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THE SUPREME COURT'S DURA DECISION UNFORTUNATELY SECURES A BRIGHTER FUTURE FOR 10b-5 DEFENDANTS

INTRODUCTION

Federal securities legislation has been prevalent in the United States since the Great Depression. Congress passed the Securities Act of 19331 (1933 Act) and the Securities Exchange Act of 19342 (1934 Act) (collectively, the Acts) in an attempt to increase investor confidence.3 The legislature believed that an upsurge in investor confidence would promote investment, which would in turn cause "capital formation, economic growth, and job creation."4

The Acts imposed "comprehensive disclosure responsibilities for companies issuing securities to the public," and they contained new causes of action created solely to enforce such responsibilities.5 Congress enacted two methods of enforcing the Acts: (1) the Securities and Exchange Commission (SEC) could directly enforce specific provisions of the Acts; and (2) private investors could recover for damages resulting from violations of the Acts by bringing causes of action afforded to investors by the Acts.6 In addition, federal courts expanded the scope of the Acts to allow private rights of action even where Congress did not expressly create them.7

The passage of the Acts caused securities litigation to increase. This trend continued into the 1990s, when plaintiffs filed a total of 164 federal securities class actions in 1991, 202 in 1992, 163 in 1993, and 233 in 1994.8 The proliferation of securities litigation eventually forced Congress to reevaluate the Acts. The Committee on Banking, Housing, and Urban Affairs (the Committee), created to investigate securities issues, became concerned that lawyers were bringing frivolous

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6. Id. at 910.
7. Id.
"strike" lawsuits alleging securities law violations with the hope that corporations would settle to avoid litigation costs. Congress found that these suits were usually groundless, unnecessarily increased the costs of raising capital, and involved the same repeat plaintiffs. The Committee may not have considered, however, that the increase in securities litigation might also have been attributable to a rise in deceptive practices.

To combat frivolous securities lawsuits, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA). Congress intended that the PSLRA "lower the cost of raising capital by combating [securities law] abuses, while maintaining the incentive for bringing meritorious actions." Despite the problems that arose from securities fraud actions, Congress implied that direct shareholder suits were still critical to the continued stability of American markets. For that reason, Congress left much of federal securities regulation untouched and made only certain particular aspects of securities fraud more difficult to plead. For example, Congress did not impose a higher pleading burden for loss causation.

In spite of Congress's determination that private securities fraud actions were still essential to the regulatory scheme, the dismissal rate following the enactment of the PSLRA more than doubled (11.2%
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dismissal rate before the PSLRA to 25.1% after its enactment.17 Some believed that this dramatic increase in the dismissal rate demonstrated that federal courts were too stringent in applying the PSLRA, and that the only way to assure the continued efficacy of private securities fraud actions was for federal courts to apply normal pleading standards where Congress did not expressly legislate otherwise.18

This Note focuses on loss causation, a subject which the Supreme Court recently addressed in Dura Pharmaceuticals, Inc. v. Broudo.19 Part II provides a backdrop of basic securities fraud actions (including the elements of a fraud action) with a focus on what burdens a plaintiff must meet.20 It also shows how circuit courts have employed different standards in determining the pleading and proof requirements of loss causation.21 Part III elucidates the holdings of the Dura decision.22 Part IV evaluates the Dura decision, concluding that the Court's adoption of common-law precedent did not fully consider the legislative history of the PSLRA, and that the resulting standard is too oppressive on plaintiffs.23 Part V observes the present impact on securities litigation and predicts future trends.24

II. BACKGROUND

This Part will provide a backdrop for why it was necessary for Congress to codify securities law legislation.25 It will describe the actual securities law enacted by Congress26 and explicate the circuit courts' loss causation approaches.27

A. Congressional Hearings Leading Up to the PSLRA

In response to mounting concerns regarding the increasing number of securities fraud actions, Congress held committee hearings to determine what reforms were essential to deter capricious securities law-

19. 544 U.S. 336 (2005); see also infra notes 86–112 and accompanying text.
20. See infra notes 28–50 and accompanying text.
21. See infra notes 51–85 and accompanying text.
22. See infra notes 86–112 and accompanying text.
23. See infra notes 113–179 and accompanying text.
24. See infra notes 180–250 and accompanying text.
25. See infra notes 28–39 and accompanying text.
26. See infra notes 40–50 and accompanying text.
27. See infra notes 51–85 and accompanying text.
The Committee noted that plaintiffs typically brought securities fraud actions under the "'catch-all' fraud provision in Section 10(b) of the 1934 Act." Congress did not originally provide for private 10(b) actions; rather, federal courts inferred that Congress had authorized such actions. Due to judicial lawmaking, conflicting legal standards developed that created significant "opportunities for abuses of investors, issuers, professional firms and others." As a result, Congress sought to reassert its authority over securities law and passed the PSLRA in 1995.

In drafting the PSLRA, Congress intended to stabilize securities law by empowering investors—not their attorneys—to initiate and recover from securities actions. Testimony presented to Congress at the PSLRA hearings indicated that lawyers were instigating shareholder suits, usually with the aid of "professional" plaintiffs, and that investors were typically recovering "only 7 to 14 cents for every dollar lost as a result of securities fraud.

The Committee decided that establishing a stringent pleading standard would be one way to slow the onslaught of groundless securities actions. Yet the Committee did not necessarily intend for this heightened standard to apply to every aspect of the complaint. The Committee resolved that a plaintiff should have to prove loss causation, and an acceptable avenue for proving this loss would be "to prove that the price at which the plaintiff bought the stock was artificially inflated as the result of the misstatement or omission." Conspicuous in its absence was any requirement that the plaintiff prove a subsequent loss. The Committee stated that a defendant would have the burden of proving that factors other than the fraud caused or contributed to the loss. Despite the Committee's intent not to raise the

32. Id. at 4-5, as reprinted in 1995 U.S.C.C.A.N. 679, 683-84.
33. Id. at 6, as reprinted in 1995 U.S.C.C.A.N. 679, 685.
34. S. REP. NO. 104-98, at 6, as reprinted in 1995 U.S.C.C.A.N. 679, 685 (stating that "professional" plaintiffs in the securities law context are ones who, because they have many shares in numerous companies, frequently lend their names to securities fraud lawsuits).
38. Id., as reprinted in 1995 U.S.C.C.A.N. 679, 694 ("The defendant would then have the opportunity to prove any mitigating circumstances, or that factors unrelated to the fraud contributed to the loss.").
pleading standard for loss causation, Congress may have inadvertently erected hurdles too high for plaintiffs to clear by not explicitly codifying what is required.39

B. Securities Law Codified

The PSLRA codified private securities fraud actions and requires that a plaintiff (1) allege that the defendant made a false statement of a consequential fact or omitted such a material fact from a statement; (2) allege that the defendant made his statement or omission with a particular state of mind; and (3) prove that the material misstatement or omission caused the plaintiff to suffer damages.40 The Supreme Court has extrapolated from these essentials of securities fraud actions the following prima facie elements: (1) a material misrepresentation or omission;41 (2) a wrongful state of mind (scienter);42 (3) a connection with the security purchase;43 (4) reliance by the plaintiff on the misrepresentation or omission, i.e., "transaction causation;"44 (5) economic loss;45 and (6) loss causation.46

39. Cf. Savett, supra note 8, at 23. Savett recognizes this possibility:

Unfortunately, the erection of litigation hurdles . . . may have been a contributing factor in the massive proliferation of corporate fraud. With major financial scandals dominating the news over the last few years, it is clear that Congress should have been concerned with protecting public investors from corporate America's abuses—not protecting the corporate elite by fostering an atmosphere favorable to fraud. Id.; see also Brief for James J. Hayes, supra note 17, at 7 ("A fraud suit against WorldCom was dismissed just three months before the company's internal auditor alerted directors and the public about WorldCom's fraudulent overstatement of earnings that led to its bankruptcy."); 2 Harold S. Bloomenthal, Securities Law Handbook § 25:5 (2006) ("With some notable exceptions, plaintiffs' bar has not fared well on the judicial front in cases construing the [PSLRA].").


41. Basic Inc. v. Levinson, 485 U.S. 224, 230 n.6 (1988) ("It shall be unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . ") (quoting 17 C.F.R. § 240.10b-5 (1987))).

42. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976) ("[Rule] 10(b) was addressed to practices that involve some element of scienter and cannot be read to impose liability for negligent conduct alone.").


44. The Supreme Court allows plaintiffs to plead transaction causation based upon the "fraud-on-the-market" theory. Basic, 485 U.S. at 243. In other words, plaintiffs may meet the transaction causation requirement by pleading "that a defendant's material misrepresentation was a fraud-on-the-market that artificially inflated the stock price on which investors relied." Laurie Smilan, Issuer Class Actions: Noteworthy Decisions and Trends of 2004/2005, 1505 Practising L. Inst. Corp. L. & Prac. Course Handbook Series 203, 209 (2005).


