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Handling a Securities Case: From Investigation to Trial and Everything in Between

***279** SECURITIES CLASS ACTION JURY TRIALS SINCE IN RE JDS UNIPHASE CORPORATION SECURITIES LITIGATION: NO CLEAN VICTORIES

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***281 I. INTRODUCTION**

In the fall of 2007, a massive securities class action lawsuit, *In re JDS Uniphase Corporation Securities Litigation*, was tried to a federal jury in the Northern District of California. [FN1] At trial, the plaintiffs attempted to prove that JDS Uniphase Corporation ("JDSU") and several of its former executives violated multiple federal securities laws by making fraudulent statements to the public about JDSU, and by selling their own JDSU stock on the basis of non-public information. [FN2] On November 27, 2007, the jury returned a unanimous verdict in favor of defendants, absolving them of all liability. [FN3]

Jury verdicts in securities fraud class actions are rare. In fact, according to the *Wall Street Journal*, only *three* other shareholder securities-fraud suits were tried to a jury verdict between 1995, when the Private Securities Litigation Reform Act (the "PSLRA") was enacted, and 2007. [FN4] JDSU was also unusual because of the amount at stake, with the plaintiffs seeking approximately $20 billion in damages. [FN5] Further, JDSU was only the second time that a jury found in favor of the defendants. The other securities class action jury trial between 1995 and the present that resulted in a defense verdict involved a far smaller amount. [FN6] At the time, many noted the unusual--in fact, almost unique--features of the JDSU case. [FN7]

Today, JDSU remains remarkable. In the four years since the JDSU trial, there have been only a handful of jury trials in securities class ***282** actions, and in none of those cases did defendants achieve a clean victory, as in JDSU. [FN8] In fact, none resulted in a clean victory for either party. In each case, the jury returned a verdict in favor of the plaintiffs, but the parties continued to litigate, often for years. [FN9] In several of the cases, post-trial litigation overturned the jury verdict entirely or undercut the plaintiffs' ability to recover damages. Trial in these cases was not a "knock-out punch," as in JDSU, but instead just another bruising round in a much longer

fight.

The contrast between the clean victory in JDSU and the messy, complex post-trial litigation in the securities class actions tried to a jury since 2007 raises an interesting question. Why did trial not resolve the parties' dispute and end (or even come close to ending) the litigation? After summarizing the JDSU case and the securities class actions tried to a jury since 2007, this article suggests two possible answers.

First, the lack of clarity in the law governing fundamental aspects of securities class action trials leaves the parties, the court, and the jury with insufficient guidance. This increases the likelihood of post-trial motion practice and appeals challenging the jury's conclusions, especially conclusions about loss causation and damages, required elements of a claim under Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"). Second, even if a jury verdict survives post-trial attacks, there will ***283** almost certainly be numerous additional issues to resolve. Most securities class action trials are split into two "phases," with an initial jury trial to decide class-wide issues like liability followed by a second phase focused on individualized issues like individual class members' reliance and damages. Accordingly, if a jury finds liability in the first phase, the parties and the court will have to contend with many important, time-consuming, and novel issues in the second phase.

Notably, the defendants in JDSU avoided both of these issues because the jury there absolved them of all misconduct. Having found no material misstatement or improper trading, the jury did not have to address complicated issues of loss causation and its verdict was therefore less vulnerable to post-trial attack. Further, because the jury found no liability, there was no need for a protracted second phase of litigation to adjudicate individual reliance and to calculate individual damages. [FN10]

II. THE JDSU TRIAL

Before the telecom meltdown of 2001, JDS Uniphase Corporation was the leading provider of fiber-optic components to the telecom industry. In 2001, when the telecommunications industry collapsed, demand for JDSU's products fell precipitously, and JDSU's stock price dropped from a peak of more than $140 per share in the spring of 2000 to less than $10 per share by mid-2001. JDSU wrote down and restated its goodwill by approximately $40 billion--the largest write-down of goodwill in history to that point--and wrote down the value of its inventory by more than $250 million. [FN11]

Eight months later, in March 2002, plaintiffs filed a securities class action lawsuit against JDSU and several of its officers in the Northern District of California. The plaintiffs asserted claims under multiple provisions of the federal securities laws: Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "1933 Act"), and Sections 10(b), 14(a), and 20(a) of the 1934 Act. [FN12] The complaint that survived motions to dismiss alleged that four former JDSU executives saw the downturn coming months before it arrived and misled investors about demand for JDSU products, while simultaneously selling hundreds of millions of dollars of their own JDSU stock. The complaint also alleged that JDSU "cooked the books" by failing to write down its goodwill and inventory earlier than it ***284** did, and that JDSU filed misleading registration statements and proxy statements during the class period. [FN13]

After five years of discovery and pre-trial motion practice, trial began in October 2007. In the months leading up to the trial, the parties and the court confronted the question of how to structure the trial. [FN14] This was complicated, for numerous reasons. First, the case itself was complex, with an enormous discovery record including more than 15 million pages of documents, nearly 100 depositions, and voluminous reports from eight expert witnesses. [FN15] Second, the plaintiffs sought to prove a broad set of claims: that the defendants made 24 materially false and misleading statements and that the four individual defendants sold their JDSU stock on the basis of material, non-public information. [FN16] Third, as a fraud-on-the-market class action, the case raised issues about when and how the defendants could rebut the presumption of reliance as to individual class

members if defendants were found liable. [FN17]

