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DOES ANYONE KNOW THE REQUIRED STATE OF MIND?: THE UNCERTAINTY CREATED BY THE VAGUENESS OF THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

I. INTRODUCTION

What is the pleading standard for the state of mind element of the Private Securities Litigation Reform Act of 1995 (PSLRA)?¹ The PSLRA fails to provide any guidelines that would unearth the state of mind (synonymous with scienter for the purposes of this Note) element required to successfully plead scienter under the PSLRA and survive a motion to dismiss.² When the United States Circuit Courts confront the scienter element and attempt to construe Congressional intent, a split among the Circuits inevitably arises.³

Congress enacted the PSLRA to deter plaintiffs from filing abusive class-action lawsuits.⁴ The PSLRA displays Congress's intent to place a higher pleading standard on plaintiffs bringing a securities fraud claim.⁵ In actions purporting to violate securities laws, the Circuits have taken varying positions as to the necessary pleading standard required to prevail over a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim.⁶

¹ See 15 U.S.C. § 78u-4(b)(2) (2000). 78u-4(b)(2) provides in pertinent part:

Required state of mind. In any private action arising under this title [15 USCS §§ 78a et seq.] in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title [15 USCS §§ 78a et seq.], state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

Id.

² See *id.* (omitting what would qualify as state of mind). See also *Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 613 (4th Cir. 1999) (noting “widespread disagreement” in determining “required state of mind” because not defined in PSLRA).

³ See *In re Silicon Graphics Inc., Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (outlining three different approaches taken by district courts interpreting PSLRA's pleading requirement).

⁴ See *id.* at 973 (construing PSLRA).

⁵ See *id.* at 973-74 (describing legislative intent of PSLRA).

⁶ See *id.* at 973 (listing different interpretations of Circuits).

This Note recognizes the need for a uniform pleading standard among the Circuits construing the PSLRA. Part II outlines the historical background leading up to the enactment of the PSLRA. Part III details Congress's intent and goals with respect to the pleading requirements promulgated by the PSLRA. Part IV illustrates the different interpretations of the PSLRA's pleading standard among the Circuit Courts. Finally, Part V concludes with an analysis of the several interpretations and suggests a uniform pleading standard that reflects Congress's intent.

II. HISTORY

Congress promulgated the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act) in response to the public's negative feelings towards securities markets following the Stock Market Crash of 1929.⁷ The 1933 Act aimed to counteract fraud and the perceived lack of public information in the securities markets by mandating full and fair disclosure of all information that is material to the markets.⁸ The 1934 Act, namely § 10b, proposed to obviate the manipulation of stock prices by regulating securities exchanges and over-the-counter markets.⁹

In 1942, the Securities and Exchange Commission (SEC), acting under the regulatory power inherited through § 10b of the 1934 Act, promulgated Rule 10b-5, which establishes a private cause of action for § 10b violations.¹⁰ To support an action under § 10(b) and 10(b)-5, a

⁷ See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-95 (1976) (explaining legislative history of both 1933 and 1934 Acts).

⁸ See *id.* (discussing Congress's intent in passing Acts); 15 U.S.C. § 78b (2000) (stating one purpose to "insure the maintenance of fair and honest markets").

⁹ See *Hochfelder*, 425 U.S. at 195 (confirming 1934 Act and § 10b purported to eliminate fraud in markets). The 1934 Act states:

It shall be unlawful for any person ... (b) to use or employ, in connection with the purchase or sale of any security ... any manipulative or ... deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Act of 1934, 15 U.S.C. § 78j (1994).

¹⁰ Employment of manipulative and deceptive devices, 17 C.F.R. § 240.10b-5 (2000). Section 240.10b-5 provides;

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or articles to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

defendant is required to have acted with scienter.¹¹ The United States Supreme Court, in *Ernst & Ernst v. Hochfelder*,¹² defined scienter as “a mental state embracing intent to deceive, manipulate or defraud.”¹³

The Second Circuit case *Shields v. Citytrust Bancorp*¹⁴ interpreted the Federal Rule of Civil Procedure 9(b) and established a private cause of action.¹⁵ *Shields* later became known as the “Second Circuit test” and heightened the existing standard by holding that the facts must additionally indicate a “strong inference” of fraud to establish scienter.¹⁶ The Second Circuit test sets forth that a “strong inference” of fraud can be established either by alleging facts that show the defendants possessed both motive and opportunity to commit fraud or by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.¹⁷ The Second Circuit’s “strong inference” requirement became the scienter test employed by many of the federal courts.¹⁸

III. THE PSLRA AND ITS GOALS

On December 2, 1995, the PSLRA officially amended the 1934 Act.¹⁹ The House Conference Report expressly states that Congress

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id. See also 15 U.S.C. § 78j (creating Congressional regulatory power with regard to Rule 10b).