46. Id.; Thomas Lee Hazen, The Law of Securities Regulation § 12.11[3] (5th ed. 2005) ("[T]he plaintiff must be able to prove 'loss causation': namely that the plaintiff's injury (generally the diminution in the value of his or her investment) is directly attributable both to the wrongful conduct and the form and manner in which the challenged transaction occurred.").
Congress did not achieve its goal of eliminating the instability in securities law with the passage of the PSLRA legislation. Federal courts were—and still are—applying varying and sometimes conflicting approaches to the PSLRA.\textsuperscript{47} One of the most notorious discrepancies among the federal courts involves loss causation.\textsuperscript{48} Loss causation compels the plaintiff in a securities fraud action to prove that the defendant's act or omission actually brought about a loss for which the plaintiff seeks compensation.\textsuperscript{49} Ultimately, the Court granted certiorari to the Ninth Circuit case, \textit{Broudo v. Dura Pharmaceuticals, Inc.}, to address loss causation issues.\textsuperscript{50}

\section*{C. Circuit Courts' Loss Causation Standards Prior to Dura}

To understand why Supreme Court review was imperative, it is necessary to analyze the discrepancies that existed among the circuit court interpretations. Comparing the Second Circuit and Third Circuit approaches with that of the Ninth Circuit demonstrates the scope of the incongruity among the appellate courts.

The Third Circuit articulated its principles of loss causation pleading in \textit{Semerenko v. Cendant Corp.}\textsuperscript{51} The \textit{Semerenko} court reviewed past Third Circuit holdings and reiterated that "where the claimed loss involves the purchase of a security at a price that is inflated due to an alleged misrepresentation, there is a sufficient causal nexus between the loss and the alleged misrepresentation to satisfy the loss causation requirement."\textsuperscript{52} The court noted that this principle assumes that the fall in price was due to subsequent disclosure of the misrepresentation.\textsuperscript{53} This assumption is significant because although the Third Circuit requires a price drop,\textsuperscript{54} it does not demand that the plaintiffs specifically plead the causal chain. The alleged misrepresentations need not be the sole cause of the decline in value; "[s]o long as the alleged misrepresentations were a substantial cause of the inflation in

\begin{footnotes}
\item[47] Smilan, supra note 44, at 207 ("Although the [PSLRA] was enacted nearly a decade ago, its key provisions continue to be litigated and their contours determined—and not always uniformly—by the federal courts.").
\item[48] Cf. \textit{id}. at 207--12.
\item[51] 223 F.3d 165 (3d Cir. 2000).
\item[52] \textit{id}. at 184.
\item[53] \textit{id}. at 184--85.
\item[54] \textit{id}. at 185 ("Where the value of the security does not actually decline as a result of an alleged misrepresentation, it cannot be said that there is in fact an economic loss attributable to that misrepresentation.").
\end{footnotes}
the price of a security and in its subsequent decline in value, other contributing forces will not bar recovery.\textsuperscript{55}

The Third Circuit then applied those concepts to the complaint. In \textit{Semerenko}, the plaintiff alleged that the market price of the stock diminished in value as a result of the alleged fraud.\textsuperscript{56} From that allegation, the court found it reasonable to infer that when the misrepresentation was disclosed to the public, the disclosure significantly contributed to the subsequent decline in value.\textsuperscript{57} To summarize, the Third Circuit required the plaintiff to plead that (1) he or she bought at an inflated price; (2) the inflated price was due to a misrepresentation or omission; (3) the stock price later dropped; and (4) the misrepresentation was a substantial cause of the decline in value.

The Second Circuit applied a more stringent standard than the Third Circuit in \textit{Emergent Capital Investment Management, L.L.C. v. Stonepath Group, Inc.}\textsuperscript{58} The court began by requiring that the plaintiff "demonstrate that its injuries were caused by defendants' omission [or misrepresentation] of material information."\textsuperscript{59} In addition, it applied the proximate cause concept of tort law to loss causation, so that a plaintiff's damages resulting from the omission or misrepresentation must be foreseeable.\textsuperscript{60} Although these principles may seem broad, the Second Circuit actually utilized a rigorous proximate cause analysis.

The Second Circuit's benchmark for pleading loss causation is deceptively high due to its tendency to impose strict standards for proving proximate cause.\textsuperscript{61} The \textit{Emergent} court noted that the plaintiff asserted that the defendants' omissions were the proximate cause of his loss.\textsuperscript{62} Such a conclusory statement would have met the Third Circuit's more liberal pleading standard, but it did not satisfy the Second Circuit. The court continued its examination, however, by noting that the plaintiffs alleged that the defendants were involved in a "pump and dump" scheme\textsuperscript{63} in addition to omitting material facts.\textsuperscript{64} The court relied on both the proximate cause allegation and the specific

\textsuperscript{55} \textit{Id.} at 186–87.
\textsuperscript{56} \textit{Id.} at 187.
\textsuperscript{57} \textit{Semerenko}, 233 F.3d at 187.
\textsuperscript{58} 343 F.3d 189 (2d Cir. 2003).
\textsuperscript{59} \textit{Id.} at 196.
\textsuperscript{60} \textit{Id.} at 197.
\textsuperscript{62} 343 F.3d at 197.
\textsuperscript{63} \textit{Id.} A "pump and dump" scheme occurs "where the company principals artificially inflate[] [the company] stock prices before 'dumping' their own shares of [the company] stock on the market." \textit{Id.}; see \textit{Hazen}, supra note 46, § 14.18.
\textsuperscript{64} \textit{Emergent}, 343 F.3d at 197.
facts of the alleged "pump and dump" scheme to find the plaintiff had adequately pled proximate causation and loss causation. Furthermore, the court called its holding a "close one," with the plaintiff prevailing only because the facts were read in the light most favorable to the nonmoving party on a motion to dismiss. Stated another way, the Second Circuit "require[d] a showing both that 'the loss be foreseeable and that the loss be caused by the materialization of the concealed risk'—that is, something beyond 'bare proximate cause.'" The Second Circuit's pleading standard thus imposes the greatest burden on plaintiffs.

The Ninth Circuit employed the most permissive—and plaintiff-friendly—loss causation pleading requirements of any circuit, which is why the Supreme Court ultimately granted certiorari. The Ninth Circuit employed its liberal standard in Broudo v. Dura Pharmaceuticals, Inc. In Broudo, the plaintiffs were stockholders who purchased "Dura Pharmaceutical securities between April 15, 1977, and Febru-

65. Id. at 197-98.
68. S. REP. No. 104-98, at 15 (1995), as reprinted in 1995 U.S.C.C.A.N. 679, 694 ("Regarded as the most stringent pleading standard, the Second Circuit requires that the plaintiff plead facts that give rise to a 'strong inference' of defendant's fraudulent intent." (citation omitted)); cf. Lentell v. Merrill Lynch & Co., 396 F.3d 161, 175 (2d Cir. 2005) ("To plead loss causation, the complaints must allege facts that support an inference that [defendant's] misstatements and omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud.").
69. The Eleventh Circuit and Eighth Circuit had their own approaches, but each was similar to other circuits. The Eleventh Circuit applied an intermediate approach before the Supreme Court's decision in Dura. In Robbins v. Koger Properties, Inc., the Eleventh Circuit stated that a plaintiff must show that the defendant's act proximately caused his loss, or in other words, "the misrepresentation touches upon the reasons for the investment's decline in value." 116 F.3d 1441, 1447 (11th Cir. 1997) (quoting Huddleston v. Herman & MacLean, 640 F.2d 534, 549 (5th Cir. 1981)). Under this theory, the plaintiff must allege that the defendant's act caused him to purchase the security and that the defendant's act caused the subsequent decline in stock price. Id. at 1448. There was no comprehensive proximate causation analysis here as there was in the Second Circuit.
70. 339 F.3d 933 (9th Cir. 2003), rev'd, 544 U.S. 336 (2005).
January 24, 1998 (the class period)." During the class period, Dura released several statements that it was doing well and that one of its products was slated for FDA approval. "On the last day of the class period," Dura publicly announced that its earnings were not as high as it had stated and that its product would not obtain FDA approval. The plaintiffs alleged that Dura knew all along that its earlier statements were erroneous and that those statements induced the plaintiffs to purchase stock at an inflated price.

The Ninth Circuit first stated that "loss causation is satisfied where 'the plaintiff shows that the misrepresentation [or omission] touches upon the reasons for the investment's decline in value,'" and admitted that "touches upon" is ambiguous. The court reviewed previous cases and asserted that it employed the fraud-on-the-market approach: "[P]laintiffs establish loss causation if they have shown that the price on the date of purchase was inflated because of the misrepresentation."