Ultimately, the court divided trial into two phases, allocating nineteen court days for the Phase I jury trial. That phase would address class-wide issues of liability--*i.e.*, whether any of the Defendants had violated the federal securities laws--and the per-share damages resulting from any such violations. [FN18] If the jury found liability in the first phase, a second phase would address individualized issues, including any rebuttal to the presumption of individual reliance and the calculation of each class member's actual damages. [FN19]

Jury trial of the first phase began on October 23, 2007. Over the next nineteen days, the parties presented more than 40 witnesses and hundreds of exhibits. [FN20] Among other things, the jury heard testimony regarding the defendants' alleged misstatements and stock trades, as well as expert testimony on the competing methods for determining damages. On November 27, 2007, after less than two days of deliberation, the jury returned a unanimous verdict in favor of the defendants. The jury found that none of the 24 statements was materially false or misleading and that none of the individual defendants sold JDSU stock on the basis of ***285** material, non-public information. [FN21] Because it found no liability, the jury did not reach the issues of loss causation or damages, and there was no need for the second phase. [FN22] Other than defendants' motion for $150,000 in Rule 11 sanctions, which was denied, there was no substantive post-trial activity. [FN23] Judgment was entered, and neither side appealed.

III. SECURITIES CLASS ACTION JURY TRIALS SINCE JDSU

In the four years since the JDSU trial, there have been only a handful of jury trials in securities class actions. Unlike in JDSU, each of these trials resulted in a plaintiff's verdict, and each was followed by lengthy post-trial litigation.

A. *In re Apollo Group, Inc. Securities Litigation*

In re Apollo Group, Inc. Securities Litigation was filed in October 2004 in the District of Arizona. The complaint alleged that defendants, Apollo Group, Inc. (“Apollo”) and two of its officers, violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 by making false and misleading statements in connection with Apollo's subsidiary, the University of Phoenix.

On November 14, 2007, after three years of litigation (and just as the JDSU trial was wrapping up), jury trial began. On January 16, 2008, the jury reached a verdict for the plaintiffs and awarded per share damages of $5.55 (or roughly $280 million for the class as a whole). The defendants filed a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), arguing that the evidence at trial was insufficient to support the jury's finding of loss causation. On August 4, 2008, the district court granted the motion, vacated the judgment, and entered judgment in favor of defendants. [FN24] The court found that although the plaintiffs had “demonstrated that Apollo misled the market in various ways,” the trial testimony did not support the jury's finding of loss causation. [FN25] The plaintiffs appealed, and on June 23, 2010, the Ninth Circuit issued a four-paragraph decision ***286** reversing the district court and holding that the jury “could have reasonably found” facts satisfying the element of loss causation. [FN26] The Ninth Circuit remanded the case and instructed the district court to reinstate the jury's verdict. [FN27] The defendants sought rehearing and rehearing *en banc*, both of which the Ninth Circuit denied. [FN28] Defendants' petition for writ of certiorari to the United States Supreme Court was denied in March 2011. [FN29] On April 6, 2011, the district court entered judgment in favor of the plaintiff class.

After the entry of judgment, litigation continued, centering on the contours of the claims administration process. Plaintiffs and defendants disagreed over the proper method for calculating individual damages. [FN30] Defendants also argued that they should be entitled to conduct individual discovery and potentially a series of

mini-trials to rebut the presumption of reliance as to individual class members. Faced with the possibility that litigation of the remaining "thorny issues" might result in additional "prolonged trials and appeals," the parties agreed to engage in mediation sessions with a former federal district judge. [FN31] Through the mediation, the parties reached a proposed class-wide settlement of $145 million. The district court judge entered an order preliminarily approving that settlement on November 28, 2011, more than seven years after the litigation began and almost four years after the jury's verdict. [FN32] Post-trial proceedings wound up taking longer than everything up to and including the trial.

B. *Lawrence E. Jaffe Pension Plan v. Household International, Inc*.

Class action litigation in *Lawrence E. Jaffe Pension Plan v. Household International, Inc*. began in August 2002 in the Northern District of Illinois against Household International, Inc. ***287** ("Household"), several of its former officers, and its underwriters and auditor. The complaint alleged that defendants made misstatements and concealed predatory lending practices and accounting improprieties, thereby violating Sections 10(b) and 20(a) of the 1934 Act, and Sections 11, 12(a)(2), and 15 of the 1933 Act.

Trial began nearly seven years later, in March 2009, against Household and its former officers. [FN33] As in the JDSU trial, the court bifurcated the proceedings, with liability to be decided in the first phase and the remaining issues to be determined in a second phase. On May 7, 2009, the jury returned a verdict, finding defendants liable under the 1934 Act for many of the misstatements alleged in the complaint. The jury also apportioned liability among the four defendants and determined the amount by which the defendants' misstatements had inflated Household's share price throughout the class period. [FN34]

The defendants moved for a new trial and for judgment as a matter of law, arguing, among other things, that the plaintiffs' evidence at trial was insufficient to establish loss causation. The plaintiffs filed a motion for entry of judgment. In July 2010, the court struck each of these motions as premature because the case would not be concluded until the second phase of the proceedings had been completed. [FN35]

The parties then turned to the second phase of litigation. On November 22, 2010, the court entered an order "creat[ing] the protocol for Phase II," which "shall address the issue of defendant's rebuttal of the presumption of reliance as to particular individuals as well as the calculation of damages as to each plaintiff." [FN36] The order established the procedures by which defendants could take discovery from individual class members as to reliance and set out a formula for ***288** calculating individual damages. [FN37] In August 2011, after this discovery had concluded, the court ordered the parties to file summary judgment style submissions as to whether any particular class members did not in fact rely on the market price. [FN38] The parties completed briefing on this issue in December 2011, and the court had not yet issued a ruling as of mid-February 2012.

