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Special Report:
Three Key Legal Issues "Resolved" Through Jury Instructions in the JDS Uniphase Securities Litigation Trial

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Securities cases are among the most intensely briefed and hardest fought of all litigation. Securities litigators devote reams of paper to parsing the language of the relevant statutes and key cases. We spill gallons of ink arguing about legal doctrines, such as the meaning of a "strong inference" of scienter or the viability of group pleading. Yet, securities litigators seldom get to see how the finer points of securities law make a difference before a judge or jury at trial. The reason is plain: Trials in securities class actions are extremely uncommon. Trials that go all the way to verdict are even rarer. How rare? *The Wall Street Journal* reports that only six securities class actions have been tried to verdict since Congress passed the Private Securities Litigation Reform Act (the "Reform Act") in 1995.[1]

Over the past few months, securities litigators have had the unique opportunity to observe *two* federal securities class actions—*In re JDS Uniphase Securities Litigation* (N.D. Cal.) and *In re Apollo Group Inc. Securities Litigation* (D. Ariz.)—go to jury verdict. There are many important lessons that securities litigators can learn from the prosecution of—and verdicts in—those trials. Perhaps the most important lesson is the central one taught by the verdict for defendants in the *In re JDS Uniphase* (JDSU)

CONTINUED ON PAGE 3

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trial: despite conventional wisdom suggesting otherwise, raw populism does not necessarily dictate outcomes at trial.

The JDSU trial presented many of the factors that plaintiffs typically cite as indicative of a major fraud: (1) billions of dollars in shareholder losses; (2) hundreds of millions of dollars of stock sales by directors and officers; (3) alleged accounting improprieties; (4) a financial restatement; and (5) bet-the-company damages. The jury's verdict for defendants—in the face of all these factors—proves that jurors take their responsibilities seriously. The *merits* of a case truly matter, and jurors will be convinced by facts rather than rhetoric. It is not enough for plaintiffs to allege that "greedy" executives "dumped" their stock on an unwitting public and must be punished. Of course, to be persuasive, the facts must be presented in a context that makes them concrete and understandable, and jurors must be provided with the tools to separate relevant facts from irrelevant hyperbole.

The lessons learned about presenting facts to a jury in a securities case are beyond the scope of this article; instead, this article discusses how three important issues of securities law played out on the critical doctrinal battlefield of jury instructions in the JDSU trial. The three issues are: (1) whether a plaintiff must show that a defendant used, or merely possessed, material, non-public information to establish an insider trading claim; (2) the applicability of the Reform Act's safe harbor provisions for forward-looking statements and the allocation of the burden of proof on that issue; and (3) whether the judge or the jury should choose among competing damages methodologies. Issues like these will be critical for future securities cases at *all* stages of litigation. The particular elements of proof for any given claim, the applicability of and allocation of burden with respect to applicable defenses, and the selection of damages methodologies are the types of issues that must be considered by securities litigators in evaluating the merits and settlement value of every securities action.

Brief Background of the Case

The JDSU litigation arose out of the telecom meltdown of 2001. During that industry collapse, JDS Uniphase—which makes fiber optic components used in telecommunications—saw its stock price fall from more than $140 per share in the spring of 2000 to less than $10 per share by mid-2001, a market cap loss of approximately $90 billion. In the wake of the telecom industry's collapse, JDSU wrote down its goodwill by $40 billion (the largest write-down of goodwill to that date) and its inventory by more than $250 million in July 2001. Eight months later, a lawsuit followed.

The Lead Plaintiff alleged, on behalf of a class of investors (Plaintiffs), that four former JDSU executives saw the downturn coming months before it arrived and misled investors about demand for JDSU products, while selling JDSU stock worth more than $500 million.[2] Plaintiffs also pointed to an additional $500 million in sales of JDSU stock by officers and directors not named as defendants. In addition, Plaintiffs alleged that JDSU "cooked its books" by overstating its goodwill and inventory and that JDSU filed misleading registration statements in connection with significant mergers. Plaintiffs claimed approximately *$20 billion* in damages on behalf of a class of investors who purchased JDSU stock between October 1999 and July 2001, alleging violations of numerous federal securities laws, including Sections 11, 12, and 15 of the Securities Act, and Sections 10(b), 14(a), 20(a), and 20A of the Securities Exchange Act.

