories of liability,[20] we are only now, years after the private cause of action was embraced, beginning to explore the meaning of key aspects of the doctrine—materiality, reliance, scienter, and causation. While the problem of keeping elements of an offense or liability rule distinct is by no means unique to the realm of securities law,[21] it is particularly pronounced for two reasons.

First, because securities litigation is so high risk for defendants, these cases—should they survive motions to dismiss and obtain class certification—will almost always settle (and usually in a fairly predictable monetary range).[22] As a result, securities litigation rarely reaches the "merits" stage, and the law evolves extremely slowly when

17. Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 78 (2008). The PSLRA requires a plaintiff to identify each statement said to be misleading and plead particular facts giving rise to a "strong inference" of scienter. *In re* Bos. Scientific Corp. Sec. Litig., 686 F.3d 21, 30 (2012). The statute further provides for an automatic stay of discovery pending resolution of motions to dismiss. Instituto de Prevision Militar v. Merrill Lynch, 546 F.3d 1340, 1345 (11th Cir. 2008).

18. The SEC has won from between 72% and 92% of recent cases brought to trial. *Proceedings of the 2007 Midwest Securities Law Institute*, 8 J. BUS. & SEC. L. 59, 98 (2007). These numbers suggest that the legal tools available to regulators can be effectively deployed against wrongdoers in serious cases.

19. *See* Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 197 (2010) [hereinafter Rapp, *Defense*].

20. Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2126 (1995) (stating securities class actions "have been a prominent feature of the American legal landscape for more than three decades").

21. In fact, this problem is one that recurs wherever legal regimes are constructed that are "parasitic" of existing remedies. Rapp, *Defense*, *supra* note 19, at 198–99. Securities fraud is an area in which existing legal rules were supplemented by federal statutory guidelines that took on a parasitic form. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 919 ("[F]ederal securities regulation is thus parasitic on other law, often including state-law principles of fiduciary obligation.").

22. Coffee, *supra* note 3, at 1570 ("[T]he sharp disparity between the corporation's ability to indemnify settlement costs, and its inability to indemnify judgments established at trial in securities class actions, places overwhelming pressure on defendants to settle.").

it comes to unpacking the nuances of securities fraud doctrine. In other words, we largely know what it takes for a securities case to survive a motion to dismiss, but we know relatively little about what it really takes to win a securities fraud trial.

Second, securities fraud litigation, as currently formulated, is characterized by an exceptionally high level of "elemental bleed." In other words, the considerations that are supposed to drive a court in deciding a single, isolated element also cloud evaluation of other unrelated elements. Materiality, reliance, scienter, and causation should be separate analytical tools used to determine if liability is appropriate—the same way that oxygen and hydrogen atoms are separate constituent parts of water molecules. Yet courts hearing securities fraud cases often look at the same types of studies and the same basic factual indicators to decide supposedly separate section 10(b) and Rule 10b-5 elements.[23] One cannot create more water with just a few more atoms of one of its constituent parts, but in securities fraud, the constituent parts mix into a confusing blur. The result of this intermingling reinforces the difficulty of developing a clean understanding of the doctrine. Securities law, though seemingly structured along the lines of clear rules (both judicially and through statutory reinforcement), is often muddled by "fuzzy standards."[24]

This Essay suggests that courts and the legislature should revisit the basic building blocks of securities fraud liability. In the course of this project, the law should embrace and recognize the degree to which past attempts to formulate securities fraud doctrine are undercut by the many insights of behavioral psychology and experimental economics. The results of such a rewiring would be drastic. Accordingly, three of the basic elements of a section 10(b) and Rule 10b-5 claim[25]—materiality, reliance, and scienter—should be jettisoned (or at least fundamentally rethought).

The Supreme Court had the opportunity to begin this project in a

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23. *See* Michael J. Kaufman & John M. Wunderlich, *Regressing: The Troubling Dispositive Role of Event Studies in Securities Fraud Litigation*, 15 STAN. J.L. BUS. & FIN. 183, 195–98 (2009) (discussing the application of event studies to considerations of materiality, reliance, loss causation, and damages).

24. *See* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 225 (2009) ("Rules are said to be certain and predictable, and standards are said to be flexible and adaptive. On the negative side, rules are said to be rigid and mechanical, and standards are said to be fuzzy and indeterminate.").

25. The basic elements of a 10b-5 claim of fraud are: "(1) fraud or deceit (2) by any person (3) in connection with (4) purchase or sale (5) of any security." HAZEN, *supra* note 4, at 445. The first element, fraud or deceit, requires plaintiffs to show the components of common law fraud: "materiality, reliance, causation and damages." *Id. See also* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005) (discussing the elements of Rule 10b-5).

recently decided case, *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*.[26] The Court granted certiorari to resolve a circuit split on whether a plaintiff must prove materiality at the class certification stage (as required by the First, Second, and Fifth Circuits) or must simply plausibly allege materiality (as held by the Third, Seventh, and Ninth Circuits).[27] The Court also had the opportunity to address whether defendants at the class certification stage must be afforded the opportunity to dispute the efficiency of the market for a security so as to rebut *Basic*'s fraud-on-the-market presumption.[28] The Court decided *Amgen* in a somewhat narrow fashion, ruling that materiality was not a class certification issue.[29] Thus, it may have missed an opportunity to further rethink the building blocks of modern securities fraud doctrine.