C. *In re Vivendi Universal, S.A. Securities Litigation*

In re Vivendi Universal, S.A. Securities Litigation was originally filed in 2002 in the Southern District of New York on behalf of a class of U.S. and foreign shareholders of Vivendi Universal, S.A. ("Vivendi"), a French company. The plaintiffs alleged that Vivendi and two of its former officers violated Sections 10(b) and 20(a) of the 1934 Act by making material misrepresentations and omissions about the company.

The case was tried to a jury beginning on October 5, 2009. [FN39] On January 29, 2010, after fourteen days of deliberations, the jury returned a verdict finding that Vivendi had violated Section 10(b) and calculating the daily inflation in Vivendi's share price caused by the fraud. The jury found no liability as to the officer defendants. [FN40] After the verdict, Vivendi moved for judgment as a matter of law and for a new trial, and the plaintiffs moved for entry of judgment, an award of pre-judgment interest, and approval of their proposed class notice and claims administration procedures. [FN41]

On June 24, 2010, while these motions were still pending, the United States Supreme Court issued an opinion in *Morrison v. National Australia Bank, Ltd.*, holding that Section 10(b) does not apply extraterritorially. [FN42] Because the *Vivendi* class included class members who purchased shares of Vivendi, a foreign company, on foreign exchanges, the *Vivendi* court asked the parties to submit supplemental briefs addressing the impact of *Morrison*. [FN43] On February 17, 2011, the *Vivendi* court issued a lengthy opinion holding that *Morrison* precluded claims by purchasers of Vivendi's ordinary shares, which did not ***289** trade on any U.S. exchange. It narrowed the plaintiff class to include only individuals who purchased or otherwise acquired Vivendi's American Depository Shares ("ADRs"), which traded on the New York Stock Exchange during the relevant period. [FN44] The opinion also denied Vivendi's post-trial motions almost entirely, granting judgment as a matter of law only with respect to one of the nearly sixty misrepresentations addressed at trial. [FN45] The court also denied the plaintiffs' motion for entry of judgment, holding that "entry of a final judgment is premature for a number of reasons, most significantly that Vivendi is entitled to rebut the presumption of reliance on the market price of Vivendi's stocks with respect to particular class members." [FN46] The court also found "that the methods for calculating an individual claimant's damages will be hotly contested and may trigger additional appeals," a possibility that further "counsel[ed] against entry of judgment." [FN47]

The plaintiffs petitioned the Second Circuit under Federal Rule of Civil Procedure 23(f) for leave to appeal the district court's decision narrowing the class definition based on *Morrison*. The Second Circuit denied the petition. [FN48] The plaintiffs also filed a motion with the district court requesting entry of final judgment under Federal Rule of Civil Procedure 54(b) as to the claims of the class members dismissed pursuant to *Morrison* to permit these class members to appeal immediately without waiting for the entire case to conclude. The district court denied the motion, holding that the plaintiffs failed to show that such a judgment would promote judicial economy or prevent them from suffering undue hardship. [FN49]

Thereafter, the parties continued to litigate over the contours of the second phase of the proceedings, proposing competing methods by which the defendants could attempt to rebut the presumption of reliance as to individual class members. [FN50] The parties also disputed a ***290** number of other issues, including the definition of the class, with plaintiffs seeking to expand the class beyond the confines set forth in the court's February 17, 2011 opinion. As of mid-February 2012, the court had not yet ruled on these issues.

D. *In re BankAtlantic Bancorp, Inc*.

Plaintiffs initiated this class action in the Southern District of Florida in October 2007, against BankAtlantic Bancorp, Inc. ("BankAtlantic") and several of its former officers and directors. The complaint alleged that defendants misrepresented the true quality and value of portions of the loan portfolio of a BankAtlantic subsidiary, in violation of Sections 10(b) and 20(a) of the 1934 Act.

Trial began on October 12, 2010, and the jury reached a verdict on November 18, 2010, after five days of deliberation. [FN51] Although it absolved several of the defendants, the jury found liability as to three defendants-- BankAtlantic and two of its officers--on a subset of the misstatements plaintiffs had attempted to prove at trial. [FN52] The jury also calculated the per share damages attributable to the defendants' misstatements. [FN53]

The defendants moved for judgment as a matter of law and for a new trial. On April 25, 2011, the court granted the defendants' motion for judgment as a matter of law, holding that there was insufficient evidence at trial to support the jury's finding of loss causation. [FN54] The court conditionally denied the defendants' motion for a new trial and entered judgment in favor of the defendants as to all of the plaintiffs' claims. [FN55] The plaintiffs appealed this decision to the Eleventh Circuit. [FN56] That appeal is now fully briefed and the Eleventh Circuit has scheduled argument for March 2012.

Litigation also continues on two motions for sanctions filed by defendants. On May 5, 2011, the defendants filed a motion for sanctions in the district court, asserting that the plaintiffs' counsel had ***291** filed frivolous claims without first undertaking a reasonable investigation, especially into the testimony of certain confidential witnesses. The district court largely denied this motion, [FN57] and the defendants appealed to the Eleventh Circuit. [FN58] The defendants also filed a separate motion for sanctions directly in the Eleventh Circuit, asserting that plaintiffs' appeal of the district court's April 25, 2011 order was itself frivolous. [FN59] The Eleventh Circuit has not yet ruled on either of these sanctions issues.

