

# A Case for Amending the Private Securities Litigation Reform Act: WHY INCREASING SHAREHOLDERS' RIGHTS TO SUE WILL HELP PREVENT THE NEXT FINANCIAL CRISIS AND BETTER INFORM THE INVESTING PUBLIC

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## I. INTRODUCTION

The Private Securities Litigation Reform Act of 1995<sup>1</sup> (“PSLRA” or “Act”) drastically altered private securities litigation by erecting a high barrier against fraud-based shareholder lawsuits and burdening shareholders with additional pleading requirements when shareholders sue. Motivated by overwhelming episodes of abusive litigation<sup>2</sup> that unduly burdened companies,<sup>3</sup> Congress overrode President Clinton’s veto<sup>4</sup> to enact the PSLRA and instituted heightened pleading standards for fraud-based shareholder lawsuits. As a result, federal securities fraud actions have noticed notable changes.

The PSLRA statutory changes primarily impacted shareholder suits by enhancing the pleading requirements a shareholder complaint must meet in two primary ways. First, a complaint must “plead with particularity” (1) each statement alleged to have been misleading, (2) the reason why the statement was misleading, and (3) all facts on which that belief is formed.<sup>5</sup> Secondly, any allegation as to the state of mind must state with “particularity” facts amounting to “a strong inference” that the defendant acted with the required state of mind.<sup>6</sup>

In light of recent episodes concerning corporate mismanagement,<sup>7</sup> Congress would be well advised to reconsider lowering the pleading requirements it imposed upon shareholders when enacting the PSLRA and creating guidelines that impose higher Rule 11 sanctions when there has been abusive litigation. More compelling still is that statistical data has concluded that the PSLRA has been ineffective in curbing abusive litigation,<sup>8</sup> and other commentators have discussed the “procedural catch 22”<sup>9</sup> that the demanding procedural requirements place upon plaintiffs while depriving them of discovery. Lowering the pleading requirements would provide greater oversight for stockholders and encourage sound management by exposing poor corporate practices. Even in cases where shareholders lose at trial, the investing public would be better informed by the increased corporate transparency resulting from the discovery process—both goals advanced by the Securities Exchange Acts of 1933 and 1934.<sup>10</sup> Concerns about vexatious litigation and *in terrorem* complaints can be addressed by increased Rule 11 sanctions already in the Act. Like sentencing guidelines used in criminal cases,

Lowering the pleading requirements would provide greater oversight for stockholders and encourage sound management by exposing poor corporate practices.

Congress should set up guidelines that classify different degrees of Rule 11 violations and escalate penalties as the violation is deemed more egregious by a court. This will address concerns of abusive litigation by tailoring a violation to the degree of the penalty while also not unfairly inhibiting plaintiffs from entering the courthouse doors.

## II. BACKGROUND TO THE PSLRA AND CONGRESS' EFFORTS TO CORRECT ABUSIVE LITIGATION PRACTICES

### A. *In Terrorem* Complaints and Abusive Litigation which Concerned Congress before they Enacted the PSLRA

One of the primary concerns which led Congress to enact the PSLRA was the danger posed by vexatious litigation, sometimes initiated merely whenever a stock price declined. The Court first noted this danger in Blue Chip Stamps v. Manor Drug Stores,<sup>11</sup> where the Court observed existing dangers<sup>12</sup> with the possibility of broadly expanding the range of plaintiffs that could sue under Section 10(b) of the Exchange Act. In Blue Chip, the Court considered whether offerees of a stock, made pursuant to an antitrust consent decree, could maintain a private cause of action under 10(b) when the offerees neither purchased nor sold any of the offered shares.<sup>13</sup> While Blue Chip predates the PSLRA, the Court’s opinion signals one of the first instances where liberal pleading rules in securities litigation received criticism after abusive litigation was employed.