II. MATERIALITY: NO ONE CARES ABOUT ANYTHING

Only *material* misstatements or omissions are actionable under section 10(b) and Rule 10b-5.[30] According to the Supreme Court, materiality is defined by the types of "information a reasonable investor would consider significant in making an investment decision."[31] Courts' interpretation of this requirement has been driven by common law concepts.[32] Vague statements and "extremely contingent or highly speculative possibilities" are not considered material.[33] Some degree of "puffing" or "sales talk" is tolerable,[34] but the more probable a contingent result becomes, the more likely an omission or misstatement

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26. 133 S. Ct. 1184 (2013).

27. WILLIAM F. SULLIVAN ET AL., PAUL HASTINGS, AMGEN PUNCTUATES CIRCUIT SPLIT: WHAT MUST PLAINTIFF PROVE TO ESTABLISH THE "FRAUD-ON-THE-MARKET" PRESUMPTION AT CLASS CERTIFICATION? (2011), *available at* http://www.paulhastings.com/assets/publications/2056.pdf.

28. *Amgen*, 133 S. Ct. at 1198. The court reaffirmed the premise of the fraud-on-the-market theory: "[T]he price of a security traded in an efficient market will reflect all publicly available information about a company; accordingly, a buyer of the security may be presumed to have relied on that information in purchasing the security." *Id.* at 1190.

29. *Id.* at 1196.

30. Review 71 v. Alloys Unlimited, Inc., 450 F.2d 482, 485 (10th Cir. 1971); HAZEN, *supra* note 4, at 447.

31. Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988). *See also* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 n.10 (1976) (giving consideration to the "balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability" in determining the general standard for materiality).

32. *See, e.g.*, Holdsworth v. Strong, 545 F.2d 687, 698 (10th Cir. 1976) (likening the materiality of misrepresentations to justifiable reliance on the misrepresentations in a Rule 10b-5 action).

33. HAZEN, *supra* note 4, at 464.

34. Johnson v. Songwriter Collective, LLC, No. 3:05-0320, 2006 WL 861490, at *12 (M.D. Tenn. Mar. 28, 2006).

regarding that potential result is to be deemed material.[35]

Richard Epstein describes securities law disputes on the meaning of materiality as having provided the opportunity to "test and refine traditional tort principles" but describes the matter as "verg[ing] on doctrinal chaos."[36] The problem presented by the Court's current formulation of materiality is the difficulty in identifying what information a "reasonable investor" considers important. Broadly speaking, courts have approached this question in two ways. One practice is fuzzy, flexible, and derivative of the approach taken in *Basic*—to evaluate the relative importance of the information and then adjudicate its materiality.[37] The second approach is numbers-driven—some courts have sided with the defendant when the plaintiff fails to prove that the alleged misinformation at issue was incorporated into stock price (such proof would typically come in the form of an "event study").[38]

Perhaps there is a better way.

The SEC's vision of the reasonable investor centers on the typical "retail" investor.[39] The reasonable investor is neither a sophisticated money manager nor an electronically savvy day trader. Rather, the reasonable investor is an ordinary person who invests money in securities subject to the SEC's regulatory authority. The doctrinal fiction surrounding materiality asks what that person considers important in deciding whether to buy or sell shares, ignoring the fact that the imagined retail investor rarely decides to buy or sell shares.[40]

35. Matrixx Initiatives, Inc., v. Siracusano, 131 S. Ct. 1309, 1318–19 (2011).

36. RICHARD A. EPSTEIN, TORTS § 20.09, at 564 (1999).

37. *See* SEC v. Meltzer, 440 F. Supp. 2d 179, 190–191 (E.D.N.Y. 2006) (rejecting a "formulaic" approach).

38. Stephan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 CASE W. RES. L. REV. 143, 165 (2010). *See also* David A. Hoffman, *The "Duty" to be a Rational Shareholder*, 90 MINN. L. REV. 537, 606 (2006) ("Some have argued that courts ought to equate materiality with market effects: when stock prices react to disclosures, we should presume that the disclosure was material to a reasonable investor. . . . [I]f this is the solution to the problems this Article has uncovered, it may be an impractical one."). In the securities context, an event study gives a "market-based estimate" of "perceived fraud." Banks v. United States, 102 Fed. Cl. 115, 192 (2011).