E. *In re Homestore.com, Inc. Securities Litigation*

In re Homestore.com, Inc. Securities Litigation was originally filed in December 2001 in the Central District of California. The plaintiffs alleged claims for violations of Sections 10(b) and 20(a) of the 1934 Act against Homestore.com, Inc. ("Homestore"), several of its officers, its auditor and a number of other related entities. Plaintiffs alleged that defendants fraudulently propped up Homestore's stock price by engaging in "dubious transactions" and improper accounting practices and by making misleading public statements. [FN60] During the ensuing years of litigation, several of the defendants were dismissed, and others, including the company, entered into settlement agreements. [FN61]

Jury trial began on January 25, 2011, against the sole remaining defendant, Stuart Wolff, the former Chairman and CEO, who was already serving a criminal sentence for conspiracy to commit securities fraud. [FN62] The jury reached a verdict on February 24, 2011. [FN63] The jury found largely in favor of the plaintiffs on liability, determining that Wolff knowingly or recklessly made or helped prepare at least five misleading statements. [FN64] The jury evaluated Wolff's proportionate ***292** liability and calculated the per share price inflation resulting from each misrepresentation for which Wolff was responsible. [FN65]

After the trial, Wolff sought judgment as a matter of law, arguing that the evidence at trial was not sufficient to support the jury's findings with respect to loss causation, the lead plaintiff's reliance, Wolff's scienter, and Wolff's status as a control person. [FN66] On April 22, 2011, the court denied this motion, finding that there was sufficient evidence to support the jury's findings on all of those issues. [FN67] However, also on April 22, 2011, the court ruled almost entirely in Wolff's favor in an order addressing the calculation of damages. It found that damages should be calculated using the method Wolff proposed and that any recovery calculated under this method must be reduced by the amounts already paid by the settling defendants, pursuant to the settlement offset provisions of the PSLRA. After the settlement setoff, the court ultimately determined that plaintiffs would recover "nothing" from Wolff. [FN68] It entered final judgment on August 30, 2011, and there has been no appeal. [FN69]

IV. WHY NO CLEAN VICTORIES SINCE JDSU?

As discussed above, the handful of securities class action tried to a jury since JDSU have not resulted in clean victories. Instead, the parties have continued to litigate for years, often reversing or at least limiting short-lived trial victories. Trial in these cases was not the decisive blow, as in JDSU, but instead just another round in a long fight. This result is striking and contradicts many litigators' view of trial as the culmination of litigation. What explains the protracted post-trial litigation in the securities class action jury trials since JDSU? This section suggests two possible answers: the lack of clear guidance as to many of the fundamental aspects of securities class action trials, and the need for extensive additional adjudication following a finding of liability.

***293** A. Lack of Clear Legal Standards

The lack of clean victories in securities class actions trials since JDSU stems in part from the dearth of fixed legal standards under the federal securities laws. The complex case law continues to evolve, and the guidance that does exist often does not translate well to the jury-trial context. These factors increase the risk that the jury's verdict will be grounded on a questionable interpretation of the law and therefore vulnerable to post-trial attack. Such attacks can prolong litigation for years--with motions for judgment as a matter of law, appeals, and even a new trial.

1. Section 10(b) Continues to Evolve

The scope of the implied right of action under Section 10(b) has been subject to significant reshaping by the Supreme Court. In just the past two years, the Supreme Court has issued landmark opinions defining who can be considered the "maker" of a misstatement for purposes of liability under Section 10(b), [FN70] and holding that Section 10(b) does not apply extraterritorially. [FN71] The evolving nature of the law on these issues is especially significant given the long lifespan of many securities class actions. Because these cases regularly take five years or more to reach trial, there is an increased likelihood that relevant legal principles will change between the filing of the complaint and the entry of final judgment. This can prolong and complicate the litigation, especially if the law evolves *after* the case has been tried to a jury.

For example, in *Vivendi*, the Supreme Court's decision in *Morrison* required the parties to relitigate the scope of the class after the jury trial. There, as discussed above, the jury returned a verdict in favor of a plaintiff class that included shareholders who purchased their shares of Vivendi, a foreign company, on foreign exchanges. After *Morrison* held that Section 10(b) applies only to domestic transactions and transactions in securities listed on domestic exchanges, the district court requested supplemental briefing on the issue and ultimately dismissed the claims of these so-called "foreign-cubed" class members. Even after the district court's order, the parties continued to litigate over the precise class definition. And besides prolonging the litigation, the post-trial ***294** evolution of the law almost certainly diminished plaintiffs' trial victory by reducing the amount of class-wide damages: Vivendi's counsel reportedly claimed that the narrowing of the class could eliminate 90% of the plaintiffs' damages. [FN72]

2. There Is Little Guidance on How to Prove Claims at Trial

The law is particularly unclear with respect to issues relating to the *trial* of securities class actions. Because few of these cases reach trial, [FN73] there is little case law instructing courts and litigants on the many complex issues that arise at trial.