At trial, Plaintiffs claimed that Defendants issued 24 materially false or misleading statements, which fell into three categories: (1) statements about demand for JDSU's products (such as "demand is so strong"); (2) projections of JDSU's future sales and earnings; and (3) the inventory and goodwill values reflected in JDSU's financial statements and press releases. Plaintiffs also attempted to prove that the four individual defendants sold JDSU stock worth hundreds of millions of dollars on the basis of material, non-public information.

After more than a month of trial, testimony from more than 40 witnesses (including eight experts), and the introduction of hundreds of exhibits, the case went to the jury in late November. The Oakland jury concluded that none of the challenged statements was materially false or misleading, and that no individual defendant sold JDSU stock on the basis of material, non-public information—a complete victory for Defendants across the board.

Structure of the Trial

The parties to the JDSU litigation agreed that trial should proceed in two phases. The initial phase of trial was intended to address issues common to all plaintiffs and defendants, with individualized issues to be deferred to a second phase of proceedings to occur only if the jury found liability in phase one. Although the precise contours of the second phase of proceedings never were developed fully, the parties ultimately agreed that the second phase would involve a non-jury proceeding following a claims process. This agreed-upon bifurcation of proceedings had many practical effects on the conduct and content of the trial.

For example, because individualized issues of damages and reliance were deferred to a second phase, the retirement plan that served as Lead Plaintiff did not present testimony from a representative of the plan, nor was it subject to examination by Defendants concerning its investment strategy or any other topic. (Had the jury found liability, the Lead Plaintiff's claims would have been presented during the second phase of proceedings.) Similarly, the jury did not hear any evidence about reliance, which also was deferred to the second phase. Plaintiffs, as in most securities cases, proceeded based on the "fraud on the market" presumption of reliance endorsed by the Supreme Court in *Basic v. Levinson*.[3] Plaintiffs recognized, however, that the presumption of reliance is rebuttable.[4] Because rebutting the presumption of reliance as to any particular plaintiff would involve individualized issues about that plaintiff's trading history—*e.g.*, whether that plaintiff was a short seller—the parties agreed that Defendants' efforts to rebut the presumption would be deferred to the second phase of proceedings.[5] Given the jury's verdict, issues surrounding the mechanics of precisely *how* Defendants would be permitted to rebut the presumption never were resolved.

Another important issue ultimately deferred by the parties (and mooted by the jury's verdict) was the application of the Reform Act's proportionate liability provisions.[6] Applying those provisions to the claims in the JDSU case was complex to say the least. For example, under the Reform Act, any defendant who "knowingly committed a violation of the securities laws" is jointly and severally liable for damages.[7] Other defendants are liable "solely for the portion of the judgment that corresponds to the percentage responsibility" of that defendant once responsibility is allocated to "all persons who caused or contributed to the loss."[8] Because each of the 24 statements at issue in the JDSU trial constituted a separate potential "violation" of the securities laws, proportionate liability findings would be required for each statement.[9] Moreover, because several of the challenged statements were forward-looking under the Reform Act, liability would attach only if the speaker had "actual knowledge" that the statement was false or misleading.[10] Presumably, anyone found liable for a forward-looking statement would be jointly and severally liable for the harm caused by that statement.

After wrestling with the complexity that considerations of proportionate liability would add to the jury's already demanding task, the parties decided to defer the issue until the jury returned its findings on liability for each statement. At that point, the parties agreed that the *court* would use the jury's findings regarding the state of mind of each defendant for each statement to make proportionate liability determinations, assuming there was a finding of liability. Because the jury found no liability for any statement, the court never had to resolve these thorny issues.

Jury Instructions

Although the phasing of the JDSU trial meant that many issues raised by the case never were resolved, the court's instructions to the jury provided a vehicle for the presentation and resolution of numerous interesting issues of securities law. The final jury instructions were the result of significant work and collaboration by the parties and the court. Although the parties ended up agreeing about the substance of many (if not most) jury instructions, the court resolved numerous disputes—some in favor of Plaintiffs, others in favor of Defendants. The following three disputes relate to issues of particular interest to securities litigators, and the court's resolution of those disputes offers some insight into how similar disputes may play out in future cases.