39. Padfield, *supra* note 38, at 155.

40. According to a recent survey, only 54% of Americans own stock. Dennis Jacobe, *In U.S., 54% Have Stock Market Investments, Lowest Since 1999*, GALLUP (Apr. 20, 2011), http://www.gallup.com/poll/147206/Stock-Market-Investments-Lowest-1999.aspx. Of those owning stock, only 54% own individual stock (as opposed to owning stock through mutual funds). INVESTMENT CO. INST. & SEC. INDUS. ASS'N, EQUITY OWNERSHIP IN AMERICA 14 (1999), *available at* www.ici.org/pdf/rpt_equity_owners.pdf. Moreover, of those owning stock, the majority, in a typical year, will engage in *no* transaction involving the purchase or sale of stock. *Id.* at 24. The law's vision of shareholders involves rational behavior, even though actual shareholder "behavior deviates from economic rationality in both predictable and unpredictable

Instead of trying to imagine whether a "reasonable" investor cares about a particular piece of information when buying or selling shares (which the reasonable investor rarely does), or looking narrowly at how a stock's price has responded to some piece of information (something that surely has little to do with the actions of "reasonable" investors), courts should recognize that reasonable investors care about very little information. All that *should* matter to an average, ordinary investor is the relationship between a particular stock and the investor's broader investment portfolio. In other words, only misstatements that go to *that relationship* should meet the current definition of "materiality."

Guided by the insights of Modern Portfolio Theory,[41] one can argue that a reasonable investor should be investing in a diversified portfolio of assets rather than picking individual securities.[42] Investors may act irrationally by picking stocks, but if so, they act *unreasonably*—the reasonable or rational investor does not place orders based on individual pieces of information about stocks.[43] Any individual stock is selected based only on its relationship to the portfolio as a whole.[44] "Stand-alone" characteristics of individual investments matter only in relation to the portfolio.[45]

Fraud, of course, is a "stand-alone" characteristic. The reasonable investor cares about fraud *only* if the fraud upsets the relationship between a particular investment and the entire portfolio. This situation would arise only if a firm dramatically misrepresents the nature of its activity or the relative risk and return associated with its business venture.[46] Since this case is rare, the reasonable investor simply does not care about fraud in most instances.

If one accepts the proposition that the reasonable investor does not care about fraud, one might take things a step further and wonder why investors would care about any firm-specific disclosure. What does an ordinary, average investor do with a company's numerous disclosure

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ways." Hoffman, *supra* note 38, at 543.

41. *See* Michael C. Macchiarola, *Securities Linked to the Performance of Tiger Woods? Not Such a Long Shot*, 42 CREIGHTON L. REV. 29, 43 (2008) (describing Modern Portfolio Theory's diversification rationale as "generally accepted").

42. Robert N. Rapp, *Rethinking Risky Investments for that Little Old Lady: A Realistic Role for Modern Portfolio Theory in Assessing Suitability Obligations of Stockbrokers*, 24 OHIO N.U. L. REV. 189, 247 (1998).

43. *Id.* at 270.

44. *Id.* at 271.

45. *Id.* at 272.

46. Arguably, this situation occurred in connection with Enron. The company represented that its business was "logistics," when in fact it was a "speculative trading company." Monica Perin, *Enron Misrepresented Origin of Revenue Streams, Koenig Testifies*, HOUS. BUS. J. (Feb. 2, 2006), http://www.bizjournals.com/houston/stories/2006/01/30/daily41.html?page=all.

statements, updates, and annual reports? She throws them in the trash. This is not to say that misstatements in such documents and disclosures should not be actionable. Rather, it is to say that our current structure making them actionable is simply incoherent. While other scholars, such as Professor Stephan Padfield, have suggested reducing the role of materiality as a "gatekeeper" for securities fraud claims,[47] I suggest that the materiality element of section 10(b) and Rule 10b-5 simply be dropped for any claims involving fraud against ordinary investors. As described below, *any* misstatement in connection with the purchase or sale of securities should trigger a reduced level of sanction.[48]

III. RELIANCE: FRAUD ON AN IRRATIONAL MARKET

For a private party to recover under section 10(b) and Rule 10b-5, she must show that her injury resulted from *relying* on a fraudulent claim.[49] The Supreme Court has ruled that plaintiffs are entitled to a presumption of reliance whenever a misstatement or omission artificially affects a security's market price.[50] When securities markets are efficient, misleading information is "injected into the market" and can "move securities prices in an artificial manner."[51] For this shift to occur, the market must be sufficiently active to process information into price, and the misinformation at issue must have been made public.[52]

Basic invited lower courts to develop a body of law for evaluating whether the market for a particular security trades efficiently. Some courts favor a bright-line test, where all stocks traded on a major public "exchange" are treated as *efficient* and all over-the-counter traded stocks are treated as *inefficient*.[53] Others prefer a multifactor test that considers trading volume, the number of analysts following a stock, the number of market makers, and empirical responsiveness to unanticipated announcements.[54] Additional factors identified by courts taking this approach include market capitalization, bid-ask spread, and the stock's float.[55]

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47. Padfield, *supra* note 38, at 193.

48. A sensible caveat would be to limit actionable misstatements to those of a substantive nature and exclude typographical errors from triggering liability.