The most striking example of this is the lack of clarity governing proof of loss causation and damages, required elements of a claim under Section 10(b). As the Supreme Court explained in *Dura Pharmaceuticals, Inc. v. Broudo,* loss causation is a "causal connection between the material misrepresentation and the loss." [FN74] In *Dura*, however, the Supreme Court "only addressed pleading standards," and did not discuss the manner in which loss causation should be proved at trial. [FN75] Accordingly, "courts continue to struggle with loss causation's standard of proof." [FN76] This is especially problematic because loss causation is an inherently complicated issue, both legally and factually. For example, one method of demonstrating loss causation is by showing that a corrective disclosure--*i.e.*, a disclosure that reveals to the market the falsity of the defendants' prior misrepresentations--caused the stock price to decline. [FN77] As the Supreme Court in *Dura* explained, however, a drop in share price is not necessarily caused by a defendants' fraud or the revelation of that fraud to the market. Instead, a "tangle of factors" affects the price of securities, including not only any alleged fraud, but ***295** also "changed economic circumstances, changed investor expectations, [and] new industry-specific or firm-specific facts." [FN78]

Further, although it seems clear that expert testimony will often be necessary to prove loss causation and damages at trial, it is not clear how precisely this should be accomplished. How much latitude should experts be given to opine on the issues? What issues are for the court rather than the jury? And what are the accepted (or rejected) methodologies for analyzing the issues? There is little--and often conflicting--guidance on these crucial questions.

This lack of legal guidance opens the door to post-trial motions arguing that the jury's verdict on loss causation was not supported by the evidence. Such motions, in turn, can change the outcome of the litigation (or at least prolong the post-trial wrangling). In fact, defendants in *each* of the five securities class action jury trials since JDSU moved for judgment as a matter of law after the trial on the ground that the plaintiffs' evidence at trial was insufficient to prove loss causation. [FN79] In *BankAtlantic*, the defendants prevailed, and the court overturned the jury verdict. The court held that the jury's verdict on loss causation was not supported by the evidence at trial because plaintiffs' damages expert failed to "disaggregate" the "tangle of fraud and non-fraud factors" to demonstrate what portion of the decline in the company's share price was due to the revelation of the defendants' fraud and what portion was due to other, non-fraud-related information disclosed at the same time. [FN80] The plaintiffs have appealed this issue to the Eleventh Circuit, further delaying final resolution of that case.

The post-trial events in *Apollo* provide an even starker illustration of the way that ambiguity surrounding the standard of proof for loss causation can prolong and complicate securities litigation. There, the parties litigated loss causation for more than *three years* after the jury verdict. As discussed above, the jury in *Apollo* returned a verdict in favor of the plaintiffs, but the district court granted defendants' motion for judgment as a matter of law, finding that the plaintiffs had presented insufficient evidence at trial to support a finding of loss causation. The district court found that two UBS analyst reports discussing the fraud were not corrective disclosures, as the plaintiffs had attempted to prove at trial, because the fraud ***296** had actually been revealed to the market five days before the reports were published, in a series of news articles that had no significant effect on Apollo's share price. The analyst reports, according to the district court, merely reiterated this information and "did not provide any new, fraud-revealing analysis." [FN81] The Ninth Circuit reversed the district court's decision, but provided little, if any, guidance. In fact, it devoted only a single paragraph to its analysis of loss causation, holding that "[t]he jury could have reasonably found that the UBS reports following various newspaper articles were 'corrective disclosures' providing additional or more authoritative fraud-related information that deflated the stock price." [FN82] After the defendants unsuccessfully sought further review by the Ninth Circuit and the Supreme Court, the district court finally reinstated the jury's verdict on April 6, 2011, more than three years after the trial.

As shown by the tortured procedural history in *Apollo*--and the potential for a similar outcome in *BankAtlantic*--the lack of legal guidance on issues like loss causation can jeopardize the finality and substance of the jury's verdict and result in years of additional litigation.

B. Need for Additional "Phase II" Adjudication After a Finding of Liability

Even if a jury verdict survives post-trial motions, litigation is likely to continue for an additional reason: the need to address so-called "Phase II" issues. As discussed above, many securities class action trials are bifurcated, or phased, with a first phase to determine liability, followed by a second phase focused on individualized issues, like damages and individual reliance. If the jury finds liability in the first phase, the parties and the court must confront the Phase II issues. Phase II, however, is almost completely uncharted territory, even more so than loss causation and damages. Because so few cases have advanced beyond a trial as to liability, there are many unanswered questions and little instructive case law. As the *Household* court explained, "[i]n

creating a Phase II protocol, this Court receives very little guidance from other courts because securities fraud class actions have rarely proceeded to trial, let alone reached subsequent ***297** proceedings." [FN83] Litigating these issues can take years, consume substantial judicial and party resources, and, in some cases, partially nullify the plaintiffs' victory. Two Phase II issues are particularly significant: rebutting the presumption of reliance as to individual class members, and calculating individual damages based on the jury's findings.

1. Rebutting the presumption of reliance

After a finding of liability premised on the fraud-on-the-market theory of reliance, a defendant may attempt to rebut that presumption as to individual investors. There is no clear framework, however, for how to adjudicate this issue during Phase II.

There are many complex issues in structuring a Phase II proceeding. How and to what extent should a court permit defendants to take discovery as to the investment decisions of individual class members? And if discovery does yield evidence that some class members did not rely on the integrity of the market, what do the parties do next? Can the court decide some or all of the relevant questions on summary judgment motions? If a trial is required, will it be tried to a judge or to a jury? Can it be tried to a different jury from the one that heard Phase I? [FN84] The court and the parties may also disagree over how exactly any "mini-trials" should proceed. Should the judge single out a few representative class members for a first wave of mini-trials?