To elaborate on the fraud-on-the-market theory, the court held that the injury occurred at the time the plaintiff bought the stock at an inflated price, and therefore no subsequent drop in the market price of the stock need actually occur. Moreover, the court noted, "for a cause of action to accrue, it is not necessary that a disclosure and subsequent drop in the market price of the stock have actually occurred, because the injury occurs at the time of the transaction." Accordingly, damages are to be measured starting at the exact moment the stock was bought at an inflated price. In a footnote, the court com-

71. Id. at 935 (internal quotation marks omitted).
72. Id. at 936.
73. Id.
74. Id.
75. Id. at 939-40.
76. Broudo, 339 F.3d at 937-38 (quoting McGonigle v. Combs, 968 F.2d 810, 821 (9th Cir. 1992)).
77. Id. at 938 (quoting Knapp v. Ernst & Whinney, 90 F.3d 1431, 1438 (9th Cir. 1996)).
78. Id. Theoretically this is true; the moment a buyer purchases at an inflated price, the seller has fraudulently gained. Nonetheless, an issue arises when the buyer immediately turns around and sells his stock for the same inflated purchase price at which he bought. The initial buyer thereby transfers the loss to the subsequent buyer. Some courts and commentators fear that applying the fraud-on-the-market theory would allow both the initial buyer and the subsequent buyer to recover against a defendant. Such a fear, however, is misplaced and is addressed later in this Note. See infra note 92 and accompanying text.
79. Broudo, 339 F.3d at 938.
80. Id.
mented that other circuits were “less favorable to plaintiffs,” but it did not explain why it disagreed with those approaches.81

The court then applied its unique principles to the facts of Broudo.82 The plaintiff-appellants pled that the stock price was overvalued, at least “in part due to the misrepresentations by [defendant].”83 The court held that in the pleading, it was only necessary for the plaintiff to allege (1) that the price of the stock at the time of procurement was inflated and, (2) that the cause of the overvaluation was the misrepresentation or omission by the defendant.84 Because the plaintiff-appellants pled that the stock price—at least partly due to misrepresentations by the defendant—was overvalued, the court held that the complaint survived the pleading stage.85

III. SUBJECT OPINION:
DURA PHARMACEUTICALS, INC. v. BROUDO

The Court granted certiorari “because the Ninth Circuit’s views about loss causation differ from those of other Circuits that have considered this issue.”86 The Court began by commenting on the complaint, stating that “the complaint says the following (and nothing significantly more than the following) about economic losses attributable to the spray device misstatement: ‘In reliance on the integrity of the market, [the plaintiffs] . . . paid artificially inflated prices for Dura securities’ and the plaintiffs suffered ‘damage[s]’ thereby.”87 The Court then turned to the Ninth Circuit’s loss causation standard.

A. Supreme Court’s Rejection of the Ninth Circuit’s Approach

The Court stated flatly that the Ninth Circuit’s holding was “wrong.”88 Inflated purchase price does not, by itself, prove loss causation.89 The Court reasoned that at the precise moment when an investor purchases stock, he has not suffered a loss.90 If the investor immediately sold the stock, he would have both bought and sold at the

81. Id. at 938 n.4.
82. For clarification purposes, this Note will refer to the Ninth Circuit’s Broudo v. Dura Pharmaceuticals, Inc. decision as Broudo, and will refer to the Supreme Court’s reversal as Dura.
83. Broudo, 339 F.3d at 939.
84. Id.
85. Id.
87. Id. at 339–40 (alterations in original).
88. Id. at 338.
89. Id. at 342.
90. Id.
inflated price and never accrued a loss. Such trading behavior is known as "in-and-out trading." In theory, no loss occurs from a misrepresentation if the purchaser of the inflated stock later sells at a reduced price, but the diminished value is a result of changed economic circumstances and not the result of the misrepresentation or omission. Moreover, the longer the interval of time between purchase and subsequent sale, the more probable it becomes that any reduction in the stock's value is due to factors other than the misrepresentation that artificially raised the price of the stock. The Court concluded that the "most logic alone permits us to say is that the higher purchase price will sometimes play a role in bringing about a future loss."

91. Id. at 342-43.
92. Lower courts have expended considerable time elucidating the alleged havoc that "in-and-out" traders would wreak on securities fraud actions. The concern is that if courts universally apply the Ninth Circuit's "fraud-on-the-market" theory, then double recoveries against defendants would be commonplace. Consider the following example: A buys stock from Company C at an inflated price, but then sells his stock to B at the same price at which he bought. Company C then issues a corrective disclosure and B subsequently loses five dollars a share. Some courts fret that the Ninth Circuit's approach would allow both A and B to bring successful 10b-5 actions against Company C, resulting in Company C having to pay twice for one actual loss. Such apprehension is validated if courts strictly apply what is known as the "out-of-pocket rule" to measuring damages:

[The out-of-pocket rule] measures the difference between the value of the security at the time the plaintiff bought (or sold). [sic] and the price the plaintiff paid (or received). For each purchase in a case in which the plaintiff class alleges price inflation, the damage is the price paid, minus the price at which the stock would have traded absent the fraud, multiplied by the number of shares bought.

William O. Fisher, Does the Efficient Market Theory Help Us Do Justice in a Time of Madness? 54 EMORY L.J. 843, 875-76 (2005) (citation omitted). There are some commentators, however, that believe concerns about double recovery in this context are groundless. See infra note 131.

Commentators who are pro-defendant may challenge that the larger problem securities companies face—namely, having to either foot the bill for expensive litigation or settle a meritless case in order to cut their losses—is not addressed. See Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioners at 4, Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005) (No. 03-932) ("So great is the pressure on corporations to settle that, even when defendants do succeed in obtaining a trial court dismissal, the risk of losing on appeal can still lead to enormous settlements."). This Note responds that all corporations face similar issues when confronted with a lawsuit of any nature, and there seems to be no reason to give securities fraud defendants extra care beyond what Congress specifically granted corporations when adopting the PSLRA. Moreover, the Chamber of Commerce's argument seems overblown in light of the fact that when a defendant wins at the trial stage, that win gives the defendant a significant bargaining chip when deciding how much to settle for in order to avoid an appeal. Any further costs are just the nature of doing business. Congress sought to impose higher pleading standards in passing the PSLRA; it did not seek to make securities fraud claims impossible for plaintiffs to prove, and it did not seek to place an impenetrable 10b-5 shield around corporations.

93. Dura, 544 U.S. at 342-43.
94. Id. at 343.
95. Id.
In addition to attacking the logic of the Ninth Circuit's standard, the Court denounced it as inconsistent with precedent. Private securities fraud actions, according to the Court, resemble common-law deceit and misrepresentation actions, wherein a plaintiff must show that, had he known the truth, (1) he would not have acted, and (2) he would not have suffered actual economic loss. Due to the common-law roots of securities fraud claims, the Court noted that other circuits have rejected the "inflated purchase price" approach. Quoting from the Restatement (Second) of Torts, the Court said that "a person who misrepresents the financial condition of a corporation in order to sell its stock" becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the facts . . . become generally known' and 'as a result' share value 'depreciate[s].' Therefore, the Court could not reconcile the Ninth Circuit's method with that of other circuits: "[T]he uniqueness of its perspective argues against the validity of its approach." Because private securities fraud actions were judicially created actions prior to the passage of the PSLRA—and thus had roots in common law—the Court held that the circuit court approaches that applied the common law were correct.

Finally, the Court rejected the Ninth Circuit's proffered approach as being contrary to the traditional objectives of securities law. The Court said that the goal of securities regulations was to maintain the public's trust in the marketplace. But the statutes were not broad insurance plans against market loss; they only protected against losses that fraudulent misrepresentations or omissions actually caused.

B. What a Plaintiff Must Allege for Loss Causation

After analyzing what a plaintiff must prove for loss causation, the Court turned to the question of what a plaintiff must plead to survive dismissal. The Court began by referring to the Federal Rules of Civil Procedure, which require only "a short and plain statement of
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the claim showing that the pleader is entitled to relief.”

Even under this minimal condition, however, the Court noted that the “short and plain statement” must provide the defendant with “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”

The plaintiffs’ complaint in Broudo had only one statement referring to the loss: “[T]hat the plaintiffs paid artificially inflated prices for Dura[’s] securities and suffered damage[s].” Because the complaint did not mention anything about a subsequent drop in price, the Court inferred that the plaintiffs were contending that merely alleging an inflated price was sufficient for adducing loss causation.

As the Court stated, an “artificially inflated purchase price” itself will not prove loss causation, and the complaint did not contain anything else that would notify the defendants of what economic loss the plaintiffs actually suffered. Despite conceding that notice pleading is not intended to be burdensome on plaintiffs, the Court found that providing a defendant “with some indication of the loss and the causal connection that the plaintiff has in mind” is not too heavy of a load for a plaintiff to shoulder. Furthermore, the Court echoed the sentiments of Congress when it declared that a failure to impose such a requirement would permit plaintiffs to bring groundless claims that alleged substantial amounts of loss in the hopes that the discovery process would reveal concrete evidence of loss, thereby giving credence to an otherwise disingenuous claim. The Court concluded by saying that it did not want to transform private securities actions into broad shareholder insurance policies—sentiments which once again stemmed from the PSLRA congressional hearings.