49. Cent. Bank of Denver, N.A. v. First Interstate Bank, 511 U.S. 164, 178 (1994). Reliance is not required in SEC enforcement actions. SEC v. Apuzzo, 689 F.3d 204, 213 (2d Cir. 2012).

50. Basic Inc. v. Levinson, 485 U.S. 224, 245 (1988).

51. HAZEN, *supra* note 3, at 474.

52. *Id.* at 475.

53. *See* Merritt B. Fox, *Securities Class Actions against Foreign Issuers*, 64 STAN. L. REV. 1173, 1247 n.231 (2012); Epstein v. Am. Reserve Corp., No. 79 C 4767, 1988 WL 40500, at *5 (N.D. Ill. Apr. 21, 1988)

54. Fox, *supra* note 53, at 1247 n.231.

55. Bradford Cornell, *Market Efficiency and Securities Litigation: Implications of the*

The problem with even the most sophisticated of these tests is that they miss the broader meaning of efficiency. A stock might trade efficiently some of the time, for some information types, but then trade inefficiently at other times, for other information types. A stock's price might efficiently process a misstatement but then inefficiently fail to process a correcting statement. Courts strive for a bright-line definition of materiality when the concept of materiality simply may elude such definition.[56]

The result, unfortunately, has been a high level of inconsistency in the courts regarding what makes a market sufficiently efficient to trigger the fraud-on-the-market presumption.[57] The inquiry is expensive and time-consuming; yet it has become "one of the primary gatekeepers to class certification."[58] *Basic*'s adoption of the fraud-on-the-market presumption of reliance was "explicitly justified . . . in terms of policy considerations, explaining that presumptions were widely used in circumstances in which direct proof is difficult."[59] The Court's decision in *Basic* should be characterized not as founded on a now-questionable economic theory, but instead as a policy judgment about the importance of private securities fraud claims.

As I have argued in prior scholarship, rather than seeking to tread through the mess of "factors" identified in the lower courts as signs of efficiency, the Court should simply eliminate the requirement of reliance for secondary market plaintiff securities cases.[60] Giving plaintiffs a presumption of reliance—either in the *Basic* fraud-on-the-market sense or in the "omission" sense[61]—is intended to relieve plaintiffs of practical and evidentiary problems. But the difficulty courts have faced in evaluating market efficiency has undercut the effectiveness of the *Basic* presumption at achieving this goal. As in the case of many state securities fraud provisions,[62] and in connection with

Appellate Decision in Thane, 6 VA. L. & BUS. REV. 237, 247 (2011).

56. *See, e.g.*, Asher v. Baxter Int'l Inc., 377 F.3d 727, 732 (7th Cir. 2004) (assuming that stock price must incorporate both cautionary statements and half-truths if stock trades in an informationally-efficient market).

57. Charles R. Korsmo, *Mismatch: The Misuse of Market Efficiency in Market Manipulation Class Actions*, 52 WM. & MARY L. REV. 1111, 1132 (2011).

58. *Id.* at 1134.

59. Jill E. Fisch, *The Trouble with* Basic*: Price Distortion after* Halliburton, WASH. U. L. REV. (forthcoming 2013) (manuscript at 18), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2153133.

60. Geoffrey Christopher Rapp, *Proving Markets Inefficient*, 10 U. MIAMI BUS. L. REV. 303, 327 (2002).

61. *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153 (1972).

62. *See* Jennifer J. Johnson, *Secondary Liability for Securities Fraud: Gatekeepers in State Court*, 36 DEL. J. CORP. L. 463, 476 n.69 (2011) (identifying state approaches that do not require reliance in privity actions).

other provisions of the federal securities laws,[63] courts should not require plaintiffs to prove reliance.

IV. SCIENTER: THE RECKLESSNESS CONUNDRUM

Plaintiffs in section 10(b) and Rule 10b-5 cases must demonstrate defendants *acted with scienter*, which can be shown by either intent to deceive or reckless disregard of truth.[64] Clearly, intentional misrepresentations satisfy the scienter element of section 10(b) and Rule 10b-5.[65] The Supreme Court has yet to officially recognize that recklessness would fulfill the scienter requirement, but that is a proposition "the large majority of lower federal courts have accepted."[66] Determining what kind of conduct falling short of knowingly made misrepresentations should be actionable is the thorny task. Under the PSLRA, plaintiffs must plead facts that create a "strong inference of scienter."[67] The Act, however, provides little guidance as to what kinds of specific facts create a sufficiently poignant inference of fraud to survive a defendant's motion to dismiss.[68]

While we have an idea as to what kinds of facts can *negate* recklessness—e.g., where a corporation's disclosures are supported by reasonable reliance on outside experts—we know very little about what *constitutes* recklessness. In a recent case involving the Madoff Ponzi scheme,[69] the Second Circuit in *Meridian Horizon Fund, LP v. KPMG (Cayman)* held that "recklessness must be conduct that is highly unreasonable, representing an extreme departure from ordinary care [and] must, in fact, approximate an actual intent to aid in fraud being perpetrated by the audited company."[70] This approach to analyzing recklessness is similar to that undertaken in common law tort cases. Recklessness is defined as a midpoint between negligent and intentional

63. For instance, reliance is not required under section 11 of the 1933 Act. James D. Gordon III, *Defining a Common Enterprise in Investment Contracts*, 72 OHIO ST. L.J. 59, 64 n.31 (2011).