Resolving individual reliance issues, then, might prolong the litigation for many years after the original jury verdict. The Phase II proceedings in the *Household* case illustrate this issue. There, the parties have been litigating over the contours of the second phase of litigation for nearly three years after the jury found the defendant liable in May 2009. The court allowed defendants to take limited discovery into the investment decisions of individual class members, with the parties vigorously disputing the exact scope of that discovery. After discovery concluded, the court ordered the parties to submit summary judgment style briefs, listing individual investors as to which defendants contend they can rebut the presumption of ***298** reliance, along with citations to the record evidence supporting or contradicting that contention. As of mid-February 2012, the court has not yet ruled on these submissions, leaving open the question of if, and when, any mini-trials might begin.

The parties in *Vivendi* and *Apollo* also continued to litigate individual reliance for years after the original jury verdicts in those actions. In fact, in *Apollo,* according to settlement papers filed by the lead plaintiff, the threat that the defendants would seek "individual discovery and potentially, a series of mini-trials," as to individual reliance was one of several factors that motivated the plaintiffs to settle with defendants for approximately half of the jury's original verdict. [FN85]

2. Calculating individual damages

Like reliance issues, calculating individual class members' damages might also result in protracted litigation following a jury verdict of liability. Although juries often make damages findings, translating these into actual payments to injured class members is no easy task. Such calculations require selecting from competing methodologies and answering complicated questions like whether a class member's losses must be "netted against their profits attributable to the same fraud," and how to match "purchases and sales when a shareholder has engaged in multiple transactions." [FN86] There is little clear guidance on this issue, [FN87] and the plaintiffs and defendants might propose wildly divergent damages calculation methodologies. [FN88] In some cases, disputes over how to calculate individual class members' damages can substantially reduce--or even eliminate--the plaintiffs' recovery. At the very least, the claims administration pro-

cess, in which a claims administrator must determine the exact recovery due to each class member, can continue for many years after the jury's verdict.

***299** In *Homestore*, for example, the jury found defendant Stuart Wolff liable, but the court accepted his proposed method for calculating damages. Using this method--and subtracting the amounts paid to the plaintiff class by previously settling defendants, as required by the PSLRA--the court held that plaintiffs were not entitled to any damages from Wolff. [FN89] Similarly, in *Apollo*, according to lead plaintiff's motion for approval of the settlement, the specter of protracted litigation over the calculation of damages, along with other factors discussed above, helped prompt the plaintiffs to settle with defendants for approximately half the amount of the jury's original verdict. There, the plaintiffs entered into mediation and eventually settlement to avoid extensive litigation over "the calculation and assessment of damages per claimant," which threatened to "postpone[] for many years . . . the recovery and distribution of damage payments." [FN90]

Accordingly, where a plaintiff wins on liability issues at trial, litigating over individual reliance and the calculation of damages might take years and consume substantial resources. Further, these issues might eliminate a plaintiff's damages altogether, as in *Homestore*, or at least prompt the plaintiff class to settle for less than the jury's original verdict, as in *Apollo*. In JDSU, by contrast, because the jury found no liability, there was no need for a second phase of litigation. [FN91]

V. CONCLUSION

The JDSU trial and verdict were the exception in 2007 and remain so today. Although several securities class actions have been tried to a jury in the last four years, JDSU continues to stand out not only because it was a victory for defendants, but also because it faced no post-trial challenges. The subsequent securities class action jury trials suggest that future clean victories for either side will remain elusive.

[FN1]. Jordan Eth and Timothy Blakely, *Lessons for Securities Litigators from the JDS Uniphase Corporation Securities Litigation Trial,* 1692 Practising Law Institute Corporate Law and Practice Handbook Series 361, 367 (2008).

[FN2]. **Morrison** & **Foerster**, LLP represented JDSU and three of the four individual defendants.

[FN3]. Eth, *supra*, at 367.

[FN4]. *Id*. (citing Ashby Jones, *JDS Wins Investor Lawsuit, Bucking a Trend,* Wall St. J., June 2, 2008, at B4). Through the beginning of 2012, a total of only nine securities class actions under the PSLRA have been tried to a jury verdict. Jury trials also began in seven additional cases, but those actions ended before reaching a verdict. Several additional cases were tried to a verdict since 1995, but they were all based on alleged misconduct that pre-dated the enactment of the PSLRA. *See* Adam T. Savett, Securities Class Action Trials in the Post-PSLRA Era (Dec. 5, 2011), available at http:// www.box.net/shared/xxav75dzpf.

[FN5]. Eth, *supra*, at 367.

[FN6]. Savett, *supra*, at 2 (discussing *In re Health Management Sec. Litig.*, in which the jury returned a defense verdict in a class action seeking $37 million in 1999).

[FN7]. *See, e.g.*, Peter Lattman, *Jury Rules for JDSU in Rare Securities Class Action Trial,* Wall St. J. Law Blog (Nov. 28, 2007), http:// blogs.wsj.com/law/2007/11/28/juryrules-for-defendants-in-rare-securities-class-action-trial/.

[FN8]. *See infra*, Section III.