It was precisely this abusive litigation that Congress sought to dispose of when they enacted the PSLRA, because Congress largely reasoned that meritless suits were “a social cost, rather than a benefit.”<sup>14</sup> More precisely, Congress sought to deter meritless suits which had value to plaintiffs simply because they

could consume large amounts of time and detract from business activity.<sup>15</sup> Congress noted that “professional plaintiffs” who would own only nominal amounts in a wide array of companies and would thereby possess standing to sue a broad array of issuers.<sup>16</sup> Such complaints, often initiated only after a company’s stock price would drop, would amount to nothing more than “fishing expeditions,”<sup>17</sup> where plaintiff’s counsel would seek to obtain any damaging evidence against the defendant in the suit, often without good faith anticipation of any wrongdoing. Thus, the settlement value of the claim was often proportional to the money required to mount a defense. These complaints are precisely those which the Court described as *in terrorem*<sup>18</sup> because they were filed merely to generate fear and were limited in value insofar as they implicated a cost to the defendant in preparing a defense. In addition to these abusive practices motivating suits, plaintiffs would often initiate a “race to the courthouse” in order to be lead plaintiff and obtain the financial benefits of that designation.

## B. How Congress Addressed these Problems when it Enacted the PSLRA

In response to these concerns, Congress devised three amendments within the PSLRA to curb the problems associated with abusive and vexatious litigation. First, Congress required that plaintiffs state with particularity the facts constituting the alleged violation, and to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”<sup>19</sup> Second, Congress sought to eliminate problems generating a “race to the courthouse” by specifying criteria to determine the “most adequate plaintiff,”<sup>20</sup> mainly relating to the institutional investor owning the largest portion of the issuer’s stock. Third, Congress addressed Rule 11 sanctions against attorneys who bring suits without merit, in hopes of awarding a sufficient sanction to make the defendant whole once the action terminates.

### 1. Pleading with Elements “Particularity” and Alleging “Strong Inference” of the Required State of Mind While Denying Discovery

In order to avoid dismissal of a cause of action, Congress required that a complaint, “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”<sup>21</sup> In Tellabs, Inc. v. Major Issues & Rights, Ltd.,<sup>22</sup> the Court elaborated upon the language of “rising to a strong inference” to give litigants more context as to what would be a sufficiently plead complaint. In Tellabs, the Court held that in order for an inference to qualify as “strong” as required under 15 U.S.C. §78 u-4 (b), such an inference must be cogent and equally “as compelling as any opposing inference of nonfraudulent intent.”<sup>23</sup> Moreover, the Court added that in determining whether a complaint sufficiently alleged a “strong



inference,” a complaint had to be viewed in its entirety and opposing inferences, ones weighing against the legally required state of mind, had to be considered by the court.<sup>24</sup> In addition to the changes concern pleadings, the PSLRA limits a plaintiff’s access to information by requiring that discovery be stayed, pending the resolution of all dispositive motions.<sup>25</sup>

Tellabs involved a group of shareholders suing under Section 10(b) of the Exchange Act while claiming that the issuer falsely represented the value of its stock.<sup>26</sup> In their complaint, the investors alleged that Tellabs, “falsely reassured public investors... that Tellabs was continuing to enjoy strong demand for its products and earning record revenues,” and that in doing so, Tellabs falsely represented the company’s financial health. The Court, while articulating the proper standard under 15 U.S.C. §78 u-4, vacated the Seventh Circuit’s conclusion that a “strong inference” merely required the complaint to allege facts from which, if true, a reasonable person could infer that the defendant acted with the required intent.<sup>27</sup>

In addition to changes created by the PSLRA, the Federal Rules of Civil Procedure impose a more demanding pleading standard for stockholders seeking to hold corporate insiders liable. Rule 9(b) requires that a plaintiff “must state with particularity the circumstances constituting fraud or mistake,”<sup>28</sup> when pleading fraud or mistake. Moreover, the Supreme Court also

influenced pleading requirements when it decided *Bell Atlantic Corp. v. Twombly*.<sup>29</sup> In *Twombly*, the Court altered the traditional pleading requirements under Rule 12(b)(6) to include requiring, “enough facts to state a claim to relief that is plausible on its face.”<sup>30</sup> In doing so, the Court added to the pleading requirements a plaintiff was required to meet in order to survive a motion to dismiss under Rule 12(b)(6).