64. *In re* VeriFone Holdings, Inc. Sec. Litig., 704 F.3d 694, 701 (9th Cir. 2012).

65. *In re* Empyrean Biosciences, Inc. Sec. Litig., 255 F. Supp. 2d 751, 765 (N.D. Ohio 2003).

66. HAZEN, *supra* note 3, at 458. *See also* Nathenson v. Zonagen Inc., 267 F.3d 400, 408–09 (2001) (discussing the circuit courts' adoption of recklessness as a basic for securities fraud liability).

67. Tellabs, Inc. v. Makor Issues & Rights Ltd., 551 U.S. 308, 323 (2007).

68. HAZEN, *supra* note 4, at 459.

69. Madoff's Ponzi scheme may have had a satisfying ending, with Madoff sentenced to 150 years in jail, but it also serves as a vivid reminder of the limitations of federal securities enforcement. *See generally* U.S. SEC. & EXCH. COMM'N, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME (Aug. 31, 2009), *available at* http://www.sec.gov/news/studies/2009/oig-509.pdf.

70. Meridian Horizon Fund, LP v. KPMG (Cayman), 487 F. App'x 636, 640 (2d Cir. 2012) (internal citation omitted).

conduct, and it is delineated by reference to and use of terminology evocative of both negligence ("unreasonable") and intentional tort ("actual intent").[71] This standard leaves courts ill-equipped to divide recklessness from the two poles—negligence and intent—against which it is defined.[72] What, for instance, does it mean to "approximate" intent, as the *Meridian Horizon Fund* court suggested a plaintiff's evidence must establish?[73]

The scienter element has "been confused to the point that courts sometimes simply say that recklessness establishes intent, which is nonsensical and, for criminal lawyers, as unpleasant as the sound of fingernails on a chalkboard."[74] It is unclear whether recklessness is a subjective concept involving deliberation (like intent) or an objective concept (like negligence). Adding to this confusion are qualifications *within* recklessness developed by some courts—unpersuasive distinctions between "conscious recklessness," "deliberate recklessness," and "simple recklessness."[75] Simply put, courts are "mired in threshold litigation about the particularity and sufficiency of scienter allegations."[76]

Drawing on the insights of behavioral psychology and neuroscience, the effort to linguistically disaggregate human decision-making into negligent, reckless, and intentional categories may be doomed to failure.[77] Courts may be searching for something that does not exist; or, at a minimum, searching for something that cannot, within the limitations of judges and juries, be found. In fact, the one set of actors whose conduct seems to comport with doctrinal articulations of recklessness are teenagers and adolescents, who, outside of the social media industry, are rarely responsible for communicating with investors.[78]

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71. Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 116–17 (2008) [hereinafter Rapp, *Wreckage*].

72. *See id.* at 118–19 (discussing the inconsistent and unpredictable court decisions defining recklessness, as well as the difficulty the American Law Institute has had in defining it in its Restatements).

73. *Meridian*, 487 F. App'x at 640.

74. Samuel Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511, 559–60 (2011).

75. Rapp, *Wreckage*, *supra* note 71, at 136–40 (discussing the inconsistencies among how courts define recklessness). *See, e.g.*, Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1324 (2011) (assuming, without deciding, that "deliberate recklessness" can satisfy the scienter requirement).

76. Michael J. Kaufman & John M. Wunderlich, *Messy Mental Markers: Inferring Scienter from Core Operations in Securities Fraud Litigation*, 73 OHIO ST. L.J. 507, 509 (2012) [hereinafter Kaufman & Wunderlich, *Messy Mental Markers*].

77. *See* Rapp, *Wreckage*, *supra* note 71, 155–56 (discussing how behavioral science has proved that humans actually tend to underestimate risk as opposed to consciously disregard risk).

78. *See, e.g.*, Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-*

In cases where conduct is labeled reckless, an actor proceeds on a dangerous course of action after miscalculating or failing to appreciate a risk. But the actor may have acted under the much-discussed and robustly documented over-optimism bias,[79] in which case it is difficult to say that the person acted with conscious recklessness.[80] Neuroscience has revealed the degree to which human brain functions are automated; in fact, the default way the brain works is through automated processes.[81] This is what Daniel Kahneman calls "System 1" thinking, which "operates automatically and quickly, with little or no effort and no sense of voluntary control."[82] Recklessness, defined by reference to consciousness, does not leave room for the automated decision-maker, leaving us with both false positives and false negatives.[83] Actors engage in a high level of self-deception—that is to say, they may have misled *themselves* about the riskiness of a course of conduct. Self-deception is inconsistent with the concept of conscious decision-making[84]—what Daniel Kahneman labels "System 2" thinking, or "allocat[ing] attention to the effortful mental activities that demand it, including complex computations."[85] Recklessness as a legal concept is also cold and calculating, ignoring that decision-making is often guided by emotions,[86] particularly in the face of risky situations

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Taking, 28 DEV. L. REV. 78 (2008) (discussing the difference between adult and adolescent risk-taking and how mid-adolescence is the height of risk-taking and recklessness).