[FN9]. Even before the PSLRA was enacted, securities class action jury trials were rare and usually did not result in clean victories. One notable example is *In re Apple Computer Securities Litigation*. There, plaintiffs brought suit in the Northern District of California, alleging that Apple and several of its officers made eighteen misleading statements about the company in 1982 and 1983. The district court granted defendants' motion for summary judgment against plaintiffs on their entire case. On appeal, the Ninth Circuit affirmed as to sixteen of the alleged misstatements, but held that plaintiffs had raised genuine issues of material fact as to two of the statements. It remanded to the district court for a jury trial as to those two statements. The jury found two of the officer defendants liable, but exonerated all other defendants, including Apple. The district court granted the officer defendants' motion for judgment notwithstanding the verdict, holding that the evidence at trial was not sufficient to support the jury's verdict. On its own initiative, the court also ordered a new trial as to Apple's liability, explaining that the original verdict was inconsistent (in that it exonerated Apple but found liability as to officers acting on Apple's behalf). Apple then settled the case for less than $20 million, even though the jury's original verdict likely would have resulted in more than $100 million in damages. Robert A. Prentice and John H. Langmore, *Beware of Vaporware: Product Hype and The Securities Fraud Liability of High-Tech Companies*, 8 Harv. J.L. & Tech. 1, 18-21 (1994); *see also In re Apple Computer Sec. Litig.*, 886 F.2d 1109 (9th Cir. 1989); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 WL 238298 (N.D. Cal. Sep. 6, 1991).

[FN10]. Eth, *supra*, at 375-80.

[FN11]. *Id*. at 368-69.

[FN12]. *Id*. at 369.

[FN13]. *Id*. at 369.

[FN14]. *Id*. at 369, 371-72.

[FN15]. *Id*. at 372.

[FN16]. *Id*. at 369, 372.

[FN17]. *Id*. at 379-80.

[FN18]. *Id*. at 374.

[FN19]. *Id*. at 371-72.

[FN20]. *Id*. at 369.

[FN21]. *Id*. at 367.

[FN22]. *Id*. at 375-80, 386.

[FN23]. *In re JDS Uniphase Corp. Sec. Litig.*, No. C 02-1486 CW, 2008 WL 753758, at *1 (N.D. Cal. Mar. 19, 2008).

[FN24]. *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2008 WL 3072731, at *1 (D. Ariz. Aug.

4, 2008).

[FN25]. *Id.* at *4.

[FN26]. *In re Apollo Grp., Inc. Sec. Litig.*, No. 08-16971, 2010 WL 5927988, at *1 (9th Cir. June 23, 2010), *cert. denied*, 131 S. Ct. 1602 (2011).

[FN27]. *Id.*

[FN28]. *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, Motion for Preliminary Approval of Stipulation and Agreement Re Final Approval Order and Judgment and Proposed Notice to the Class, at 4 (D. Ariz. Nov. 21, 2011).

[FN29]. *Id.*

[FN30]. *Id.* at 5-6.

[FN31]. *Id.*

[FN32]. *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, Preliminary Approval and Scheduling Order in Connection with Approval of Stipulation and Agreement re Final Approval Order and Judgment (D. Ariz. Nov. 29, 2011).

[FN33]. The underwriter defendants had been dismissed from the case and the plaintiff entered into a settlement with Household's auditor. *See* Kevin LaCroix, *Rare Securities Lawsuit Jury Trial Commences in Case with Predatory Lending Issues*, D&O Diary (Mar. 30, 2009), http://www.dandodiary.com/2009/03/articles/securities-litigation/rare-securities-lawsuit-jury-trial-commences-in-case-withpredatory-lending-issues/.

[FN34]. *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*,756 F. Supp. 2d 928, 930 (N.D. Ill. 2010); Kevin LaCroix, *Plaintiffs Prevail in Mixed Jury Verdict in Household International Securities Fraud Trial*, D&O Diary (May 7, 2009), http://www.dandodiary.com/2009/05/articles/securities-litigation/plaintiffs-prevail-in-mixed-jury-verdict-in-household-international-securities-fraud-trial/.

[FN35]. *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*, No. 1:02-cv-05893, Minute Entry striking defendants' motions (N.D. Ill. Jul. 28, 2010); *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*, No. 1:02-cv-05893, Minute Entry striking plaintiff's motions (N.D. Ill. Jul. 28, 2010).

[FN36]. *Lawrence E. Jaffe Pension Plan*, 756 F. Supp. 2d at 930.

[FN37]. *Id.* at 933-939.

[FN38]. *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*, No. 1:02-cv-05893, Order at 1 (N.D. Ill. Aug. 24, 2011).

[FN39]. *In re Vivendi Universal, S.A.*, 765 F. Supp. 2d 512, 523 (S.D.N.Y. 2011).

[FN40]. *Id.* at 523-25.

[FN41]. *Id*. at 525.

[FN42]. 130 S. Ct. 2869, 2884 (2010).

[FN43]. *Vivendi*, 756 F. Supp. 2d at 525.

[FN44]. *Id*. at 533-34.

[FN45]. *Id*. at 587.

[FN46]. *Id*. at 583.

[FN47]. *Id*. at 587.

[FN48]. *Ret. Sys. for Gen. Emps. of the City of Miami Beach v. Vivendi Universal, S.A.*, No. 11-0908-mv, Mandate (2d Cir. Jul. 20 2011).

[FN49]. *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH/HBP), 2012 WL 362028, at *5 (S.D.N.Y. Feb. 6, 2012).

[FN50]. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH/HBP), Defendant Vivendi S.A.'s Memorandum of Law in Opposition to Plaintiffs' Renewed Motion for Approval of Post-Verdict Class Notice and Claims Administration and to Require Vivendi to Pay for those Procedures; Motion to Approve Plaintiffs' Proposed Procedures for Adjustment of Class Definition; Motion to Approve Plaintiffs' Proposed Procedures for the “Individual Reliance Phase”; Renewed Motion for Award of Prejudgment Interest; Motion Regarding Plaintiffs' Application for Attorneys' Fees and Costs (S.D.N.Y. Nov. 7, 2011).