IV. ANALYSIS

This Part will demonstrate how the Court failed to comprehensively consider the legislative history of the PSLRA in arriving at its loss causation standard and illuminate how the Court relied on faulty common-law principles. It will expound on how the Court, by not erecting an exact loss causation standard and by not considering re-

105. Id. at 346 (quoting Fed. R. Civ. P. 8(a)(2)).
106. Id. (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
107. Id. at 347 (alterations in original) (internal quotation marks omitted).
108. Id. at 346–47.
109. Dura, 544 U.S. at 347.
110. Id.
111. See id. (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975)).
112. Id. at 347–48.
113. See infra notes 116–127 and accompanying text.
114. See infra notes 128–150 and accompanying text.
lated securities-law issues, left the issue of loss causation just as ambiguous as it was before *Dura*.\footnote{115}

A. *Dura* Decision Did Not Thoroughly Consider PSLRA Legislative History

The Supreme Court’s holding in *Dura* is consistent with the approach taken by a majority of circuits, but it disregards the Committee’s intentions regarding the PSLRA. After the 1933 and 1934 Acts, federal courts had increasingly created their own securities causes of action—essentially fashioning securities common law where there had been none.\footnote{116} Congress passed the PSLRA to reinstate congressional authority over securities regulation.\footnote{117} The majority of circuits had been applying common-law standards to interpret the PSLRA—particularly when addressing the pleading standards for loss causation.\footnote{118} The Supreme Court adopted the common-law approach to loss causation without fully taking into account the legislative history of the PSLRA.\footnote{119}

At the congressional hearings for the consideration and passage of the PSLRA, the Committee explicitly stated which elements of a securities fraud action must be pled with particularity.\footnote{120} The Committee chose the Second Circuit’s pleading standard as the appropriate benchmark for pleading the circumstances surrounding the fraud.\footnote{121} The Committee decided that plaintiffs must plead “allegations of fraud with ‘particularity.’”\footnote{122} They must specifically identify each allegedly misleading statement, state why it was deceptive, and explain how they relied on the statement.\footnote{123}

The Committee then discussed loss causation:

\footnote{115. *See infra* notes 151–179 and accompanying text.}
\footnote{118. *See* *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005) (“Given the common-law roots of the securities fraud action (and the common-law requirement that a plaintiff show actual damages), it is not surprising that other Courts of Appeals have rejected the Ninth Circuit’s ‘inflated purchase price’ approach to proving causation and loss.”).}
\footnote{119. *See id.*}
\footnote{121. *Id., as reprinted in* 1995 U.S.C.C.A.N. 679, 694. The committee discussed the Second Circuit’s standard:

Regarded as the most stringent pleading standard, the Second Circuit requires that the plaintiff plead facts that give rise to a “strong inference” of defendant’s fraudulent intent. The Committee does not intend to codify the Second Circuit’s caselaw interpreting this pleading standard, although courts may find this body of law instructive.  

*Id., as reprinted in* 1995 U.S.C.C.A.N. 679, 694 (citations omitted).}
\footnote{122. *Id., as reprinted in* 1995 U.S.C.C.A.N. 679, 694.}
\footnote{123. *Id., as reprinted in* 1995 U.S.C.C.A.N. 679, 694.}
The Committee also requires the plaintiff to show that the misstatement or loss alleged in the complaint caused the loss incurred by the plaintiff. For example, the plaintiff would have to prove that the price at which the plaintiff bought the stock was artificially inflated as a result of the misstatement or omission. The defendant would then have the opportunity to prove any mitigating circumstances, or that factors unrelated to the fraud contributed to the loss.124

Clearly and unambiguously, the Committee recited the exact standard of loss causation that the Ninth Circuit utilized.125 These statements elucidate that while Congress intended to heighten pleading standards for certain aspects of securities actions, it did not intend to impress a higher standard for pleading loss causation.126 The Ninth Circuit's interpretation, which the Supreme Court rejected, coincided exactly with the Committee's statement on loss causation.127 Thus, the Supreme Court's interpretation ignored the Committee's instructions on how courts should apply the PSLRA to loss causation.

B. Dura Decision Mistakenly Follows Common-Law Precedent

One thing is true about the Dura decision: it follows common-law precedent. Securities fraud actions have long resembled common-law misrepresentation actions, which require the plaintiff to demonstrate that he suffered actual monetary damages.128 Congress and the Court
both acknowledge that securities fraud actions have had a long history in the common law, and thus closely resemble common-law fraud claims.\textsuperscript{129}

The \textit{Restatement (Second) of Torts} pronounces that a person who fraudulently persuades another to act or fail to act upon the fraud is liable for any harm \textit{caused to} the other through reliance on the fraud.\textsuperscript{130} Hence, common law has long required plaintiffs to prove that they in fact suffered an economic loss due to reliance on a fraudulent misrepresentation.\textsuperscript{131} Also, the \textit{Restatement of Torts} states that a person who, through misrepresentation of the financial condition of a

\textsuperscript{129} See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 744 (1975) ("[I]t is not inappropriate to advert briefly to the tort of misrepresentation and deceit, to which a claim under Rule 10b-5 certainly has some relationship.").

\textsuperscript{130} \textsc{Restatement (Second) of Torts} § 525 (1977).

\textsuperscript{131} \textit{Dura}, 544 U.S. at 343-44. This focus on "actually suffering a loss" is part of the reason why so many people are worried about recovery for "in-and-out-buyers." See supra note 92. Ninth Circuit case law and at least two commentators, however, believe that such alarm is unfounded. The first is Professor Merritt B. Fox, who finds no concern of double recovery:

> It is certainly true . . . that it would be a mistake to grant damages to [an in-and-out] purchaser. The reason for not granting damages, however, is not that the purchaser did not incur an injury at the time of purchase as a result of defendant's wrongful misstatement; he did suffer an injury by having to pay more than he otherwise would have but for the misstatement. The reason for not granting damages is that the purchaser has received a benefit arising from the same wrong in an amount equal to the injury he suffered earlier. Indeed, a bar on the payment of damages to the extent that the plaintiff recoups his injury by sale at a still inflated price is exactly the Ninth Circuit rule on damages, one set out by Judge Sneed in his concurring opinion in \textit{Green v. Occidental Petroleum Corp.}, which is a standard textbook case on the matter. Thus any implication in the Court's opinion that the Ninth Circuit holding in \textit{Dura} would have led to such a purchaser receiving damages is unfounded.

Merritt B. Fox, \textit{Understanding Dura}, 60 Bus. Law. 1547, 1568-69 (2005) (citing \textit{Green v. Occidental Petroleum Corp.}, 541 F.2d 1335, 1341-46 (9th Cir. 1976) (Sneed, J., concurring)).

A second commentator who does not fear double recovery is Harold S. Bloomenthal. See 2 \textsc{Bloomenthal, supra note 39, § 29:54}. Bloomenthal responded to the part of Justice Breyer's \textit{Dura} decision that concerned in-and-out trading by saying "no one claims that such an in and out purchaser . . . could recover damages. Section 28(a) of the Exchange Act . . .provides that 'no person . . . shall recover . . . a total amount in excess of his actual damages on account of the act complained of.'" \textit{Id.} (alterations in original) (citing 15 U.S.C.A. § 78bb(a) (1997)). Bloomenthal cites support from a 1975 Ninth Circuit case, \textit{Blackie v. Barrack}: "If the stock is resold at an inflated price, the purchaser-seller's damages, limited by § 28(a) of the Act, 15 U.S.C. § 78bb(a) to 'actual damages,' must be diminished by the inflation he recovers from his purchaser." \textit{Id.} at § 29:54 n.14 (quoting Blackie v. Barrack, 524 F.2d 891, 908-09 (9th Cir. 1975)).

A Ninth Circuit case, \textit{Wool v. Tandem Computers Inc.}, also distinctly clarifies why in-and-out traders would not cause a double recovery:

> For in-and-out traders, on the other hand, both the \textit{time of purchase} and the \textit{time of sale} are considered in determining recoverable damages. . . . If the purchaser sold at [five dollars less than original inflated purchase price] (before the complete corrective disclosure), the purchaser would nevertheless suffer a recoverable damage of $5. Instead of determining the damages at the date of purchase, therefore, a two-step process is used when dealing with in-and-out traders. First, the spread between market price and value of the stock at the time of purchase is determined. When the purchaser sells
corporation, induces another to buy stock, is liable to the susceptible
purchaser for any loss that the buyer suffers when the public becomes
aware of the misrepresentation and the share price
drops. In other
words, a plaintiff must plead and prove proximate causation.

The Court basically adopted the common-law teachings of fraud. But Congress seemed to be tired of federal courts legislating from the
bench and promulgating common-law securities law standards, and
thus enacted the PSLRA to thwart such action by the courts. While
Congress did not create a precise loss causation standard, this Note
argues that Congress did not intend for a higher pleading standard to
apply to loss causation. Since the Court relied upon decisions of
strict lower courts, it adopted a tougher measure for loss causation
than Congress ever envisioned. It appears that the Court, satisfied
with the status quo of the common law, decided that the Ninth Cir-
cuit’s interpretation caused too many problems.

the stock, the spread is again measured. If the spread has diminished, the purchaser
would recover the differences.

818 F.2d 1433, 1437 n.4 (9th Cir. 1987).

132. See Restatement of Torts § 549 (1938). The notes after the Restatement address this
issue:

The measure of damages which the recipient of a fraudulent misrepresentation is
entitled to recover from its maker as damages under the rule stated in § 525 is the
pecuniary loss which results from the falsity of the matter misrepresented, including (a)
the difference between the value of the thing bought, sold or exchanged and its
purchase price or the value of the thing exchanged for it, and (b) pecuniary loss suf-
fered otherwise as a consequence of the recipient’s reliance upon the truth of the
representation.

Id.