## ***2. Professional Plaintiffs, Races to the Courthouse and the Lead Plaintiff as an Institutional Investor***

Abusive litigation took place when “professional plaintiffs” raced to the courthouse to become lead plaintiffs in a suit. As a result, Congress enacted several provisions in the PSLRA to address these problems. First, Congress limited the role of lead plaintiff to the “most adequate plaintiff.” This determination is made by court and places the plaintiff having the greatest financial stake in the outcome of the suit as the “most adequate plaintiff” to be the lead plaintiff in the suit.<sup>31</sup> Previously, the lead plaintiff was determined on a “first come, first serve” basis, leading “plaintiffs’ attorneys to become fleet of foot and sleight of hand. Most often speed has replaced diligence in drafting complaints.”<sup>32</sup> Counsel had incentive to be the lead plaintiff because often such would bring financial benefits.<sup>33</sup> Indeed, a class of “professional plaintiffs”<sup>34</sup> emerged who owned merely nominal shares in large issuers and thereafter sued for meritless reasons.<sup>35</sup>

Accordingly, Congress sought to limit the financial incentives leading plaintiffs to race to the courthouse and being lead plaintiff. First, the PSLRA limited a lead plaintiffs award only a pro-rata share of the plaintiff’s ownership in the issuer.<sup>36</sup> Thereafter, the PSLRA specified criteria for courts to determine the “most adequate plaintiff,”<sup>37</sup> mainly relating to the institutional investor owning the largest portion of the issuer’s stock. This resulted in the lead plaintiff as limited to “institutional investors,” those investors holding the largest share of company stock. Congress reasoned that institutional investors were the ones that could most benefit from meritorious litigation since they also had the largest interest in the financial stake of the companies they owned.<sup>38</sup> As a result, the PSLRA sought to eliminate the financial incentives for “professional plaintiffs” to be the lead plaintiff by changing awards to only a pro rata share of the stock ownership and giving the privilege of being lead plaintiff to institutional investors who could best represent the interests of the stockholders.

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## ***3. Mandatory Rule 11 Sanctions to Make Whole Those Subjected to Bad Faith Litigation***

In addition to the procedural mechanisms enacted in the PSLRA, Congress decided to further deter abusive litigation by imposing mandatory Rule 11 sanctions<sup>39</sup> on plaintiffs counsel at the conclusion of litigation. Rule 11 of the Federal Rules of Civil Procedure is intended to deter attorneys from filing frivolous lawsuits in the interests of judicial efficiency.<sup>40</sup> More specific to securities litigation, Congress required courts to conduct a mandatory review as to whether counsel violated Rule 11 at the conclusion of the litigation.<sup>41</sup> The Act creates a rebuttable presumption<sup>42</sup> that any finding of a Rule 11 violation entitles the opposing part to “reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.”<sup>43</sup> In enacting such provisions, Congress recognized that previous Rule 11 sanctions had been an ineffective mechanism to deter abusive litigation, and that courts were often overly reluctant to impose damages.<sup>44</sup> As a result, Congress intended to “give teeth” to Rule 11 sanctions and aspired to have the Rule 11 sanction make the wronged party whole after the litigation while also deterring future conduct.<sup>45</sup>

## **III. REDUCING THE PSLRA’S PLEADING REQUIREMENTS WILL IMPROVE CORPORATE TRANSPARENCY AND BETTER INFORM THE INVESTING PUBLIC BY EXPOSING POORLY-REASONED CORPORATE PRACTICES**

In light of recent public events concerning inadequate corporate transparency and ensuing financial crisis,<sup>46</sup> Congress would be well advised to amend the PSLRA to allow more shareholders to sue. Doing so will increase corporate transparency through the discovery process and further the aims of better informing the investing public, both aims squarely advanced by the 33 and 34 Acts.<sup>47</sup> Moreover, existing pleading requirements in Federal Rule of Civil Procedure 9 and Supreme Court jurisprudence already require plaintiffs to allege facts with particularity and to allege enough to make a case for relief plausible on its face, thus making the particularity requirements of the PSLRA duplicative and unduly burdensome for plaintiffs. Lastly, concerns over abusive and meritless litigation can be addressed by maintaining and even enhancing the current Rule 11 framework for sanctions by created a multi-tiered classification of violations, which would entitle the aggrieved party to double or triple fees if a court so found necessary to deter baseless litigation.