[FN51]. *In re BankAtlantic Bancorp., Inc. Sec. Litig.*, No. 07-61542-CIV, 2011 WL 1585605, at *4-6 (S.D. Fla. Apr. 25, 2011).

[FN52]. *Id*. at *6.

[FN53]. *Id*.

[FN54]. *Id*. at *1.

[FN55]. *Id*. at *1.

[FN56]. *State-Boston Ret. Sys. v. BankAtlantic Bancorp., Inc.*, No. 11-12410 (11th Cir.).

[FN57]. *In re BankAtlantic Bancorp., Inc. Sec. Litig.*, No. 07-61542-CIV-UNGARO, Order on Motion for Sanctions and Motion for Hearing, (S.D. Fla. Aug. 2, 2011).

[FN58]. *State-Boston Ret. Sys. v. BankAtlantic Bancorp., Inc.*, No. 11-14703 (11th Cir.).

[FN59]. *State-Boston Ret. Sys. v. BankAtlantic Bancorp., Inc.*, No. 11-12410-E, Motion to Impose Sanctions (11th Cir. Aug. 12, 2011).

[FN60]. *In re Homestore.com, Inc. Sec. Litig.*, 252 F. Supp. 2d 1018, 1020 (C.D. Cal. 2003).

[FN61]. Kevin LaCroix, *CalSTRS Wins Rare Securities Suit Jury Verdict Against Homestore CEO,* D&O Diary (Feb. 28, 2011), http://www.dandodiary.com/2011/02/articles/securities-litigation/calstrs-wins-rare-securities-suit-jury-verdict-against-homestoreceo/.

[FN62]. *Id.*

[FN63]. *Id.*

[FN64]. *Id.*

[FN65]. *Id.*

[FN66]. *In re Homestore.com, Inc. Sec. Litig.*, No. CV 01-11115 RSWL (CWx), 2011 WL 1564025, at *1 (C.D. Cal. Apr. 22, 2011).

[FN67]. *Id.*

[FN68]. *In re Homestore.com, Inc. Sec. Litig.*, No. CV 01-11115 RSWL (CWx), Order Re: Defendants' Motion for Judgment (C.D. Cal. Apr. 22, 2011); *In re Homestore.com, Inc. Sec. Litig.*, No. CV 01-11115 RSWL (CWx), Final Judgment as to Stuart H. Wolff (C.D. Cal. Aug. 20, 2011).

[FN69]. *Id.*

[FN70]. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011).

[FN71]. *Morrison*, 130 S. Ct. at 2884.

[FN72]. David Bario, *Vivendi Foreign Shareholders' Claims Bounced; $9.3 Billion Jury Verdict Will Be Drastically Reduced*, The American Lawyer (Feb. 22, 2011), http://www.law.com/jsp/tal/digestTAL.jsp?id=1202482938288&Vivendi_ Foreign_Shareholders_Claims_Bounced__Billion_Jury_Verdict_Will_Be_Drastically_ Reduced&slreturn=1.

[FN73]. Andrew M. Erdlen, *Timing is Everything: Markets, Loss, and Proof of Causation in Fraud on the Market Actions*, 80 Fordham L. Rev. 877, 911 (2011).

[FN74]. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005).

[FN75]. Erdlen, *supra*, at 880.

[FN76]. *Id.*

[FN77]. *See, e.g.*, *Apollo*, 2008 WL 3072731, at *2 (collecting cases).

[FN78]. *Dura*, 544 U.S. at 342-43.

[FN79]. *See supra*, Section III.

[FN80]. *BankAtlantic*, 2011 WL 1585605, at *20-24.

[FN81]. *Apollo*, 2008 WL 3072731, at *3.

[FN82]. *Apollo*, 2010 WL 5927988, at *1.

[FN83]. *Lawrence E. Jaffe Pension Plan*, 756 F. Supp. 2d at 930.

[FN84]. Because reliance is an element of Section 10(b) liability, either party can assert the right to a jury trial, but the parties may elect to waive the right to a jury trial. The parties in the JDSU litigation agreed to waive a jury trial on these issues. *See* Eth, *supra*, at 380.

[FN85]. *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, Motion for Preliminary Approval of Stipulation and Agreement Re Final Approval Order and Judgment and Proposed Notice to the Class, at 4 (D. Ariz. Nov. 21, 2011).

[FN86]. *Lawrence E. Jaffe Pension Plan*, 756 F. Supp. 2d at 935-37.

[FN87]. *See* Elizabeth Chamblee Burch, *Reassessing Damages in Securities Fraud Class Actions*, 66 MD. L. REV. 348, 349 (2007) (asserting that "no coherent doctrinal statement exists for calculating open-market damages in Rule 10b-5 securities fraud class actions").

[FN88]. *Lawrence E. Jaffe Pension Plan*, 756 F. Supp. 2d at 935-37 (describing the competing damages methodologies proposed by the parties).

[FN89]. *In re Homestore.com, Inc. Sec. Litig.*, No. CV 01-11115 RSWL (CWx), Final Judgment as to Stuart H. Wolff (C.D. Cal. Aug. 20, 2011).

[FN90]. *In re Apollo Grp, Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, Motion for Preliminary Approval of Stipulation and Agreement Re Final Approval Order and Judgment and Proposed Notice to the Class, at 5 (D. Ariz. Nov. 21, 2011).

[FN91]. Eth, *supra*, at 376-80.
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