133. See Black’s Law Dictionary 234 (8th ed. 2004) (defining proximate cause as “merely
the limitation which the courts have placed upon the actor’s responsibility for the consequences
of the actor’s conduct... [L]egal responsibility must be limited to those causes which are so
closely connected with the result and of such significance that the law is justified in imposing
liability”).

lack of congressional involvement has left judges free to develop conflicting legal standards,
thereby creating substantial uncertainties and opportunities for abuses of investors, issuers, pro-
fessional firms and others. The Committee has determined that now is the time for Congress to
reassert its authority in this area.”).

135. See supra notes 120–127 and accompanying text.


137. Professor Merritt B. Fox argues that not only was the Court wrong in stating that the
Ninth Circuit’s approach lacked precedent, he also contends that the Court was wrong to rely on
common-law fraud actions. Fox, supra note 131, at 1570. “[T]he fraud-on-the-market theory,”
says Professor Fox, “is not a common law doctrine,” and the Court’s reliance on traditional
reliance-based actions like Emergent Capital Investment Management, L.L.C. v. Stonepath
Group, Inc., 343 F.3d 189 (2d Cir. 2003), and Bastian v. Petren Resources Corp., 892 F.2d 680 (7th
Cir. 1990), was faulty because the causal link between the defendant’s harmful act and the plain-
tiff’s harm is completely different in a reliance-based case versus a fraud-on-the-market action.
Fox, supra note 131, at 1570. Professor Fox points out that the court relied on only one fraud-on-
C. Dura Decision Relies on Faulty Theories

Besides ignoring congressional intent and relying on common law, the Court also based its decision on faulty principles. One such principle is that a loss may not occur without a decline in stock price. Consider the following hypothetical: A buys 1000 shares of stock from company C at $10 a share (total value of A’s investment is $10,000). Misrepresentations by company C artificially inflated the share price by $10. One month later, company C makes a corrective disclosure regarding the misrepresentation, and at the same time, company C unveils a revolutionary product that enhances public interest in company C stock, which naturally leads to an increase in share value. Assume that the corrective disclosure results in the share price diminishing by $3, and assume that the product unveiling led to an increase of $8 per share. Overall, A’s stock will increase by $5 per share for an overall gain of $5,000.

In the hypothetical, company C has still committed fraud, and investor A suffered a loss. But under the loss causation standard adopted in Dura, a court would likely dismiss any action brought by A. In this context, the Court’s interpretation of loss causation has effectively stripped the PSLRA of much of its deterrent value. Company C can continue to defraud investors and hide its misrepresentations by disclosing them simultaneously with positive information; no drop in price will occur, and common-law applications of loss causation will bar the plaintiff from any recovery. While this argument is admittedly abstract, it is entirely possible for this scenario to occur.

The other problem with basing loss causation on a subsequent decline in stock value occurs when the corporation does not make an immediate corrective disclosure, but rather makes a gradual disclosure over a period of months. The Amicus Brief of City of New York Pension Funds et al. provides an example of how this would work:

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138. Cf. Fox, supra note 131, at 1567 (arguing that in rejecting the Ninth Circuit’s loss causation approach, “[t]he Court gives a number of reasons for reaching this conclusion. These reasons, when subject to scrutiny, appear to be rather confused and so they unfortunately do not provide much helpful guidance concerning how future courts should decide the open issues delineated above.”).

139. This hypothetical derives its origin from the arguments the United States as Amicus Curiæ developed. Solicitor General, supra note 125, at 13; see also Fox, supra note 131, at 1553 (examining the situation where the stock price at time of suit is higher than the stock price at time of purchase, although not as high as it should have been had a misstatement not caused inflation).

140. See Solicitor General, supra note 125, at *13.

141. Id.
Assume, as above, that Company A releases false information that its revenues were $1 billion and its profits were $250 million. As a result, investors believe [A] will earn $300 million going forward, or $3 per share. However, the actual undisclosed numbers were $750 million in revenues and a $200 million loss. At the end of the six months, [A] realizes it has a problem and will not be able to keep booking the fictitious sales. Rather than disclose the truth about its past practices, over the next few months, [A] gradually discloses that it will only break-even over the next year. The stock price declines to $10 based upon those deflated expectations. Investors do not know that the deflation in the expectations is the result of a fraud.

In the hypothetical above, at the end of the year, [A] reveals that its information the previous year was false and that its more recent information is accurate. There is no immediate subsequent decline in price because the market has already gradually incorporated the lessened expectations that [A] revealed. Thus, if the shareholders of [A] subsequently bring a fraud action against the corporation, they would be unable to allege that the price of the stock dropped as a direct result of a corrective disclosure. Depending on how rigidly the court applies loss causation pleading standards, the court may dismiss the plaintiffs' meritorious claim because the unambiguous corrective disclosure came too late.

Returning to the above hypothetical, assume that shareholder S—having a hunch that [A]'s initial announcement was fraudulent and that the first subsequent statement by [A] was a corrective disclosure (albeit a small one)—does bring a claim soon after the company releases its first minor disclosure. In this scenario, if loss causation must be pled with particularity—as the Court's ultimate holding suggests—then S will have to claim that he is seeking only the minor damages that occurred from that initial inconsequential disclosure. Thus, S will be reduced to receiving only a pittance if his claim succeeds, and [A] can continue to release corrective disclosures gradually without fear that S will be able to claim any of the subsequent drops in price. Were S,
however, allowed to plead simply that he bought at an inflated purchase price, he would be able to recover for all of the ongoing price drops due to A's lengthy disclosure.149 There is no risk to A not knowing what total damages S eventually will seek, because A knows how much of the value it exaggerated. And any speculation as to a correlative drop in price should be a burden born by A because A was the wrongdoer.

From these two hypotheticals it is clear that the standard for loss causation should not require the plaintiff to plead with particularity a subsequent decline in price. The plaintiff's calculation would inevitably be speculative, and a court would either dismiss the claim or force the plaintiff to accept inadequate compensation for his loss.150

D. The Supreme Court Squarely Renounced the Ninth Circuit's View but Failed to Provide Any Guideposts as to What Was Needed to Plead Loss Causation

The Court thoroughly condemned the Ninth Circuit's approach, but failed to provide any guidance as to what is actually required to plead loss causation.151 The Court concluded only that the Ninth Circuit's method varied from the common law, which required "that a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss."152 Therefore, the Court said that it "need not, and [did] not, consider other proximate cause or loss-related questions."153

The Court determined that the plaintiffs' complaint inadequately alleged proximate causation.154 Because the complaint declared only that the plaintiffs "paid artificially inflated prices for Dura's securities" and suffered "damages,"155 the Court found that the complaint fell short of providing the defendants with "fair notice of what the plaintiff's claim is and the grounds upon which it rests."156 After vaguely stating that a plaintiff who sustains a loss should be able "to provide a defendant with some indication of the loss and the causal connection that the plaintiff ha[d] in mind," the Court's analysis es-

149. Id.
150. See supra notes 130-134 and accompanying text.
151. Fox, supra note 131, at 1552 ("The Court . . . does not specify what kinds of allegations and proofs would be sufficient to meet [loss causation pleading requirements].").
152. Dura, 544 U.S. at 346.
153. Id.
154. Id.
155. Id. at 347.
156. Id. at 346 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).
It provided only nebulous clues as to what is sufficient to plead loss causation.

The Court should not have abrogated the Ninth Circuit's approach without offering guidance as to appropriate methods of alleging and proving loss causation. The Court should use its opinions as a means of clarifying issues instead of further muddying the waters. In Dura, the Court merely managed to eliminate the Ninth Circuit's approach; therefore, the Dura decision has no effect on the methods employed by other circuits. Hence, lower courts are free to be as stringent as they desire, with an implied order from the Court to shy away from any analysis that is too friendly to plaintiffs.

E. The Court Declined to Acknowledge Other Related Securities Issues

Certain commentators claim that the Court did not answer all of the prayers of 10b-5 defendants and their amici. For example, the Court did not endorse the defendant's argument that a "plaintiff must allege 'a corrective disclosure followed by a stock price drop.'" Commentators urge that "[h]ad the Court adopted defendants' proposed requirement of a specific corrective disclosure of the truth—by

157. Id. at 347; see also Karl A. Groskaufmanis, Fried, Frank, Harris, Shriver & Jacobson L.L.P Memoranda, 1501 PRAC TISING L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 721, 725 (2005) (stating that the Supreme Court "did not expressly articulate any single standard for alleging and establishing loss causation").

158. Cf BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 602 (1996). Justice Scalia criticized the Court's lack of clarity:

One might understand the Court's eagerness to enter [the punitive damages] field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a "constitutionally proper" level of punitive damages might be.

Id. (Scalia, J., dissenting).

159. See In re Initial Pub. Offering Sec. Litig., 399 F. Supp. 2d 261, 265 n.23 (S.D.N.Y. 2005). The court recognized Dura's limited scope:

Dura itself does not define a pleading standard for loss causation; rather, it simply rejects the Ninth Circuit's standard as overly permissive. Accordingly, the Second Circuit's standard—which certainly requires "a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind,"—is undisturbed by Dura.

Id. (citation omitted).

