

Reflections on the PSLRA at 30

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This year marks three decades since Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA or Reform Act) to eradicate “perceived abuses of the class action vehicle in litigation involving nationally traded securities.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

At the time, “nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and ‘manipulation by class action lawyers of the clients whom they purportedly represent’ had become rampant”—resulting in “extortionate settlements” and an atmosphere that not only “chilled any discussion of issuers’ future prospects” but “deterred qualified individuals from serving on boards of directors.”

Through the PSLRA, Congress codified a battery of reforms, including restrictions on the selection of (and compensation awarded to) lead plaintiffs; limitations on recoverable damages and attorneys’ fees; an automatic stay of discovery during the pendency of motions to dismiss; a safe harbor for certain forward-looking statements; a mandate directing courts to sanction attorneys who violate Rule 11(b) of the Federal Rules of Civil Procedure; and, most significantly, a heightened requirement for pleading falsity and scienter for securities fraud actions.

These protections—among others memorialized in the PSLRA—have reshaped how securities class actions are litigated today. Whether the Reform Act has fully achieved its objectives, however, is a more complicated question.



Securities Litigation

The Supreme Court Has Played an Active Role in Furthering the PSLRA's Objectives, Contributing to High Dismissal Rates

On the one hand, data suggest that courts dismiss well over a majority of all securities class action complaints. One report by NERA found that motions to dismiss were brought in 96% of all resolved securities class actions filed between 2015 and 2024, with 74% of this group producing a decision. NERA, *Recent Trends in Securities Class Action Litigation: 2024 Full-Year Review*, at 17.

NERA determined that within this cohort of decisions, motions were granted in full (either with or without prejudice) 61% of the time, denied in full 19% of the time, and partially granted 20% of the time. *Id.* In our experience, the PSLRA's heightened pleading requirements have been a major reason for these dismissal rates.

The Supreme Court has also played a key role by issuing decisions that have strengthened the requirements for pleading and proving securities claims. There have been numerous examples since the PSLRA's enactment, but three in particular stand out:

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), for instance, the Supreme Court clarified a plaintiff's burden to "prov[e] that the act or omission of the defendant... caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. §78u-4(b)(4). As the court observed, an inflated purchase price "will not itself constitute or proximately cause the relevant economic loss" in fraud-on-the-market cases because this inflation, at that moment, "is offset by ownership of a share that at that instant possesses equivalent value."

Thus, "if... the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss." Reasoning from this premise, the court held that a plaintiff must demonstrate that the alleged misrepresentation actually "cause[d] a loss."

The court next turned to a defendant's state of mind. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), the court affirmed that Congress had "unequivocally raised the bar for pleading scienter," and that, as a result, a complaint's inference of fraudulent intent "must be more than merely 'reasonable' or 'permissible'—it must be cogent and compelling, [and] thus strong in light of other explanations."

And finally, in *Omnicare, Inc. v. Laborers District Council Construction Industries Pension Fund*, 575 U.S. 175 (2015), the court clarified the test for opinion-based liability under Section 11 of the Securities Act of 1933.

Writing for the court, Justice Elena Kagan adopted a stringent, three-part framework under which a plaintiff must allege facts sufficient to show that (1) "the speaker d[id] not hold the belief... professed"; (2) the "fact[s] supplied in support of the belief professed [were] 'untrue'"; or (3) the speaker "omit[ted] information" that "makes the statement misleading to a reasonable investor." The court stressed that pursuing an

omissions theory, in particular, would be "no small task for an investor."

Plaintiffs Have Continued Filing Securities Class Actions at Elevated Rates

Despite the Supreme Court's efforts, securities class actions have not vanished or even declined in any meaningful way. Between 1996 and 2024, the number of U.S.-listed companies fell from 8,783 in 1996 to 5,455 in 2024. NERA, *Recent Trends in Securities Class Action Litigation: 2024 Full-Year Review*, at 2.