79. Over-optimism bias describes the theory that people believe that negative events are less likely to occur to them than to others. Rapp, *Wreckage*, *supra* note 71, at 155–57. The quintessential example is drunk driving, as most people know the risk of driving drunk but believe they will be the "lucky ones," and they choose to drive drunk nevertheless. *Id.* *See also* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 260 (2011) ("[P]eople tend to be overly optimistic about their relative standing on any activity in which they do moderately well.").

80. *See* Rapp, *Wreckage*, *supra* note 71, at 157 (arguing that because all people suffer from over-optimism bias and cannot truly appreciate risk, it is unfair to draw fine lines between negligence, recklessness, and intent).

81. *See id.* at 163–64.

82. KAHNEMAN, *supra* note 79, at 20. *See also id.* at 21 (listing examples of automatic activities attributed to System 1, including detecting hostility in a voice, driving a car on a barren road, and comprehending simple sentences).

83. Rapp, *Wreckage*, *supra* note 71, at 165. While individuals make decisions automatically, some decisions are made through conscious thought. *Id.* When behavior results from an interaction between automatic and conscious decisions, people falsely attribute the process to conscious decision-making. *Id.*

84. *Id.* at 166–67.

85. KAHNEMAN, *supra* note 79, at 21. *See also id.* at 22 (listing examples of the highly diverse operations of System 2 thinking, including focusing on the voice of one particular person in a throng of people, filling out income tax forms, and checking the accuracy of a complex argument).

86. *See* Rapp, *Wreckage*, *supra* note 71, at 168–69 (discussing how recent scholarship has demonstrated that humans act based on their emotions more than through conscious decision-making, especially in ambiguous situations).

and danger.[87]

So what is to be done to address the recklessness conundrum in securities fraud litigation? There are two main threads in the scholarship. One group suggests that courts look to verifiable indicators of recklessness. The other faction simply wants to eliminate recklessness as requisite scienter—bifurcating securities fraud into a set of claims actionable via negligence and a set actionable only with proof of deliberation and intent.

Dean Michael Kaufman and John Wunderlich's work suggests the former approach.[88] They argue that the objectively verifiable fact that a senior executive made a misstatement regarding the core of a firm's operations should create an inference of recklessness sufficient to win a securities fraud claim.[89] This proposal has some appeal—it eliminates the search for a speaker's subjective state of mind in favor of a cleaner solution.

Despite its appeal, this proposal invites two questions. First, courts historically have been reluctant to use circumstantial evidence to establish recklessness.[90] In a sense, Dean Kaufman's proposal involves using "core operations,"[91] the way tort law uses circumstantial evidence in *res ipsa loquitor* cases.[92] My sense is that courts will be reluctant to do so, given the inherently *subjective* inquiry recklessness involves.[93]

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87. While disclosures in the financial industry might appear free from emotion, the financial industry may in fact be characterized by a high level of irrational "Wall Street Macho" and arrogance. *See* Elisabeth Prügl, *"If Lehman Brothers Had Been Lehman Sisters . . .": Gender and Myth in the Aftermath of the Financial Crisis*, 6 INT'L POL. SOC. 21, 31 (2012).

88. *See generally* Kaufman & Wunderlich, *Messy Mental Markers*, *supra* note 76.

89. *Id.* at 509.

90. There are very few tort law cases discussing whether *res ipsa* is available to create an inference of recklessness, as opposed to negligence. Those cases that do exist—mostly from the time of automobile guest statutes—hesitate to allow plaintiffs to use circumstantial evidence to support *res ipsa*. *See, e.g.*, Feld v. Borkoski, 759 N.W.2d 2, 6 n.2 (Iowa Ct. App. 2008) (*res ipsa* not applicable where plaintiff must prove recklessness), *vacated* 790 N.W.2d 72 (Iowa 2010); Johnson v. Johnson, 174 N.W.2d 444, 446 (Iowa 1970) (*res ipsa* will not support a finding of recklessness); Krell v. May, 149 N.W.2d 834, 837 (Iowa 1967) (same); Burghardt v. Olson, 354 P.2d 871, 874 (Or. 1960) (same).

91. A firm's core operations concern is its "primary product or service," as well as anything "that might affect the company in a significant way." Kaufman & Wunderlich, *Messy Mental Markers*, *supra* note 76, at 517–18. The "core operations inference" is a "common sense notion that senior management is or should be aware of facts material to the company and investors." *Id.* at 518. When senior management speaks on those matters and does so in a way that misrepresents, the inference would posit that such misrepresentations represented recklessness.