160. See Alan Schulman & Niki Mendoza, Dura Pharm. [sic], Inc. v. Broudo—The Least of All Evils, 1505 PRACTISING L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 271, 273 (2005) ("[I]n the end, the unanimous Supreme Court opinion in Dura was not a bad decision for plaintiffs—defendants got the price inflation theory win, and nothing else, and the plaintiffs' bar ended up with the best of all possible non-prevailing scenarios.").

161. Id. at 273-74 (quoting Brief for the Petitioner at 10, Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005) (No. 03-932)).
confession or otherwise—linked to a drop in stock price, the pleading hurdle could have been 'insurmountable.'”¹⁶²

Despite future 10b-5 defendants' possible disappointment by the Court's decision, the situation does not seem as bright for plaintiffs as certain commentators purport. First, the Court emphatically discarded the Ninth Circuit's approach,¹⁶³ which could result in lower courts steering clear of methodologies that seem similar to the Ninth Circuit's prior loss causation holdings. Second, the Court explicitly stated that if "the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss."¹⁶⁴ That statement alone does not suggest that a plaintiff will need to prove that a defendant made a corrective disclosure that caused a successive drop in share price, but the market will have no means of assimilating the discrepancy into the price until the defendant releases some kind of statement or data.¹⁶⁵ When there is no definite corrective disclosure, a problem arises because the more attenuated and circumstantial the evidence, the harder it is for a plaintiff to prove proximate causation.¹⁶⁶ Add to this the Court's conclusion that even when a purchaser does subsequently sell at a lower price, economic factors other than the misrepresentation may account for the decrease.¹⁶⁷ These factors imply that a plaintiff will have to plead with specificity that the price drop was due to some distinct corrective disclosure; when no such disclosure is present, the pleading burden becomes insurmountable.

In addition, commentators have remarked optimistically that Justice Breyer's discussion on the appropriate pleading standards of loss cau-

¹⁶². Id. at 274.
¹⁶⁴. Id. at 342.
¹⁶⁵. This fact is because of the efficient market theory: “A market in which prices always fully reflect available information is an 'efficient' market.” Christopher Paul Saari, Note, The Efficient Capital Market Hypothesis, Economic Theory & the Regulation of the Securities Industry, 29 STAN. L. REV. 1031, 1031 (1977) (emphasis added). The Supreme Court has adopted the efficient market theory as accurate. Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988) (“Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.”).
¹⁶⁶. Due to the vague nature of proximate cause, judges routinely disagree as to where to draw the line between actual causation and legal causation; perhaps the best demonstration of this disagreement is Chief Justice Cardozo's majority opinion versus Justice Andrew's dissenting opinion in Palsgraf v. Long Island R.R., 162 N.E. 99, 99–101 (N.Y. 1928). This variance occurs whenever courts apply proximate causation, as evidenced by the Second Circuit's and the Eleventh Circuit's approaches to loss causation. See supra notes 51–68 and accompanying text.
¹⁶⁷. See Dura, 544 U.S. at 342–43.
Pleading Loss Causation

The surface, such an interpretation appears plausible, but in context it seems to lose muster. Justice Breyer conceded that the federal pleading rules should not create large obstacles for plaintiffs. But plaintiffs must provide securities fraud defendants with sufficient notice: "[I]t should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." How courts interpret "some" will be crucial to determining the pleading burden lower courts will impose upon plaintiffs. Certainly, district courts will fear being too lenient considering the Court's remarks that "allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause . . . would bring about harm of the very sort the statutes seek to avoid," and "[s]uch a rule would tend to transform a private securities action into a partial downside insurance policy." Such strong sentiments by the Court suggest that lower courts should employ—at least stricter pleading standards—at least stricter pleading standards.

Furthermore, the Court should have paid more attention to the cases upon which it relied when explaining the pleading standard it

170. Id. (emphasis added).
171. Id.
172. Id. at 347–48.
173. FED. R. CIV. P. 9(b).
174. Commentators are genuinely concerned as to what pleading standard courts will employ after the Dura decision. Consider the following passage Professor Fox wrote while analyzing Dura:

The Court's holding in Dura is extremely narrow. It settles only one issue: We now know that a plaintiff who merely alleges, and subsequently establishes, that a positive, materially false misstatement in violation of Rule 10b-5 inflated the price she paid for a security has not done enough to establish causation in a fraud-on-the-market action for damages. The pleadings must provide in addition "some indication of the loss and the causal connection the plaintiff has in mind." And proof at trial must provide evidence that the inflated purchase price proximately caused an economic loss. The Court, however, does not specify what kinds of allegations and proofs would be sufficient to meet these standards. . . . [I]s it necessary for the plaintiff to plead and prove a price drop immediately following the public announcement of the truth? Or can the pleadings or proof at trial consist of some other kind of indication that the purchase price had been inflated by the misstatement and that the market had later realized the true situation dissipating this inflation?

Fox, supra note 131, at 1552–53 (citations omitted). Regarding Professor Fox's first rhetorical question, if a court did require an immediate public corrective disclosure, then a plaintiff would be hard-pressed to plead loss causation were the defendant company less than forthright in revealing damning information. The second rhetorical question grants a plaintiff much more leeway in formulating its complaint. The problem, however, is that the Court's words in Dura point toward applying a standard that resembles the former rather than the latter.
adopted for loss causation. In particular, the Court cited to Swierkiewicz v. Sorema N.A. as support for the proposition that Federal Rule of Civil Procedure 8(a) does not place too much of a burden upon a plaintiff. In Swierkiewicz, the Court reiterated that "Rule 8(a)'s simplified pleading standard applies to all civil actions," except where Rule 9(b) or Congress expressly places a higher pleading standard. As already argued above, Congress did not explicitly place such a standard on the loss causation element. For this reason, under simplified 8(a) notice pleading, courts should "dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." To be sure, there are enough procedural safeguards among the Federal Rules of Civil Procedure and the PSLRA to prevent unmeritorious claims from proceeding. Therefore, the Court should have used—and lower courts should prospectively use—a liberal pleading standard for loss causation.

V. IMPACT

As with every Supreme Court case, the Dura decision will have wide effects on the law and on people. The most direct effect will be that lower courts will have to fashion their opinions on loss causation to coincide with Dura. Courts like the Second Circuit that already employ strict pleading standards may continue as if nothing changed, or they may increase their standards, thus leading to more dismissals. Courts like the Ninth Circuit, however, must increase their loss causation pleading and proof standards or search for a way to remain somewhat liberal under the Dura application. The real problem is that Dura provided no guideposts as to what the actual pleading standard

176. 534 U.S. at 513.
177. See supra notes 120–127 and accompanying text.
179. See id. ("If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under [Federal Rule of Civil Procedure] 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56."). Under the PSLRA, Congress adopted a heightened pleading standard for the scienter element. 15 U.S.C. § 78u-4(b)(2) (2000) ("[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.").
PLEADING LOSS CAUSATION

is, which will cause courts to take stabs in the dark as to the appropriate standard.\textsuperscript{180}

Moreover, it is likely that a number of courts will apply 9(b) heightened pleading standards to loss causation due to the Court's disparaging critique of the Ninth Circuit's liberal approach. Yet the concern does not end there. Because \textit{Dura} referred to Rule 8(a) notice pleading in general, courts may apply heightened pleading standards to normal cases that have nothing to do with securities law.\textsuperscript{181} The \textit{Dura} decision will have the effect of further confusing plaintiffs and increasing the rate at which courts dismiss meritorious claims of all types.

This Part discusses how the ambiguity of the \textit{Dura} decision will cause further inconsistency among lower courts.\textsuperscript{182} It predicts that dismissal rates will increase as lower courts apply "heightened" pleading standards to loss causation.\textsuperscript{183} It also touches on how lower courts will apply "heightened" pleading standards to cases beyond the securities realm.\textsuperscript{184}

\textbf{A. Dura's Failure to Define a Pleading Standard for Loss Causation Will Result in Continued Variance Among Circuit and Lower Courts}

The Court provided little direction as to what a plaintiff must plead to illustrate how the public learned of a defendant's fraud and how that "disclosure" caused a subsequent drop in price.\textsuperscript{185} The Court's only references to what constitutes an exposure of fraud were phrases like "the relevant truth begins to leak out" and "after the truth makes its way into the market place."\textsuperscript{186} These words provide no guidance as to whether the revelation must be a corrective disclosure, or whether a plaintiff may claim that investors discovered the misrepresentation in some other fashion.\textsuperscript{187} The Court implied that if there was no corrective disclosure, then it will be difficult to prove loss causation be-

\begin{footnotesize}
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\item\textsuperscript{180} Bloomenthal, supra note 39, § 29:54.10 ("It is likely that it will be years before the questions left open by the Supreme Court's [Dura] decision are resolved, with different courts finding different aspects of the opinion to rationalize their rulings on motions to dismiss.").
\item\textsuperscript{181} See infra notes 236–250 and accompanying text.
\item\textsuperscript{182} See infra notes 185–202 and accompanying text.
\item\textsuperscript{183} See infra notes 203–235 and accompanying text.
\item\textsuperscript{184} See infra notes 236–250 and accompanying text.
\item\textsuperscript{186} Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342 (2005).
\item\textsuperscript{187} Roberts & Chalmers, supra note 185, at 351.
\end{enumerate}
\end{footnotesize}
cause "the longer the time between purchase and sale, ... the more likely that other factors caused the loss."\(^{188}\)