Issue 1: Insider Trading—Possession vs. Use

Plaintiffs alleged that the four individual defendants violated Sections 10(b) and 20A of the Exchange Act by selling JDSU stock worth hundreds of millions of dollars in the summer of 2000, while purportedly knowing that JDSU's business would collapse in 2001. The parties disagreed not only about the merits of Plaintiffs' claim—a disagreement that the jury decisively resolved in Defendants' favor—but also about the elements Plaintiffs needed to establish to prove their claim. The disagreement reflected what has been called the possession vs. use debate, which asks whether a plaintiff must show a causal link between a defendant's possession of material, non-public information and that defendant's purchase or sale of a security.[11]

Plaintiffs argued that if an individual defendant sold stock "while in possession of material, non-public information," that defendant was liable for insider trading. In support, Plaintiffs cited the language of Section 20A of the Exchange Act, which refers to "purchasing or selling a security while in possession of material, non-public information."[12] Relying on case law interpreting insider trading under Section 10(b)—which the parties agreed was the predicate Exchange Act violation supporting Plaintiffs' Section 20A claim—Defendants argued that Plaintiffs had to prove that a defendant actually *used* material, non-public information in deciding to sell JDSU stock.[13]

The court resolved the dispute by endorsing what has been called an *Adler*-type presumption, named after the Eleventh Circuit decision in *SEC v Adler.*[14] The *Adler* Court held that "use" was a required element of a Rule 10b-5 insider trading claim, but that "when an insider trades while in possession of material, non-public information, a strong inference arises that such information was used by the insider in trading."[15] The JDSU court similarly recognized the "use" requirement by instructing the jury that to hold a defendant liable for insider trading, the jury must find that the defendant "sold JDSU stock *using* material, non-public information." The court also instructed the jury that there "is a presumption that an individual who decides to sell stock while in possession of material, non-public information used that information in deciding to sell" and that the jury could not find for Plaintiffs if that defendant "disproved this presumption."

Requiring Plaintiffs to prove that the individual defendants used material, non-public information to hold them liable for insider trading is the right result as a matter of law and policy. Holding a defendant liable for insider trading based solely on possession of material, non-public information at the time of a purchase or sale would create an unwarranted form of strict liability for insider trading, and could penalize directors and officers for knowing important information necessary to manage the company for the benefit of its shareholders. Indeed, part of the defense strategy in the JDSU litigation was to emphasize the individual defendants' awareness of JDSU's overall business situation. They made well-informed business decisions and honest statements to investors based on information about the company's overall prospects, rather than on isolated pieces of arguably negative information contained in the millions of pages of documents produced in discovery. The individual defendants also testified about the reasons they sold stock when they did, which had nothing to do with any of the isolated information identified by Plaintiffs. This testimony was supported by the individual defendants' past stock sales, which were consistent with the challenged sales and were made when everyone agreed that JDSU's prospects were bright. This evidence demonstrated both that the individual defendants did not possess any materially adverse, non-public information when they sold JDSU stock and that the individual defendants' decisions to sell stock were not related to any such information.

The jury's verdict does not tell us whether the "presumption of use" instruction affected the jury's deliberations. The verdict form required the jury to determine whether any individual defendant "made a decision to sell shares of JDSU stock using material, non-public information about the company." The jury's unanimous answer for each individual defendant was "No." This could mean that the jury concluded that the individual defendants did not *possess* any material, non-public information when they sold JDSU stock; or, the jury could have determined that even if the individual defendants *possessed* material, non-public information, the individual defendants rebutted any presumption of *use* through evidence about their reasons for selling JDSU stock. Given the jury's universal finding that Defendants made no materially false or misleading statements, however, it seems more likely that the jury concluded that the individual defendants did not possess any material, non-public information when they sold JDSU stock. Regardless, the court's resolution of the possession vs. use question suggests that an *Adler*-type presumption may be used in other civil insider trading cases.[16]

Issue 2: The Reform Act's Safe Harbor Provisions—Who Decides if They're Applicable and Who Bears the Burden of Showing They Were Satisfied?