And yet, the plaintiffs' bar continues to file complaints at an elevated rate, as evidenced by the 225 new federal and state filings in 2024, a figure just below the 1997-2003 average of 227. Cornerstone Research, *Securities Class Action Filings: 2024 Year in Review*, at 1.

This resiliency would have been hard to envision in 1995, when President Bill Clinton vetoed the PSLRA over fears that the "legislation [would]... have the effect of closing the courthouse door on investors who have legitimate claims." William J. Clinton, *Message to the House of Representatives Returning Without Approval the Private Securities Litigation Reform Act of 1995* (Dec. 19, 1995). The filing data confirm that the PSLRA did not, in fact, "clos[e] the courthouse door on investors."

Part of the answer can be found by looking behind the numbers. In addition to filing garden variety "stock drop" suits, securities plaintiffs have, with some success, adjusted their tactics to account for emerging business trends and changes in the financial markets. In the early 2000s, for instance, plaintiffs capitalized on stock declines stemming from the bursting of the Internet bubble.

Then, towards the latter part of the decade, plaintiffs transitioned to credit crisis cases and fallout from Bernard Madoff's Ponzi scheme. As the 2010s began, plaintiffs continued to adapt by targeting Chinese and other foreign-based issuers with greater frequency.

Then, as the decade unfolded, plaintiffs started filing a spate of event-driven litigations, including suits arising from the #MeToo movement, government investigations and cybersecurity breaches. This evolution continues today, with

plaintiffs focusing in recent years on the pandemic, the emergence of SPACs, the cryptocurrency industry, artificial intelligence, and more.

Another clue may lie in the statutory language itself. Whether facts are adequately particularized, whether allegations raise a “strong” inference of fraudulent intent, and whether cautionary language is “meaningful” under the statutory safe harbor are all questions that require judges to apply their common sense and judgment to a specific set of alleged facts.

Without bright-line rules, the PSLRA has produced disagreements, both within and across jurisdictions, over what suffices to state an actionable claim. And this arguably has allowed the securities plaintiffs’ bar to gain a foothold in a minority of cases.

Novak v. Kasaks and Confidential Witnesses: An Early Analysis of Particularity

This can be observed in the case law. Judges today are continuing to debate some of the same interpretive issues as their predecessors did several decades ago. Take for instance the question of whether, as to allegations made on “information and belief,” the plaintiff has adequately “stat[ed] with particularity all facts on which that belief is formed.” 15 U.S.C. §78u-4(b)(1).

One of the first decisions to tackle this question was *Novak v. Kasaks*, 216 F.3d 300 (2d Cir. 2000). There the Second Circuit held that “notwithstanding the use of the word ‘all,’ [section 78u-4(b)(1)] does not require that plaintiffs plead with particularity every single fact upon which their beliefs concerning false or misleading statements are based.” Rather, plaintiffs only must “plead with particularity sufficient facts to support those beliefs.”

In *Novak*, plaintiffs relied primarily on allegations from confidential witnesses. The Second Circuit outlined a multi-part test for whether these “information and belief” allegations could be credited under Section 78u-4(b)(1). As the court held, if “plaintiffs rely on confidential personal sources but also on other facts, they need not name their sources as long as the latter facts provide an adequate basis for believing that the defendants’ statements were false.”

And “even if personal sources must be identified, there is no requirement that they be named, provided they are described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged.” *Id.* Over the past twenty-five years, this test, with some variation, has been adopted widely and confidential witnesses have become a key component of many (if not most) securities class action complaints.

Indeed, just recently, in *Sherman v. Abengoa, S.A.*, — F.4th —, 2025 WL 2825369 (2d Cir. Oct. 6, 2025), the Second Circuit partially reversed a district court’s dismissal of securities claims for failing to credit plaintiffs’ allegations from confidential witnesses and from Spanish criminal proceedings.

Thirty Years Later, the Debate Over Pleading Standards Continues

Novak, however, did not explore other ways in which plaintiffs might satisfy the requirements of paragraph (b)(1). And over the past quarter century, plaintiffs have developed other strategies and tactics for pushing their complaints past the motion to dismiss stage.