The Ninth Circuit responded to \textit{Dura} in \textit{In re Daou Systems Inc. Securities Litigation},\(^{189}\) implementing another liberal standard to determine whether the plaintiff had adequately described the causal connection.\(^{190}\) In \textit{In re Daou}, the plaintiffs claimed that the defendant company was recognizing revenue prematurely.\(^{191}\) But the plaintiffs had not pled that the defendant had made any corrective disclosure, so the lower court determined that loss causation had not been sufficiently pled.\(^{192}\) In spite of this, the Ninth Circuit found that the defendant's stock prices began to fall abruptly after the defendant started to reveal truthful figures of its financial condition.\(^{193}\) Furthermore, the court recited other allegations in the complaint that adduced that the defendant made several announcements regarding its deteriorating business and that such decline was "a result of prematurely and improperly recognizing revenues."\(^{194}\) Based on these allegations, the Ninth Circuit concluded "that the foregoing allegations, if assumed true, are sufficient to provide [the defendant] with some indication that the drop in [the defendant's] stock price was causally related to [the defendant's] financial misstatements reflecting its practice of prematurely recognizing revenue before it was earned."\(^{195}\)

Essentially, the Ninth Circuit allowed the plaintiff merely "to point to a disclosure that deflate[d] the market's expectations about the company" instead of requiring the plaintiff to indicate "a disclosure revealing that the alleged misrepresentations were false when made."\(^{196}\) In other words, if a company reveals that it is approaching insolvency, but such a revelation does not divulge the existence of previous misrepresentations, the Ninth Circuit accepts this as sufficient to link a decline in share price to an alleged fraud.\(^{197}\)

Contrary to the Ninth Circuit, a Fourth Circuit district court recently held that a plaintiff must plead with particularity every element of a 10b-5 claim, including loss causation. In \textit{In re First Union Corp. Securities Litigation}, the court looked to other circuits to determine

\(^{188}\) \textit{Dura}, 544 U.S. at 343.

\(^{189}\) 411 F.3d 1006 (9th Cir. 2005).

\(^{190}\) \textit{Id.} at 1030.

\(^{191}\) \textit{Id.} at 1026; \textit{see also} Roberts & Chalmers, supra note 185, at 352.

\(^{192}\) \textit{In re Daou}, 411 F.3d at 1025–26.

\(^{193}\) \textit{Id.} at 1026.

\(^{194}\) \textit{Id.}

\(^{195}\) \textit{Id.}

\(^{196}\) Roberts & Chalmers, supra note 185, at 352.

\(^{197}\) \textit{Id.} at 352–53.
whether loss causation pleadings must meet the particularity standard, noting that the Fourth Circuit had never expressly stated that loss causation calls for a heightened pleading standard.\textsuperscript{198} The court determined that "circuit courts that have considered the issue have held that the particularity requirement applies to the loss causation element of a Section 10(b) claim."\textsuperscript{199} In addition, the court acknowledged that the Fourth Circuit had previously held that a common-law fraud plaintiff must plead every element of the fraud with particularity\textsuperscript{200}—a comparison the court prided itself on, considering the \textit{Dura} Court had applied the same type of analogy.\textsuperscript{201} After reaching the conclusion that a heightened pleading standard applied, the court predictably dismissed the case.\textsuperscript{202}

\textbf{B. Dismissal Rates Will Increase When Lower Courts Apply the "Heightened" Pleading Standards}

Not only will courts apply varying pleading standards to loss causation, but the majority of cases will probably apply "heightened" pleading standards. The issue is whether loss causation is a "circumstance" of securities fraud actions such that it must be pled with particularity.\textsuperscript{203} After \textit{Dura}, it does not appear that any court has expressly stated that a 9(b) pleading standard specifically applies to loss causation assessments, but courts have held that "heightened" pleading

\begin{footnotes}
\item[199] Id. (citing Plotkin v. IP Axess Inc., 407 F.3d 690, 696 (5th Cir. 2005); GSC Partners CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004)). The Fifth Circuit held, in \textit{Plotkin}, that to demonstrate a 10b-5 violation, a plaintiff must prove that the defendant proximately caused the plaintiff's injury. 407 F.3d at 696. The PSLRA, continued the court, "requires a securities fraud plaintiff ... to plead [that] substantive element[ ] with particularity. The PSLRA's particularity requirement incorporates, \textit{at a minimum}, the pleading ... under Federal Rule of Civil Procedure 9(b)." Id. (emphasis added) (citation omitted).
\item[200] In re First Union, 2006 WL 163616, at *6 (citing Learning Works, Inc. v. Learning Annex, Inc., 830 F.2d 541, 546 (4th Cir. 1987)).
\item[201] Id. (citing Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005)).
\item[202] Id. at *7. The actual pleadings are not that significant; the important point is that the court referred to \textit{Dura} when deciding to use a heightened pleading standard. For reference, however, the court noted that "[p]laintiffs concede[d] that the particularity requirement ap[plied] to the other elements of their Section 10(b) claim, [but] they contend that because the causation element concern[ed] the losses caused by the allegedly misleading statements, rather than the statements themselves, simple notice pleading should [have] appl[ied] to that single element." Id. at *6. The plaintiffs in \textit{In re First Union} alleged that the stock price fell because of two public statements and because of the acquisition of a company. Id. However, the price drop occurred after the public statements but before the acquisition of the company; thus, the court held that the plaintiffs failed to particularly plead loss causation and accordingly dismissed the case. Id. at *6-7.
\item[203] Roberts & Chalmers, supra note 185, at 354.
\end{footnotes}
standards apply, and the varying applications will undoubtedly lead to and require a unifying judgment. And although a court may not explicitly state that it is using a heightened pleading standard, a number of cases appear to be doing just that.

A Northern District of California case (which, if appealed, is within the purview of the Ninth Circuit), *In re Gilead Sciences Securities Litigation*, exemplifies the unyielding standards that some lower courts will now apply to loss causation pleading. The plaintiffs in *In re Gilead* alleged in their pleadings that the defendant announced in July 2003 that it expected its second quarter results to exceed expectations due to increased sales of its new HIV/AIDS drug, Viread, and not because of swelling inventory stockings. Two weeks later, allegedly, the defendant informed analysts and investors during a conference call that its inventory had increased noticeably and that Viread sales would decrease in the third-quarter. Then, on August 7, 2003, the defendant publicized a letter from the FDA that warned the defendant of its promotional practices. On October 28, 2003, the defendant released its third-quarter numbers, which were drastically lower than second-quarter results. The defendant's stock plummeted $7.46 a share the following day, although it regained its value a month later.

The plaintiffs' primary allegation was that the defendants carried out "off-label marketing" as early as September 2001, and that such improper marketing caused the defendant to overstate its second-quarter Viread sales results by roughly ninety-five million dollars. The defendants moved to dismiss, countering that the plaintiffs failed
to adequately plead loss causation because the defendant divulged the FDA's letter in August 2003, but the drop in share price did not transpire until October 29, 2003. In reply, the plaintiffs claimed that the FDA letter caused the defendant's national sales, which were allegedly comprised of off-label sales, to decline significantly. The FDA letter had alerted doctors to the safety problems of Viread, which consequently made them "less inclined to prescribe Viread." Hence, the plaintiffs contended that the FDA letter, which caused the drop in the October sales report, triggered the twelve percent stock price drop.

The court found the plaintiff's contentions "too attenuated to withstand scrutiny under Dura." Essentially, the court decided that the plaintiff had not met the proximate cause standard for loss causation that the Supreme Court had adjudicated. The court justified its decision by stating that the defendant's stock price in fact rose following the disclosure of the FDA letter. Such justification, however, is logically flawed. If the plaintiffs' allegations were true—as a court must assume on a motion to dismiss—then the fact that the stock price did not immediately decrease makes sense. The FDA letter would have first caused doctors to shy away from prescribing Viread, sales would have subsequently decreased, and then the dismal sales report of October 28 would have been a direct result of the FDA letter. Yet the court demonstrated that it took Dura's words too literally:

Plaintiffs do not allege that a price drop immediately accompanied the disclosure of the FDA warning letter, and hence the Court is left to speculate as to what portion of the eventual loss, if any, should be attributed to the disclosure or whether the loss was caused by other factors.

Because there was no immediate drop in stock price, the court decided that the plaintiffs had not met the loss causation standard and dismissed the case.

A Connecticut district court was similarly harsh in Malin v. XL Capital Ltd. In Malin, the plaintiffs attempted to distinguish their complaint from Dura, arguing that they met the loss causation pleading standard by alleging that they bought at an inflated price, that the

213. Id. at *8.
214. Id.
215. Id.
216. Id.
218. Id.
219. Id. at *9 (emphasis added).
defendant's misrepresentations caused the inflated price, that the stock price dropped, and that a corrective disclosure caused the price drop.\textsuperscript{221} The court initially viewed these averments as sufficient for the \textit{Dura} pleading standard.\textsuperscript{222}

Nonetheless, the court noted that the defendants had presented evidence that the stock price had rebounded to its predisclosure value two-and-a-half months after the disclosure.\textsuperscript{223} The court decided that the fact that the stock price recovered in less than three months defeated the inference that the defendants' misrepresentations caused the economic loss.\textsuperscript{224} The court then proclaimed, "[i]f the current value [of the security] is commensurate to the purchase prices, there is no loss, regardless of whether the purchase price was artificially inflated."\textsuperscript{225} The court's reasoning is problematic in that there are many reasons that might account for a fall and subsequent rise in stock price, namely the advent of a new product, the downfall of a rival, or an overall improved economy.\textsuperscript{226} Based solely on the court's opinion, it appears that the court dismissed the plaintiffs' claim only because the stock price recouped to the value of the inflated price.\textsuperscript{227} Such an approach to loss causation validates the fear that a defendant may avoid any and all liability for fraud by releasing enough positive information at the same time as a corrective disclosure to assure that the stock price does not diminish.