### **A. Even if Plaintiffs Lose at Trial, the Discovery Process will Better Inform the Investing Public, a Fundamental Aim of the 33 and 34 Acts**

Protecting investors by requiring corporate transparency has been a central aim of securities policy since the enactment of the Securities Acts of 1933 and ‘34.<sup>48</sup> Presently, all discovery is stayed<sup>49</sup> pending the resolution of all dispositive pre-trial motions, thus erecting a high procedural barrier for plaintiffs to



obtain vital non-public information to form their case-in-chief. While discovery is a time consuming process that often requires substantial resources,<sup>50</sup> the discovery process does have the benefit of providing shareholders access to information through depositions, access to corporate documents and other sources of information. Allowing discovery would also give shareholders the opportunity to obtain targeted information about the corporate practices which has raised suspicion and altered shareholders that some illegal activity is taking place. Lastly, the enhanced possibility that corporate officers and directors could be sued will have the ripple effect of further altering corporate actors of the consequences of breaching any legal duties, and thereby promote more transparent corporate conduct. Accordingly, allowing more suits to proceed to discovery will further enhance corporate transparency and encourage proper conduct by corporate officials.

### **B. Federal Rule of Civil Procedure 9 and *Twombly* Already Require that a Complaint Plead with Specificity and Allege Facts Making a case for Relief Plausible on its Face.**

The PSLRA sought to curb abusive litigation by erecting a higher barrier for plaintiffs to avoid dismissal of their claim. The PSLRA requires a complaint to plead with particularity (1) each statement alleged to have been misleading, (2) the reason why the statement was misleading, and (3) all facts on which that belief is formed.<sup>51</sup> Moreover, the complaint must state with particularity facts amounting to “a strong inference” that the defendant acted with the required state of mind.<sup>52</sup> In outlining

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such a requirement, Congress intended to enhance the pleading requirements and place a more demanding burden on plaintiffs if they intended to avoid having their complaint dismissed under Rule 12(b)(6).<sup>53</sup>

Nevertheless, the interests represented by §78 u-4 (b)(1) and (b)(2) are already codified within the existing requirements that plaintiffs must meet, making such requirements duplicative and unduly burdensome in many cases. Federal Rule of Civil Procedure 9 applies to actions having as elements “fraud or mistake” and requires that “the circumstances constituting fraud . . . be stated with particularity.”<sup>54</sup> Indeed, while Rule 9 is tailored to fraud actions, Rule 9 is not the sole mechanism for ensuring that a complaint contains a sufficient factual basis to proceed to trial. In *Twombly*, the Court elaborated that a complaint needed to allege requiring, “enough facts to state a claim to relief that is plausible on its face.”<sup>55</sup> After *Twombly*, a complaint could longer proceed to trial under the “no set of facts” standard from *Conley v. Gibson*.<sup>56</sup>

As a result, *Twombly* and Rule 9 already encompass many of the concerns that Congress contemplated when it passed the PSLRA in 1995, and such requirements in the Act are duplicative and unfairly burden plaintiffs when pleading their case.<sup>57</sup> Rule 9, like §78 u-4 (b)(1), already requires a plaintiff to plead with particularity all elements of their cause of action. Moreover, *Twombly* requires that the plaintiffs allege sufficient facts to make a complaint “plausible on its face,” a standard which advances the interest of alleging enough facts to arise to a “strong inference”<sup>58</sup> that the defendants acted with the required state of mind. In *Tellabs*, the Court elaborated that a “strong inference” required determining whether the allegations were “cogent” and equally “as compelling as any opposing inference of nonfraudulent intent.”<sup>59</sup> Accordingly, alleging enough facts to make a complaint “plausible on its face” most likely already requires the plaintiff to compellingly allege facts to equally as compelling to avoid any opposing inference of nonfraudulent activity.