¹¹ See *Hochfelder*, 425 U.S. at 193 (holding no private cause of action for damages under § 10(b) and Rule 10b-5 without scienter); *Shields v. Citytrust Bankcorp, Inc.*, 25 F.3d 1124, 1127-28 (2d Cir. 1994) (concluding FED. R. CIV. P. 9(b) scienter requirements avoid claims of fraud based on speculation); *Freidberg v. Discreet Logic, Inc.*, 959 F. Supp. 42, 47-48 (D. Mass. 1997) (noting requirement of scienter under Section 10b and Rule 10b-5).

¹² 425 U.S. 185 (1975).

¹³ *Hochfelder*, 425 U.S. at 194 n.12 (1976).

¹⁴ 25 F.3d 1124 (2d Cir. 1994).

¹⁵ *Shields v. Citytrust Bancorp*, 25 F.3d 1124 (2d Cir. 1994); FED. R. CIV. P. 9(b); 17 C.F.R. § 240.10b-5 (2000). Rule 9(b) states that the Plaintiff must state facts with particularity and that malice, intent, knowledge, and other conditions of scienter can be asserted. *Id.*

¹⁶ *Shields*, 25 F.3d at 1128 (setting scienter requirements referenced by all Circuits and followed by most).

¹⁷ *Id.* See also *In re Carter-Wallace, Inc.*, 220 F.3d 36, 39 (2d Cir. 2000) (citing *Shields*, 25 F.3d at 1128).

¹⁸ See *In re Criimi Mae, Inc. Sec. Litig.*, 94 F. Supp. 2d 652, 657-58 (D. Md. 2000) (employing Second Circuit test); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534-35 (3d Cir. 1999) (stating Second Circuit test as rule of all Circuits); *Lirette v. Shiva Corp.*, 27 F. Supp. 2d 268, 275 (D. Mass. 1998) (citing Second Circuit test as standard for pleading scienter).

¹⁹ Eugene P. Caiola, *Retroactive Legislative History: Scienter Under the Uniform Security Litigation Standards of 1998*, 64 ALB. L. REV. 309, 326 (2000) (discussing legislative history of PSLRA).

attempted to restore confidence in our capital markets through deterring wrongdoing by corporations and their agents and, ultimately, returning the securities litigation system into the good graces of the public.²⁰ The legislative history further indicates that the purpose of the PSLRA was to prevent the exploitation of deep-pocket defendants in securities class-action litigation.²¹ Moreover, Congress intended to narrow the filing of securities suits arising from significant stock price shifts without regard to the defendant's culpability and eliminate the strategic use of the discovery process to intimidate defendants into settling.²²

The PSLRA set out the requirements for private securities fraud actions, providing in pertinent part:

(2) Required state of mind. In any private action arising under this title ... in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title ... state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.²³

The Conference Committee ("Committee") clearly indicated its intent to heighten the existing scienter pleading requirements necessary to survive a motion to dismiss.²⁴ Although the Second Circuit test was not codified in the PSLRA, it strongly influenced Congress in drafting the bill.²⁵ The Committee borrowed language from the Second Circuit test; namely, the requirement that the plaintiff must state facts with particularity that give rise to a "strong inference" of the defendant's fraudulent intent.²⁶ In drafting the PSLRA, the Committee created uncertainty by employing vague and ambiguous language and refusing to interpret what may qualify

²⁰ H.R. REP. NO. 104-369, at 31 (1995).

²¹ See H.R. REP. NO. 104-369, at 31-32 (referring to accountants, underwriters and those covered by insurance policies). See also *Advanta*, 180 F.3d at 531-32 (explaining Congressional history and intentions behind PSLRA).

²² See *Advanta*, 180 F.3d at 531 (construing PSLRA to restrict abuses of securities fraud claims).

²³ 15 U.S.C. § 78u-4(b)(2) (2000).

²⁴ See H.R. REP. NO. 104-369, at 3 (1995) (seeking to deter plaintiffs lawyers "race to the courthouse").