92. *See* RESTATEMENT (THIRD) OF TORTS § 17 (2010).

93. In *Puskala v. Koss Corp.*, securities fraud plaintiffs tried to use circumstances surrounding an embezzlement to show recklessness. The court described the plaintiff's' argument as a "distorted form of res ipsa loquitor" and found it unpersuasive. 799 F. Supp. 2d 941, 950–51 (E.D. Wis. 2011). *See also* Gebhart v. SEC, 595 F.3d 1034, 1042 (9th Cir. 2010) ("Scienter, however, is a *subjective* inquiry. It turns on the defendant's actual state of mind." (emphasis

Second, if one accepts the broader proposal that circumstantial evidence can establish scienter in securities fraud cases, why not take things a step further and allow "core operations" evidence to create an inference of *intent*? In other words, the core operations presumption could provide an equally persuasive inference that senior managers acted with *knowledge*, thereby allowing recovery even if securities law rejects the idea that recklessness could suffice to establish scienter.

The second approach involves doing away with recklessness and instead bifurcating securities fraud into two categories: the traditional core fraud/deception cases for which evidence of intent is required, and another cause of action for misrepresentation, for which negligence alone would be sufficient. This proposal would structure the penalties, including damages, differently across the two categories. Thus, while an intentional wrongdoer would face stiffer sanctions and have greater responsibility for investor losses, a merely negligent actor would receive less severe rebuke. Though it stands against the statutory tradition of the PSLRA,[94] this proposal is in fact consistent with broader shifts in American misrepresentation law, which increasingly allows claims for negligence in business relationships.[95]

I suggest a third way to treat scienter in securities fraud litigation (though admittedly one closer to the second approach). Instead of allowing claims for *negligence*, courts should allow securities misstatement claims to be brought through *strict liability*, with a second category, involving more serious sanctions, for misstatements *with aggravation*. Any misstatement would trigger liability, subject to a modest sanction, and evidence associated with a traditional scienter analysis would increase the gravity of an offense and trigger increased punishment or sanction.

V. PROPOSAL

So what can courts and/or Congress do to clean up the securities fraud claims mess? A more orderly, simpler approach would both ensure the deterrence and investor-confidence goals of federal regulation and protect defendant companies from meritless "strike suits."[96] Here are some preliminary thoughts about a different approach

added)).

94. The PSLRA requires particularized pleading creating a "strong inference" with regard to each misstatement or omission that "the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (2006).

95. Section 522 of the Restatement (Second) of Torts helped fuel the expansion of claims involving professionals who negligently supplied information. *See* Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 816 (2006).

96. A "strike suit" is a "frivolous securities class action[] that [subjects] defendants to the

to securities fraud.

Instead of modeling private federal securities fraud class actions on state common law fraud claims (with a confusing overlap created by various federal statutes), a better parallel might be state deceptive and/or false advertising statues. These state approaches, of course, derive inspiration from the same kinds of common law claims as does federal securities law. However, a number of states have adapted these common law requirements for reasons of practicality and in recognition that common law claims constructed around individual interactions are ill-suited for regulating disputes between a single defendant and a diffuse set of victimized plaintiffs.

Secondary market securities fraud claims could be divided into two categories. The first would cover "plain vanilla" securities fraud against a dispersed set of shareholders trading in a secondary market setting. The basic elements of a claim would be: a false statement, in connection with the purchase or sale of a security. A modest statutory damages remedy would attach to each violation, allowing plaintiffs to recover without proving actual damages.[97] Proof of individual reliance would not be required. Also, instead of a presumption of reliance based on market efficiency, a rethought presumption based on the nature of the misstatement of omission would be embraced. A plaintiff could bring a claim wherever the false statement "has the *tendency or capacity* to mislead consumers," which is the fairly dominant approach under state false advertising laws.[98] Scienter also would not be required. As is the case with some consumer deception statutes, plaintiffs could either proceed without any proof of intent,[99] or without proof of intent whenever an affirmative misrepresentation (as opposed to an omission or concealment of facts)[100] was involved.[101] Materiality, rather than

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unappealing choice of settling claims, however meritless, or risking extravagant discovery and trial costs." Freeman Invs., L.P. v. Pac. Life Ins. Co., 704 F.3d 1110, 1114 (9th Cir. 2013).

97. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 22, 23 (2005). Plaintiffs might be called upon to prove a cognizable *injury*, without being required to prove *actual losses*.

98. *Id.* at 19. *See* Daniel D. Blinka & Thomas J. Hammer, *Court of Appeals Digest*, WIS. LAWYER, Nov. 2006, at 43 (explaining that reliance is not always required for false advertising claims); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. LEGIS. 1, 24 (2006). *See also* Weinberg v. Sun Co., Inc., 740 A.2d 1152, 1169 (Pa. Super. Ct. 1999) (finding individual reliance was not required to establish an unfair trade practice claim), *aff'd in part, rev'd in part*, 565 A.2d 442 (Pa. 2001).