In recent years, for instance, plaintiffs have relied with greater frequency on allegations derived from reports issued by short-sellers, investors who have a built-in incentive to drive the issuer’s stock price lower. In general, courts have been reluctant to credit allegations from these “short reports” unless they have been corroborated with other well-pled facts.

Plaintiffs have also tried to meet the PSLRA’s pleading requirements through the use of expert reports. This tactic was on display in a recent securities fraud class action involving NVIDIA, a leader in artificial intelligence computing known for its graphics processing units (GPUs), devices that quickly perform complex computational problems. See *E. Ohman J:Or Fonder AB v. NVIDIA Corp.*, 81 F.4th 918 (9th Cir. 2023).

Plaintiffs had accused the company and its executives of concealing the extent to which NVIDIA’s Gaming-segment revenues had been derived from GPU sales to the volatile cryptocurrency industry

rather than gamers. See 81 F.4th at 929, 960. To support this assertion, plaintiffs engaged Prysm Group, an economic consulting firm.

Drawing on publicly available information (rather than facts gleaned from current or former NVIDIA employees or internal company documents), the expert estimated the amount by which NVIDIA's Gaming segment revenues had been driven by cryptocurrency miners rather than gamers.

Two judges of a three-judge panel held that plaintiffs had adequately pled falsity, relying in part on conclusions drawn from Prysm's report. This sparked a debate between the majority and Judge Gabriel P. Sanchez, writing in dissent.

Sanchez faulted the majority for "allow[ing] an outside expert to serve as the primary source of falsity allegations under the PSLRA where the expert relies almost exclusively on generic market research and without any personal knowledge of the facts on which their opinion is based." In this regard, Sanchez highlighted plaintiffs' failure to allege "that Prysm's revenue estimates [were] based on information provided by any current or former NVIDIA employee or any internal report or data source."

The majority countered that its holding did not rest solely on Prysm's opinions. Plaintiffs, the majority explained, had also supported their expert's opinions with other facts—specifically, a stock analyst report that reached similar conclusions and allegations from confidential witnesses "that revenues from purchases of GeForce GPUs [had been] counted as Gaming-segment rather than OEM-segment [i.e., cryptocurrency-related] revenues."

It was "the totality of [these] detailed allegations," not the Prysm report in isolation, that "satisfie[d] the PSLRA pleading standard for falsity." The majority also rejected Judge Sanchez's contention "that, to be credible, an expert opinion must rely on internal data and witness statements." This, according to the majority, "would place an onerous and undue pre-discovery burden on plaintiffs in securities fraud cases," contrary to the PSLRA's requirements.

Disagreements like this may explain, in part, why the PSLRA has not deterred plaintiffs from filing well over 200 new securities class actions year after year. As the data confirm, the PSLRA—along with the Supreme Court jurisprudence surrounding it—has given corporate defendants a potent tool for dispatching over 60% of these suits at the pleading stage. But this still means that a substantial number of suits, including many meritless suits, are surviving and proceeding to discovery.

In years past, defendants have turned to the Supreme Court to resolve disputes like this. And that is what the NVIDIA defendants did here, successfully petitioning the Supreme Court to hear their appeal and review the Ninth Circuit's holding as to falsity and scienter. This time, though, the Justices reconsidered their initial decision to grant certiorari and dismissed the petition as being improvidently granted without further elaboration.

This result was foreshadowed during oral argument, when several Justices expressed reservations about being asked to, in their words, "error correct" rather than articulate legal principles of general applicability that could be applied to future cases. Some have suggested that this concern was behind the Justices' about-face, and have wondered aloud if the Court may be less willing to hear securities cases in the future.

Looking ahead, only time will tell if these concerns come to pass. If they do, however, we might see more circuit splits and other disagreements over how to interpret the PSLRA. It would then be up to Congress to further advance the goals that it set thirty years ago.

The opinions expressed in this article are those of the authors and do not necessarily reflect the views of Skadden or its clients.

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