There is no question that the Reform Act's safe harbor provisions for forward-looking statements have become important tools in defending securities claims, both at the pleading stage and at summary judgment.[17] But who determines whether a particular statement qualifies as forward-looking in the first instance? And who bears the burden of proof at trial on the applicability of the safe harbor provisions, which provide an absolute defense against liability for forward-looking statements? Although "Forward-Looking Statement" is a defined term under the Reform Act, the Act does not state who determines whether any particular statement falls within that definition. Similarly, the Act does not expressly allocate the burden of proof for establishing the elements of the safe harbor under subsection A of 15 U.S.C.A. § 78u-5(c). Nor is there other conclusive authority on that issue.

Before reaching the burden issue in the JDSU litigation, the court had to resolve the parties' dispute about which of the challenged statements were "forward-looking," as defined by the Reform Act.[18] The parties agreed that four of the 24 challenged statements were forward-looking, but disputed whether five other statements qualified for protection under the statute. The court resolved that dispute by issuing a pre-trial order confirming that a total of six of the 24 challenged statements were forward-looking. That order, however, did not address whether the classification of statements as forward-looking is a question of law for the judge or a question of fact for the jury. The court did not need to reach that issue because it found that, in this case, no genuine issues of material fact existed regarding the classification of the statements as forward-looking.

With respect to the six forward-looking statements, Plaintiffs argued that, because the safe harbors provide a complete defense to liability, Defendants bore the burden of showing that the forward-looking statements were accompanied by sufficiently meaningful cautions. Defendants argued that the safe harbor provisions, modeled after the common law "bespeaks caution" doctrine, represent the "pragmatic application of two fundamental concepts in the law of securities fraud: materiality and reliance."[19] Because there is no question that plaintiffs bear the burden of establishing materiality and reliance to prove a fraud claim, Defendants argued, Plaintiffs bore the burden of showing that the challenged forward-looking statements were not protected by the Reform Act's safe harbor provisions, a result supported by the Act's legislative history.[20]

The court resolved this dispute by allocating the burden to Plaintiffs. After explaining that a defendant cannot be held liable for a forward-looking statement if that statement was accompanied by adequate cautionary language, the court instructed the jury that the verdict form would require it "to find whether Plaintiffs have proved that such cautionary statements were not made." Accordingly, had the jury determined that a forward-looking statement was materially false or misleading, it would then have been required to determine whether Plaintiff had proved that the statement "lacked cautionary language." Because the jury found that none of the challenged forward-looking statements were materially false or misleading in the first place, it never reached this question.

Issue 3: Judge or Jury— Who Decides Which Damages Method to Use?

Under the Reform Act, plaintiffs cannot recover more than their "actual damages."[21] Although that sounds simple enough, the actual calculation of damages in a securities case can be quite complex. Numerous factors influence that calculation, especially in a case—such as the JDSU litigation—involving multiple statements made over a significant period of time. What happens, for example, if a jury finds that only certain statements were false or misleading? How is the jury to determine the proportion of claimed damages attributable to the false statements as opposed to statements that were *not* false or misleading? How is the jury to determine the amount of decline in stock price that is attributable to the false statements, rather than to "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events?"[22] These questions would be difficult enough for a jury to tackle if it were instructed on the methodology to use in calculating damages. Requiring a jury to choose among competing *methodologies* before beginning those calculations could further compound the difficulty. Just that scenario was presented in the JDSU litigation.[23]

In the JDSU case, Plaintiffs' damages expert advocated the "constant percentage" method of calculating damages as part of his overall damages methodology. In oversimplified terms, the "constant percentage" method takes the percentage by which a stock price drops in response to a "corrective disclosure" and assumes that the stock price was inflated artificially by that same percentage on every day going back to the date when the challenged statement was made. As an alternative, Plaintiffs' expert also calculated damages using the "constant dollar" or "dollar drop" method, which often is advocated by defendants. Under Plaintiffs' approach to measuring damages using the "dollar drop" method, the absolute amount of the dollar decline (rather than the relative percentage decline) in the stock price following a corrective disclosure is extrapolated backwards in the same way as in the constant percentage method.[24] The choice between these two methods made an enormous difference: during discovery, Plaintiffs' expert calculated $26 billion in damages using the constant percentage method and "only" $10 billion using the constant dollar method. Plaintiffs' expert also opined that the constant percentage method was the proper method based on the relevant academic literature.