99. Schwartz & Silverman, *supra* note 97, at 20.

100. The line between omissions and misstatements, unfortunately, remains somewhat "fuzzy." LOUIS LOSS ET AL., 2 FUNDAMENTALS OF SECURITIES REGULATION 1655 (6th ed. 2011).

101. Schwartz & Silverman, *supra* note 97, at 20.

being a required element of a plaintiff's claim, would simply be presumed.[102] A fee- and cost-shifting provision could incentivize attorneys to bring actions concerning securities fraud even in the absence of the availability of massive settlements.[103]

Ultimately, an approach along these lines would improve the effectiveness of courts in resolving securities law disputes. Courts would no longer require complex inquiries created by the current convoluted set of rules. Plaintiffs could bring private actions to supplement governmental resources without exposing actors responsible for relatively "technical" violations of the securities laws to massive potential liability. Freed from that concern, defendants could more vigorously contest the underlying elements of a plaintiff's claim at trial, and greater clarity in the rules would evolve with a more significant share of courts resolving cases on their merits.

In a second category of cases, additional "aggravation" could justify the imposition of higher statutory damages or even punitive relief. Sources of aggravation could include demonstrated proof of investor losses or high levels of intent to defraud.

An obvious downside of this two-pronged proposal is that it would eliminate the "investor compensation" aspect of private securities fraud claims. That result, of course, may not be a problem if one accepts the "circularity" view of private securities claims—that diversified shareholders are just as likely to be winners as losers in securities cases.[104] Moreover, in appropriate cases, the SEC can utilize its recently expanded powers to obtain restitution and investor compensation.[105]

CONCLUSION

This Essay has demonstrated that the three basic building blocks of section 10(b) and Rule 10b-5 litigation—materiality, reliance, and scienter—are problematic. Addressing these three aspects of securities litigation should be a starting point for the Supreme Court and

102. *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965) (noting that materiality can be inferred from deception). So long as the falsehood was *capable* of producing reliance, courts would deem it material. Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. REV. 99, 107–08 (2010).

103. Schwartz & Silverman, *supra* note 97, at 26–27.

104. James J. Park, *Securities Class Actions and Bankrupt Companies*, 111 MICH. L. REV. 547, 579–80 (2012). *See also* Coffee, *supra* note 3, at 1586 (arguing that it is an "inescapable fact" that the "securities class action is unlikely to afford significant compensation to shareholders").

105. Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 504 n.14 (2011) (discussing the SEC's powers to compensate investors via disgorgement remedies).

Congress, but the remaining work to be done on other pieces of this doctrine deserves reconsideration.

For instance, loss causation may improperly conceptualize the harm that results from securities fraud. The causation component of a Rule 10b-5 claim requires, in part, as the Court ruled in *Dura*, that the plaintiff establish a "causal connection" between the transaction and loss.[106] Plaintiffs must show more than just an inflated price; instead, they must show an actual economic loss.[107] *Dura* held that a mere drop in stock price after revelation of the truth behind a misstatement would not suffice.[108] Later, in *Erica P. John Fund, Inc. v. Halliburton Co.*, the Court clarified that loss causation was a merits issue, not one to be determined at the class certification stage.[109] Despite this seemingly clear guidance, courts "continue to struggle with loss causation's standard of proof."[110] Recent trials have involved competing experts, dueling event studies, and confused juries.[111]

Loss causation is a problematic inquiry in part because investor losses are not the reason one worries about securities fraud. Instead, securities fraud poses a policy challenge because it reduces investor faith in the market.[112] Compensation should be thought of as an ancillary goal. Deterrence and investor confidence arguably could be achieved in a cheaper, cleaner fashion if a statutory damages approach were selected for securities fraud claims, similar to that available in False Claims Act cases,[113] Truth in Lending Act litigation,[114] and under some state deceptive advertising laws and securities statutes.[115]

Amgen represented an opportunity for the Supreme Court to begin the work of rebuilding a muddled and messy area of federal practice. The Court chose the safe approach, deciding the case without revisiting the misshapen building blocks of securities litigation. Work remains to be done.

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106. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342 (2005).

107. *Id.*

108. *Id.*

109. 131 S. Ct. 2179, 2185–86 (2011).

110. Andrew M. Erdlen, Note, *Timing is Everything: Markets, Loss, and Proof of Causation in Fraud on the Market Actions*, 80 FORDHAM L. REV. 877, 880 (2011).

111. *Id.* at 916.

112. SEC v. Palmisano, 135 F.3d 860, 866 (2d Cir. 1998).

113. False Claims Act, 31 U.S.C. §§ 3729–3733 (2006 & Supp. IV 2011).

114. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667 (2006)).

115. *See* Ryon M. McCabe, *Statutory Damages Under the Florida Securities and Investor Protection Act: How to Calculate and Apply Rescission Damages*, FLA. BAR J., Oct. 2009, at 32, 34 (discussing the difference between statutory damages and compensatory damages in securities claims).