### **C. Alleging Facts Amounting to a “Strong Inference” Before Allowing Discovery Unfairly Burdens the Plaintiff and Leaves a Plaintiff’s in a “Procedural Catch-22”**

Congress should remove the stay of discovery requirement to better allow plaintiffs to state a cause of action. In order to survive a motion to dismiss, the PSLRA requires a plaintiff to allege facts amounting to a “strong inference” that the defendants acted with the required mental state.<sup>60</sup> However, the PSLRA unfairly limits a plaintiff’s access to information by staying discovery until the conclusion of all dispositive motions<sup>61</sup>—such as a motion to dismiss under Rule 12(b)(6). As a result, plaintiffs are unfairly caught in a “procedural catch-22”<sup>62</sup> and this creates the danger that legitimate complaints will be dismissed.<sup>63</sup> This is especially true when *Tellabs* requires a court to not read a complaint “in a vacuum”<sup>64</sup> and consider opposing inferences of lawful intent.

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Because of this flexibility, mere creativity or speculation allows defense counsel to proffer lawful inferences that can explain the defendants conduct and thereby compel a court to dismiss the action for failure to plead a strong inference of the required state of mind.<sup>65</sup> Accordingly, removing the stay on discovery<sup>66</sup> will better allow plaintiffs to establish sufficient facts to show “a strong inference” of the required state of mind in order to proceed to trial.

#### **D. Even After Lowering the Pleading Requirements, Abusive Litigation can be Avoided by Retaining—and Even Enhancing—Rule 11 Sanctions**

Congress was rightfully concerned with abusive litigation when it enacted the PSLRA, given the substantial history of meritless lawsuits brought by “professional plaintiffs.” As a result, Congress specifically provided for Rule 11 sanctions to deter abusive litigation.<sup>67</sup> Congress required a mandatory review as to whether counsel violated Rule 11<sup>68</sup> and created a rebuttable presumption<sup>69</sup> that a Rule 11 violation entitles the opposing party to reasonable attorneys’ fees and other expenses from the violation.<sup>70</sup> However, as scholarship has shown, such sanctions have been ineffective in deterring abusive class action suits.<sup>71</sup>

##### ***1. Create a Rubric Which Imposes Increased Sanctions for Rule 11 Sanctions that Correlate to the Seriousness of the Rule 11 Violation***

Congress should create a rubric tailored to securities litigation that classifies different types of Rule 11 violations and provides penalties that should be imposed for the corresponding violations. Borrowing from the logic that promotes sentencing

guidelines in criminal cases,<sup>72</sup> courts conducting their mandatory Rule 11 inquiry would take the guidelines under advisement when considering the penalty to impose a violator. Indeed, the guidelines would also provide courts with much-needed guidance as to what conduct amounts to a Rule 11 violation within the context of securities litigation.

Congress currently requires that court’s conduct a mandatory review as to whether counsel violated Rule 11 at the conclusion of the litigation.<sup>73</sup> Thus, the more significant the court determines a Rule 11 violation to be, the more recovery that would be available to the defendant at the plaintiff’s expense. Some proposed criteria that could aggravate a violation could be, (1) degree of research and investigation prior to filing the lawsuit; (2) significance of loss suffered by the plaintiff; (3) the presence of unfair or deceptive representations which the defendant knew or should have known would lead to the plaintiffs’ harm; (4) a correlation between the information the plaintiff used in their complaint and the scope of discovery; and (5) other standards of fairness which the court may deem proper for consideration. While these standards are flexible, they provide courts with needed autonomy to consider the unique elements of each violation on a case by case basis – and any imperfections can always be amended, since the guidelines would merely serve an advisory role.

##### ***2. Require that Rule 11 Sanctions be Paid According to Plaintiffs Pro Rata Share***

Lastly, Rule 11 sanctions must also be paid out according to each plaintiff’s pro rata share of ownership in the company stock. This will be entirely appropriate, since the plaintiff with the largest pro rata share will also be the “institutional investor” operating as the lead plaintiff orchestrating the litigation and overseeing the process.