Defendants asked the court, in its gatekeeper role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[25] to exclude the opinion of Plaintiffs' expert, including his opinion that the constant percentage method was proper. Among other things, Defendants argued that Plaintiffs' methodology was inconsistent with the requirement that plaintiffs prove loss causation as mandated by *Dura* because that methodology resulted in a dollar value recovery attributable to share price declines that occurred before the first corrective disclosure.[26] Defendants also argued, under Federal Rule of Evidence 702 and *Daubert*, that determining whether the constant percentage or dollar drop method should be used was a question of law for the court, not a question of fact for the jury. Plaintiffs argued that the constant percentage method was proper because the amount of inflation in the stock price can change over time as a result of market and industry forces acting on the fraud, and that the jury should be permitted to decide whether Plaintiffs' expert's testimony established that the constant percentage method was the best method for measuring damages.

The court permitted Plaintiffs' expert to testify about his damages methodology, including the difference between the dollar drop and constant percentage methods. The court then tasked the jury with determining the proper method for measuring damages. If it found liability, the jury had to decide whether the dollar drop method or the constant percentage method was "the most accurate method for calculating damages in this case." Depending on the method chosen, the jury would then complete either a "Dollar Inflation Table" or a "Percentage Inflation Table" by filling in either a dollar or percentage amount of inflation for each of twenty different dates during the class period.

The jury never had to tackle the difficult issues of damages because it found that no violation of the securities laws occurred. Determining the correct methodology for calculating damages should not—in most securities cases—require assessment of factual or credibility disputes, and thus should be viewed as a pure question of law.[27] This important issue is worth careful thought and planning as it likely will arise in future securities class actions and can have a tremendous effect on the amount of damages at play.

Conclusion

As these three examples illustrate, when securities cases go to trial, the nuances of key legal doctrines come to a head and will be resolved through the court's instructions of law to the jury. Just *how* the court resolves those issues can have a major impact on the jury's consideration of the claims before it. For that reason, securities litigators, whether they represent plaintiffs or defendants, must give serious consideration to the content and formulation of jury instructions well in advance of trial. Indeed, this should be done at the earliest stages of litigation as the parties are planning the defense or prosecution of the case. Although few securities litigators ever have had to argue competing jury instructions to a judge at trial—and, in all likelihood, few ever will—those confrontations bring nuanced points of securities law into sharp relief and may prove to be important to the future development of doctrine in key areas. Even more importantly, understanding how these doctrines may play out at trial is invaluable for parties as they attempt to evaluate the merits and estimate the value of their case during all stages of litigation.

NOTES

1. *See* Peter Lattman, *Jury Finds Against Apollo Group*, Wall St. J., Jan. 17, 2008, at B6.
2. The court appointed the State of Connecticut Retirement Plans and Trust Funds as Lead Plaintiff.
3. *See Basic Inc. v. Levinson*, 485 U.S. 224, 248-49, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).
4. *See id.* ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.").
5. Courts have held, in varying contexts, that short sellers may not be able to benefit from the fraud on the market presumption of reliance. *See, e.g.*, *Zlotnick v. TIE Communications,* 836 F.2d 818, 822-23, Fed. Sec. L. Rep. (CCH) P 93575, R.I.C.O. Bus. Disp. Guide (CCH) P 6838 (3d Cir. 1988) (requiring short seller to plead actual reliance to state securities fraud claim); *In re Critical Path, Inc. Securities Litigation*, 156 F. Supp. 2d 1102,1110 , Fed. Sec. L. Rep. (CCH) P 91514 (N.D. Cal. 2001) (rejecting short seller as class representative in fraud-on-the-market case); *Ganesh, L.L.C. v. Computer Learning Centers, Inc.*, 183 F.R.D. 487, 491 (E.D. Va. 1998) (short sellers "cannot logically use a fraud on the market theory to obviate the need for positive proof of individual reliance").
6. *See* 15 U.S.C.A. § 78u-4(f) ("Proportionate Liability" provisions of the Reform Act).
7. 15 U.S.C.A. § 78u-4(f)(2)(A).
8. 15 U.S.C.A. §§ 78u-4(f)(2)(B)(i) & 78u-4(f)(3)(A)(ii).
9. *See, e.g.*, *In re Convergent Technologies Securities Litigation,* 948 F.2d 507, 512, Fed. Sec. L. Rep. (CCH) P 96211 (9th Cir. 1991), as amended on denial of reh'g, (Dec. 6, 1991) ("[T]o prevail, the plaintiffs must demonstrate that *a particular statement*… conveyed a false or misleading impression.") (emphasis added).
10. *See* 15 U.S.C.A. § 78u-5(c)(1)(B)(i) (application of Safe Harbor for Forward-Looking Statements).
11. *See United States v. Smith*, 155 F.3d 1051, 1066 (9th Cir. 1998) (citing academic commentary on the possession vs. use debate).
12. *See* 15 U.S.C.A. § 78t-1.
13. *See, e.g.*, *Smith*, 155 F.3d at 1069. Section 20A also restricts recovery to plaintiffs that trade "contemporaneously" with an insider. The JDSU parties disagreed about the meaning of this requirement. Defendants argued that only purchases made later on the same day as the challenged sales were contemporaneous; Plaintiffs argued that purchases within a few days after the challenged sales qualify. This was one of