The cases mentioned above are only the tip of the iceberg; a plethora of recent cases have applied heightened pleading standards to loss causation. A Delaware district court began one of its opinions with a long recitation of how the Federal Rule of Civil Procedure 9(b) particularity requirement "has been rigorously applied in securities fraud

\begin{itemize}
\item\textsuperscript{221} \textit{Id.} at *3.
\item\textsuperscript{222} \textit{Id.}
\item\textsuperscript{223} \textit{Id.} at *4.
\item\textsuperscript{224} \textit{Id.}
\item\textsuperscript{225} \textit{Id.}
\item\textsuperscript{226} \textit{Cf.} \textit{Dura Pharm.}, Inc. v. Broudo, 544 U.S. 336, 342–43 (2005). The court noted other factors affecting price:
\begin{quote}
When [a] purchaser subsequently resells . . . shares . . . at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price.
\end{quote}
\textit{Id.}
\item\textsuperscript{227} See \textit{Malin}, 2005 WL 2146089, at *4. Perhaps the court was privy to facts that allowed it to rule out that any factor other than the misrepresentation itself ultimately had an effect on the market price, but the court did not disclose such facts in its opinion. \textit{See generally id.}
\end{itemize}
cases." The plaintiff in Brashears v. 1717 Capital Management alleged that he was duped into purchasing a more expensive life insurance policy because he had not been informed of the more economical policy. The court concluded that although the plaintiff had paid more in premium, he had also received the increased benefit of that insurance plan, so he was not in a worse situation—just a different one. That opinion is an example of a court blindly and literally applying the Dura standard. The court failed to examine the problem in its simplest form: the defendant omitted key facts that induced the plaintiff to pay more money than what he would have paid had he been aware of the omission. Hence, the plaintiff suffered a loss.

The Sixth Circuit's formalistic approach in D.E. & J. Ltd. Partnership v. Conaway almost appears naïve. In Conaway, the complaint alleged that the defendant, Kmart, hid its financial difficulties from its investors by using interim financial statements that did not adequately report Kmart's financial state and misstating inventory ledgers. Kmart quickly filed for bankruptcy, citing "a combination of factors, including a rapid decline in its liquidity... and earnings performance in the fourth quarter" as the cause. The court accepted Kmart's reasons for failure at face value: "Of course, the filing of a bankruptcy petition by itself does not a security fraud allegation make." Yet at the dismissal stage, a court is supposed to accept the plaintiff's allegations as true—not the defendant's contentions. Apparently there is the potential for a defendant in the Sixth Circuit to fraudulently run his company into the ground, hide it from his investors, merely state that he lost money because business was bad, and be free and clear of any securities fraud liability. It would be nice to live in a world where a corporation would never lie, but the mere existence of 10b-5 securities fraud actions tends to show that such a dream will never become reality.

229. Id. at *4.
230. Id.
231. 133 Fed. App'x 994 (6th Cir. 2005).
232. Id. at 996.
233. Id.
234. Id. at 1000.
235. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993) ("We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.").
C. **Dura Will Cause Lower Courts to Apply Semi-Heightened Pleading Standards to Nonsecurities Cases**

Besides adversely affecting securities claims, the *Dura* decision will influence lower courts to apply heightened pleading standards to claims outside of the securities field.²³⁶ This follows from the Court's exacting application of the Rule 8(a) pleading standard.²³⁷ The Court's exact words were "[w]e concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. But it should not prove burdensome for a plaintiff . . . to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind."²³⁸ Because the Court referred to Rule 8 notice pleading in general, and because all federal claims—unless otherwise indicated by statute—are pled using Rule 8(a) standards,²³⁹ *Dura*'s decision directly applies to the vast majority of federal claims.

A Florida district court was one of the first courts to apply *Dura*'s heightened Rule 8(a) pleading standard to a nonsecurities case in *Allied Van Lines, Inc. v. Gulf Shores Moving & Storage, Inc.*²⁴⁰ That case involved contract and conversion claims, but no securities fraud claims.²⁴¹ The court stated that "[w]hile the federal notice pleading is liberal, it is not without limits," and subsequently dismissed the conversion claim.²⁴² The court never recited the actual allegations; it merely stated that "there [were] no factual allegations as to any of these individual defendants which would state a cause of action for conversion under Illinois law."²⁴³ However, the actual pleadings are not significant; what is relevant is that the court decided to reference *Dura* when deciding that notice pleading should not be too liberal.²⁴⁴ The *Allied Van Lines* case is a concrete example of a lower court looking to *Dura* for guidance outside the securities fraud context.

²³⁶. Richard A. Spehr & Joseph De Simone, *The Battleground After Dura Decision*, N.Y. L.J., Aug. 22, 2005, at S6 ("Lower courts may apply the recently invigorated Rule 8 to any cause of action.").
²³⁸. See id. at 347 (citation omitted).
²³⁹. FED. R. CIV. P. 8(a). The rules requirements are simple:
A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.
Id.
²⁴¹. Id. at *1.
²⁴². Id.
²⁴³. Id.
²⁴⁴. Id.
A New York court has similarly applied a demanding Rule 8(a) standard to a racial discrimination suit. In *Baptiste v. The W Hotel*, the plaintiff was an African-American woman who went to the defendant hotel to visit her friend who was staying there. She alleged that employees of the defendant hotel subjected her to abuse and discrimination on the basis of sex and race by verbally ridiculing her and muttering racial epithets. The defendants moved to dismiss, and the court began its opinion by quoting *Dura*: "[P]leadings are to give 'fair notice' of a claim and 'the grounds upon which it rests.'" The court quickly decided that the plaintiff's allegations were not detailed enough to provide fair notice. Referring to *Dura*, the court stated that the plaintiff "ha[d] pointed to no facts or circumstances, other than the fact that she is African-American, that would [have] give[n] the W fair notice of the grounds from which one could infer that her treatment by The W's staff was motivated by racial animus." Apparently, alleging the use of a racial epithet is not enough to plead racial motivation under the heightened 8(a) pleading standard of *Dura*; thus, the New York court was able to make a hasty dismissal.

VI. Conclusion

Securities law is a complex field that has continually piqued the interest of both Congress and the Supreme Court. As a result, both of these branches of government have written and imposed regulations, primarily with the intent of preventing plaintiffs and their attorneys from profiting off of frivolous or vexatious lawsuits. Such focus has resulted in 10b-5 claims having little deterrent effect, perhaps evidenced by the WorldCom and Enron scandals.

In 1996, when Congress conducted committee hearings and codified securities law in the PSLRA, Congress explicitly stated that it wanted to end judicial legislation and consequently provide uniformity to securities law. For that reason, federal courts, and particularly the Supreme Court, should have given deference and merit not only to the PSLRA itself, but to the rationale behind its passage. Congress's words were not left on deaf ears, because the Ninth Circuit employed the exact standard of loss causation that the Committee suggested in the PSLRA hearings. The *Dura* Court nevertheless gave little weight

246. Id. at *1.
247. Id.
248. Id. at *2 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005)).
249. Id. at *4.
250. Id.
to the committee hearings and instead adopted the more stringent common-law viewpoints.

Besides applying the burdensome common-law approaches, the Court also relied upon faulty theories of loss causation in reaching its decision. The *Dura* opinion requires that a plaintiff allege and prove that the stock price dropped as a proximate result of the fraud’s disclosure. The Court never explicitly says that there must be a definitive corrective disclosure, but it states that as more time elapses between the fraud and the drop in price, the more likely that factors other than the fraud caused the drop in price. Those words imply that a plaintiff will have to tie the price drop to a specific event or disclosure—and a recent event, as well—lest he risk the chance of dismissal as the chain of proximate cause attenuates. Moreover, the words of the Court denote that in complex situations, like the atmosphere that typically surrounds securities fraud, all the cards are stacked against the plaintiff because he has the burden of sifting the fraud and resultant share price drop from other market forces—and then pleading the details with particularity.

Increased dismissal rates will be the first and most obvious result of *Dura*. Next, due to the vague language of the *Dura* opinion, confusion will permeate the lower courts. Some courts will be applying heightened pleading standards while other courts will be doing their best, within the confines of *Dura*, to aid meritorious plaintiffs. And finally, lower courts will apply heightened 8(a) pleading standards to cases outside the realm of securities fraud since the Court’s opinion “touched upon” federal notice pleading. Perhaps the only way people can effectively avoid suffering losses from securities fraud is by never purchasing stock.

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