#### **IV. CONCLUSION**

The PSLRA was enacted with the legitimate concerns of preventing abusive and meritless litigation that did not provide any social benefit. However, in light of recent episodes of corporate misconduct, Congress should reconsider the pleading requirements the PSLRA imposes. Doing so will allow more plaintiffs to sue defendants and enhance corporate transparency. Amending the stay of discovery will also allow plaintiffs to avoid a “procedural catch-22” and crafting stricter Rule 11 sanctions will adequately deter abusive litigation. BLB



## ENDNOTES: Neil Pandey-Jorin

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- <sup>1</sup> Pub. L. 104-67, 109 Stat. 737 (codified at 15 U.S.C. § 77z-1, *et seq.*)
- <sup>2</sup> H.R. CONF. REP. NO. 104-369, p.31 (1995) (discussing, “the routine filing of lawsuits . . . with only a faint hope that the discovery process might lead eventually to some plausible cause of action”).
- <sup>3</sup> See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (“ . . . to the extent that [liberal pleading rules] permit a plaintiff with a largely groundless claim to simply take up the time of a number of other people . . . it is a social cost rather than a benefit.”).
- <sup>4</sup> See President Bill Clinton, Private Securities Litigation Reform Act of 1995—Veto Message From the President of the United States, H.R. Doc. No. 104-150, reprinted in 141 Cong. Rec. H15215 (daily ed. Dec. 20, 1995).
- <sup>5</sup> 15 U.S.C. §78 u-4 (B)(1).
- <sup>6</sup> *Id.* at (B)(2). See also *Tellabs, Inc. v. Major Issues & Rights, Ltd.*, 551 U.S. 308, 312 (2007) (outlining that a strong inference may be found only if, “a reasonable person would deem the inference of [the required state of mind] cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”)
- <sup>7</sup> See Gretchen Morgenson, *Approve this Deal, or Else*, N.Y. TIMES, June 15, 2008; *Documents show AIG knew of problems with valuations*, WALL ST. J., Oct. 13, 2008.
- <sup>8</sup> Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 934-76 (2003) (conducting numerous empirical studies that conclude that abusive class-action litigation has actually increased after the passage of the PSLRA).
- <sup>9</sup> See Elloitt J. Weiss and Janet E. Roser, *Enter Yossarian: How to Resolve the Procedural Catch-22 that the Private Securities Litigation Reform Act Creates*, 76 WASH. U. L. Q. 457, 472 (1998) (utilizing a case study to demonstrate that the pleading demands are unduly burdensome on shareholders when they are denied discovery).
- <sup>10</sup> See *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953) (“The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.”)
- <sup>11</sup> 421 U.S. 723 (1975).
- <sup>12</sup> *Id.* at 740 (“ . . . even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.”)
- <sup>13</sup> *Id.* at 725.
- <sup>14</sup> *Id.* at 741.
- <sup>15</sup> S. REP. NO. 104-98, at 6 (1995) (“The dynamics of private securities litigation create powerful incentives to settle, causing securities class actions to have a much higher settlement rate than other types of class actions. Many such actions are brought on the basis of their settlement value. The settlement value to defendants turns more on the expected costs of defense than the merits of the underlying claim.”).
- <sup>16</sup> H.R. CONF. REP. 104-369, at 32-33 (indicating the concern that “the world’s unluckiest investors” repeatedly appeared in securities class action lawsuits.”)
- <sup>17</sup> *Id.* at 37 (“[O]nce the suit is filed, the plaintiff’s law firm proceeds to search through all of the company’s documents and take endless depositions for the slightest positive comment which they can claim induced the plaintiff to invest and any shred of evidence that the company knew a downturn was coming.”)