the many issues deferred to a second phase of proceedings and never resolved.

14. *S.E.C. v. Adler,* 137 F.3d 1325, Fed. Sec. L. Rep. (CCH) P 90177 (11th Cir. 1998).
15. *Adler,* 137 F.3d at 1337-39; *see also Smith*, 155 F.3d at 1069 (discussing *Adler*).
16. *See, e.g.*, *Johnson v. Aljian*, 394 F. Supp. 2d 1184 (C.D. Cal. 2004), aff'd in part, 490 F.3d 778, Fed. Sec. L. Rep. (CCH) P 94417 (9th Cir. 2007), petition for cert. filed, 76 U.S.L.W. 3316 (U.S. Dec. 7, 2007) ("The Court will apply the presumption of *Adler* in the present civil case."). The SEC sought to resolve the possession vs. use debate by enacting Rule 10b5-1, which became effective in late 2000. *See* Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590-01, at 72600 (proposed Dec. 28, 1999) (proposing new rule to "define the scope of Rule 10b-5, as it applies to the use/possession issue"). That rule defines trading "on the basis of" material non-public information to mean purchasing or selling a security while "aware" of such information. *See* 17 C.F.R. § 240.10b5-1(b). The Rule allows specific affirmative defenses, however, to defendants who demonstrate in accordance with the rule that the material non-public information was not used in making the trades. *Id.* at § 240.10b-5-1(c). In essence, this approach allows a defendant to break the link of causation between possession and use of material inside information. *See, e.g.*, Selective Disclosure and Insider Trading, 65 Fed. Reg. 51716 (Aug. 24, 2000) (noting that the affirmative defenses "permit persons to trade in certain circumstances where it is clear that the information was not a factor in the decision to trade"); *Securities and Exchange Com'n v. Lipson,* 278 F.3d 656, 660-61, Fed. Sec. L. Rep. (CCH) P 91674 (7th Cir. 2002). In insider trading cases involving trades that occurred after Rule 10b5-1, the specific contours of that rule likely will inform the content of jury instructions.
17. *See* 15 U.S.C.A. § 78u-5(c)(1) & (2). Numerous courts have dismissed complaints or granted summary judgment for defendants based on these safe harbor provisions. *See, e.g.*, *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co*., 353 F.3d 1125 (9th Cir. 2004) (affirming summary judgment); *Harris v. Ivax Corp*., 182 F.3d 799, Fed. Sec. L. Rep. (CCH) P 90528 (11th Cir. 1999) (affirming dismissal).
18. *See* 15 U.S.C.A. § 78u-5 (defining forward-looking).
19. *See In re Worlds of Wonder Securities Litigation*, 35 F.3d 1407, 1414, Fed. Sec. L. Rep. (CCH) P 98393 (9th Cir. 1994).
20. *See, e.g.*, S.R. Rep. 104-98 at 16 ("pleading requirements [of the Reform Act] will apply to a complaint *alleging that a forward-looking statement is not within the safe harbor*" and "plaintiffs have the burden of pleading *and proving*" that "the forward-looking statement was knowingly made with the expectation, purpose, and actual intent of misleading investors") (emphasis added); H.R. Conf. Rep. 104-369 at 44 ("plaintiff must plead with particularity all facts giving rise to a strong inference of a material misstatement in a cautionary statement").
21. *See* 15 U.S.C.A. § 78bb(a) (plaintiffs cannot recover "a total amount in excess of … actual damages").
22. See *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 343, 125 S. Ct. 1627, 161 L. Ed. 2d 577, Blue Sky L. Rep. (CCH) P 74529, Fed. Sec. L. Rep. (CCH) P 93218 (2005).
23. Another issue initially disputed by the parties and ultimately resolved without a ruling by the court was whether plaintiffs would be permitted to pursue an aggregate damages award or whether they were limited to seeking a "per-share" damages award, with "aggregate" damages to be determined through a post-trial claims process. Defendants argued that because a plaintiff is entitled to only *actual* (as opposed to estimated) damages under the securities laws, the jury should be restricted to making a per-share damages determination during the first phase of trial rather than a determination about damages in the aggregate. *See, e.g.*, *Biben v. Card*, 789 F. Supp. 1001, Fed. Sec. L. Rep. (CCH) P 96848 (W.D. Mo. 1992) (trial to proceed in two phases, with first phase to address "liability and the true value of the shares" and second phase "to determine individual class member's damages"); *Jaroslawicz v. Engelhard Corp*., 724 F. Supp. 294, 302, Fed. Sec. L. Rep. (CCH) P 96929 (D.N.J. 1989) (damages to be "determined at trial solely on a per share basis that will later be sued in a separate proceeding on individualized damages"). Plaintiffs ultimately decided to pursue only a per-share damages award, mooting the debate.
24. Because there were multiple alleged disclosure dates and multiple allegedly false or misleading statements, these formulations are overly simplified, although they capture the essence of the "constant percentage" and "dollar drop" methodologies. The "backwardization" or "back-casting" inherent in Plaintiffs' methodology itself is suspect under *Dura*. *See, e.g.*, Allen Farrell & Atanu Saha, "The Loss Causation Requirement for Rule 10b-5 Causes of Action: The Implications of *Dura Pharmaceuticals, Inc. v. Broudo*," 63 Bus. Law. 163, 185-86 (Nov. 2007) (criticizing "back-casting" approach and discussing "forward-casting" alternative).

25. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993).
26. *See In re Williams Securities Litigation*, 496 F. Supp. 2d 1195, 1267, Fed. Sec. L. Rep. (CCH) P 94445, 74 Fed. R. Evid. Serv. 678 (N.D. Okla. 2007) (finding, as a matter of law, that damages analysis "premised on a 'constant percentage inflation' approach impermissibly seeks recovery of losses as to which loss causation has not been, and cannot be, established"). Defendants also argued that Plaintiffs' constant percentage methodology violated the Reform Act requirement that "no person" can recover more than "actual damages" suffered. 15 U.S.C.A. § 78bb(a). Plaintiffs' expert testified that he converted the constant percentage drops into a rounded "average dollar inflation" for each of several sub-periods. This use of average dollar inflation per sub-period means that some investors who purchased shares during each sub-period could receive a damage award *greater* than the amount of actual damages.
27. Indeed, many courts have recognized the general proposition that although "the calculation of the amount of damages is a factual determination, the formula used in making that calculation is a question of law." *Vermont Microsystems, Inc. v. Autodesk*, Inc., 138 F.3d 449, 452, 45 U.S.P.Q.2d 2014 (2d Cir. 1998); *see also Southern Colorado MRI, Ltd. v. Med-Alliance, Inc.*, 166 F.3d 1094, 1100 (10th Cir. 1999) ("The methodology a district court uses in calculating a damage award, such as determining the proper elements of the award of the proper scope of recovery, is a question of law."); *In re Air Crash Disaster Near Cerritos, Cal., On Aug. 31,* 1986, 982 F.2d 1271 1275, (9th Cir. 1992) (elements of damages award reviewed as a matter of law); *The Topps Co., Inc. v. Cadbury Stani S.A.I.C.*, 2006 WL 176995, at *6 (S.D. N.Y. 2006) (rejecting expert testimony that reasonable royalty was "best measure[]" of damages because proper method was a question of law). Moreover, requiring the jury to determine the proper method for calculating damages arguably contravenes the role assigned to the court under *Daubert*.