- <sup>18</sup> Latin for “in order to frighten.” See *Blacks Law Dictionary*, (8th ed. 2004) (“By way of threat; as a warning. ‘the demand letter was sent *in terrorem*; the client has no intention of actually suing.’”)
- <sup>19</sup> See 15 U.S.C. §78 u-4 (b)(1).
- <sup>20</sup> See *id.* at (a)(3)(b) (including in the factor to determine the lead plaintiff as, “in the determination of the court, has the largest financial interest in the relief sought by the class.”)
- <sup>21</sup> See 15 U.S.C. §78 u-4 (b)(1).
- <sup>22</sup> 551 U.S. 308 (2007).
- <sup>23</sup> *Id.* at 312.
- <sup>24</sup> *Id.* at 314.
- <sup>25</sup> 15 U.S.C. §78 u-4 (a)(3).
- <sup>26</sup> 551 U.S. at 314.
- <sup>27</sup> *Id.*
- <sup>28</sup> Fed. R. Civ. P. 9(b).
- <sup>29</sup> 550 U.S. 544 (2007).
- <sup>30</sup> *Id.* at 570.
- <sup>31</sup> *Id.*
- <sup>32</sup> H.R. CONF. REP. 104-369 at 33.
- <sup>33</sup> Prior to the PSLRA, attorney’s fees would be calculated by the court using the lodestar approach. The lodestar approach required multiplying the attorney’s hours by a reasonable hourly fee. Thereafter, additional factors such as the case’s risk, degree of skill required, difficulty involved in the case, the degree of its urgency, and its novelty. See *Blacks Law Dictionary* (8th ed. 2004).
- <sup>34</sup> H.R. CONF. REP. 104-369 at 32.
- <sup>35</sup> *Id.*
- <sup>36</sup> 15 U.S.C. §78 u-4 (a)(3)
- <sup>37</sup> H.R. CONF. REP. 104-369 at 32 (including in the factor to determine the lead plaintiff as “in the determination of the court, has the largest financial interest in the relief sought by the class.”)
- <sup>38</sup> *Id.* at 34 (“Institutional investors are America’s largest shareholders, with about \$9.5 trillion in assets, accounting for 51% of the equity market.”). See also *Before the Subcomm. on Securities of the S. Comm. on Banking Housing, and Urban Affairs*, 103rd Cong. (1993) (testimony of Maryellen Anderson, Investor and Corporate Relations Director of the Connecticut Retirement & Trust Funds and Treasurer of the Council of Institutional Investors).
- <sup>39</sup> 15 U.S.C. §78u-4(c)(2-3).
- <sup>40</sup> See 35B C.J.S. *Federal Civil Procedure* § 1365 (2008) (“ The central purpose of Rule 11 is to deter baseless filings in the federal district court and thus, streamline administration and procedure of federal courts by thwarting use of frivolous lawsuits and abusive trial tactics.”)
- <sup>41</sup> 15 U.S.C. §78u-4(c)(1).
- <sup>42</sup> Such a presumption may be rebutted upon a showing that, the award of attorneys’ fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or the Rule 11 violation was *de minimis*. *Id.* at §78u-4(c)(3)(b).
- <sup>43</sup> *Id.* at §78u-4(c)(3)(a).
- <sup>44</sup> Cf. H.R. CONF. REP. 104-369 n. 17 *Before Telecomm. And Finance Subcomm. of H. Comm. on Commerce*, 104th Cong. (1994) (testimony of Saul S. Cohen, Rosenman & Colin) (“Rule 11 has been largely ineffective in deterring strike suits. As a general matter, courts rarely grant Rule 11 sanctions in all but the most egregious circumstances”).
- <sup>45</sup> See *Id.* at 39-40. Interestingly, President Clinton cited the Rule 11 changes when he vetoed the PSLRA. Reasoning that the measures lacked balance and treated plaintiffs more harshly than defendants, the President objected to the measure observing that the provision resembled the “loser pays” standard which he opposed. See President Bill Clinton, Private Securities Litigation Reform Act of 1995—Veto Message From the President of the United States, H.R. Doc. No. 104-150, reprinted in 141 Cong. Rec. H15215 (daily ed. Dec. 20, 1995).
- <sup>46</sup> Paul Krugman, *America the Tarnished*, N.Y. TIMES, Mar. 30, 2009 (discussing the lack of corporate transparency in causing the national banking crisis).
- <sup>47</sup> See generally *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1975)
- <sup>48</sup> See H.R. REP. NO. 85, 73d Cong., 1st Sess., 1-5 (1933); see also See S. REP. NO. 792, 73d Cong., 2d Sess., 1-5 (1934).

<sup>49</sup> 15 U.S.C. §78 u-4 (a)(3).

<sup>50</sup> See H.R. CONF. REP. 104-369 at 37 (“discovery costs account for roughly 80% of total litigation costs.”)

<sup>51</sup> 15 U.S.C. §78 u-4 (b)(1).

<sup>52</sup> *Id.* at (b)(2); see also *Tellabs*, 551 U.S. at 312 (outlining that a strong inference may be found only if, “a reasonable person would deem the inference of [the required state of mind] cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”)

<sup>53</sup> See, e.g., *id.* at 314.

<sup>54</sup> FED. R. CIV. P. 9(b).

<sup>55</sup> 550 U.S. at 570.

<sup>56</sup> 355 U.S. 41, 45-46 (1957).

<sup>57</sup> See Weiss and Moser, *supra* note 9, 76 Wash. U. L. Q. at 472; see also Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675 (1996).

<sup>58</sup> 15 U.S.C. §78 u-4 (b)(2).

<sup>59</sup> 551 U.S. at 312.

<sup>60</sup> 15 U.S.C. §78 u-4(B)(2).

<sup>61</sup> *Id.* at §78 u-4(a)(3).

<sup>62</sup> See Weiss and Moser, *supra* note 9, 76 Wash. U. L. Q. at 459.

<sup>63</sup> See Securities Litigation Reform Act-Veto, 141 Cong. Rec. S19,038 (daily ed. Dec. 21, 1995) It simply will be impossible for the plaintiff, without discovery, to meet the standard inserted in the conference committee at the last minute.” Securities Litigation Reform Act-Veto, 141 Cong. Rec. S19,038 (daily ed. Dec. 21, 1995) (Remarks of Sen. Sarbanes, quoting letter from John Sexton, Dean, New York University School of Law) (“It simply will be impossible for the plaintiff, without discovery, to meet the standard inserted in the conference committee at the last minute.”).

<sup>64</sup> *Id.* at 314.

<sup>65</sup> See Private Securities Litigation Reform Act of 1995-Veto Message From the President of the United States, H.R. Doc. No. 104-150, reprinted in 141 CONG. REC. H15215 (daily ed. Dec. 20, 1995) (President Clinton’s veto message observed that the requirements would erect a, “procedural hurdle . . . so high that even the most aggrieved investors with the most painful losses may get tossed out of court before they have a chance to prove their case.”). Private Securities Litigation Reform Act of 1995—Veto Message From the President of the United States, H.R. Doc. No. 104-150, reprinted in 141 Cong. Rec. H15215 (daily ed. Dec. 20, 1995).

<sup>66</sup> See Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA’s Internal-Information Standard on ’33 and ’34 Act Claims*, 76 WASH. U. L. Q. 537, 583 (1998) (advocating for removing the stay of discovery from the PSLRA).

<sup>67</sup> See H.R. CONF. REP. 104-369, *supra*, n. 44. Cf. Testimony of Saul S. Cohen, Rosenman & Colin, before the Telecommunications and Finance Subcommittee of the House Committee on Commerce, February 10, 1995. (“Rule 11 has been largely ineffective in deterring strike suits. As a general matter, courts rarely grant Rule 11 sanctions in all but the most egregious circumstances.”)

<sup>68</sup> 15 U.S.C. § 78u-4(c)(1).

<sup>69</sup> Such a presumption may be rebutted by showing that awarding attorneys’ fees will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or the Rule 11 violation was *de minimis*. *Id.* at §78u-4(c)(3)(b).

<sup>70</sup> *Id.* at §78u-4(c)(3)(a).

<sup>71</sup> See Perino, *supra* note 8, 2003 U. ILL. L. REV. at 934-76.

<sup>72</sup> See generally United States Sentencing Commission Guidelines, available at <http://www.uscc.gov/guidelin.htm>.

<sup>73</sup> 15 U.S.C. § 78u-4(c)(1).