²⁵ See H.R. REP. NO. 104-369, at 41 (expressly stating Conference Committee did not intend to codify Second Circuit test); *Caiola*, *supra* note 19, at 334-35 (describing debates within Senate rejecting Second Circuit test). Congress wanted to take steps toward eliminating frivolous securities claims. *Id.* at 325. The Second Circuit test provided a backbone for the PSLRA, but the final language failed to include the required state of mind or how it was to be proven. *Id.*

²⁶ *Id.*

as the defendant's "required state of mind."²⁷ By virtue of the vague language, the Committee failed to establish a uniform pleading requirement because it neglected to provide a framework for a scienter pleading standard.²⁸

Additionally, the PSLRA complicated matters by requiring a dismissal of the complaint for a failure to establish the required state of mind.²⁹ The Circuit Courts that review a motion to dismiss involving securities fraud have construed Congress's intent with regard to state of mind.³⁰ As a result, various Circuit Courts have either adopted the PSLRA in its entirety, adopted certain portions, or devised a new, more stringent standard.³¹

Further complicating matters, Congress passed the Securities Litigation Uniform Standards Act of 1998 (Standards Act).³² A review of the Standards Act's legislative history displays Congress's intention to return to a heightened uniform pleading standard based on the Second Circuit test.³³ Unfortunately, the passage of the Standards Act failed to settle the uncertainty among the Circuits in establishing a uniform pleading standard.³⁴

²⁷ See 15 U.S.C. § 78u-4 (failing to define "state of mind"). Legal commentary on the PSLRA has analogized Congress's shortcomings in drafting the PSLRA to Pandora's Box, because of the disarray it has caused in the Circuits. *Caiola, supra* note 19, at 310.

²⁸ See *Silicon Graphics*, 183 F.3d at 973-79 (determining pleading standard as main issue in PSLRA); *In re Comshare, Inc., Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 1999) (noting Congress did not define "required state of mind").

²⁹ 15 U.S.C. § 78u(b)(3). The PSLRA states, in pertinent part:

(3) Motion to dismiss, stay of discovery.

(a) Dismissal for failure to meet pleading requirements. In a private action arising under this title ..., the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraph (1) and (2) are not met.

Id.

³⁰ See *Advanta*, 180 F.3d at 531 (noting how Congress complicated securities fraud actions by passing PSLRA).

³¹ See *Criimi Mae*, 94 F. Supp 2d at 657-58 (listing varied scienter pleading standards among Circuits).

³² Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353 (1998).

³³ See H.R. REP. NO., 105-803, at 13 (1998) (stating Congress intended to raise pleading standards by passing PSLRA); S. REP. NO. 105-182, at 11 (1998) (discussing Senate hearing regarding impact of PSLRA). The Senate Report provides an interesting attachment compiled by staff attorneys at the Securities and Exchange Commission entitled, "Pleading Standard Scorecard." S. REP. NO. 105-182, at 26-7. The Scorecard lists several cases among the federal courts that either adopted the Second Circuit test in its entirety, or applied a stricter or lesser version of the test. *Id.*

³⁴ See *Advanta*, 180 F.3d at 533 (reiterating dispute between Senate and House on whether PSLRA codified Second Circuit test).

IV. ANALYSIS OF THE DIFFERING VIEWS AMONG THE CIRCUITS

A. *Second and Third Circuits*

The Second and Third Circuits have held that the requisite state of mind under the PSLRA is at least equal to the Second Circuit standard.³⁵ These Circuits consistently hold that Congress intended to codify the Second Circuit test with the passage of the PSLRA.³⁶

In *Novak v. Kasaks*,³⁷ the Second Circuit determined that scrutinizing the PSLRA legislative history was unnecessary.³⁸ Utilizing the language from the Second Circuit, both the *Novak* and *Advanta* Courts held that the PSLRA's pleading standard was equal to the Second Circuit test because the PSLRA contained no ambiguity.³⁹ Language in the *Novak* case momentarily altered the established pleading requirement, stating, "[w]e believe that Congress's failure to include language about motive and opportunity suggests we need not be wedded to these concepts."⁴⁰ The *Novak* Court, however, was reacting to lower court challenges, such as the Southern District of New York's decision *In re Beasa Sec. Litig.*^{41, 42} In *Baesa*, the Court held that it was unclear whether the Second Circuit has "always" considered motive and opportunity to be sufficient to establish scienter.⁴³ The court in *Novak*, however, attempted to extinguish the dissent among its immediate districts by directing the district courts to look

³⁵ See *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 537 (2d Cir. 1999) (holding PSLRA heightened pleading standard to level of Second Circuit); *Advanta*, 180 F.3d at 534 (holding PSLRA codified Second Circuit test).

³⁶ See *Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000) (construing Congress enacted Second Circuit standard adding phrase "with particularity"); *Novak v. Kasaks*, 216 F.3d 300, 310 (2d Cir. 2000) (stating enactment of 15 U.S.C. § 78u-4(b)(2) did not change pleading standard within Circuit); *Advanta*, 180 F.3d at 530 (adopting Second Circuit's pleading standard); *Press*, 166 F.3d at 537-38 (stating PSLRA raised scienter pleading requirement to Second Circuit level).

³⁷ 216 F.3d 300 (2d Cir. 2000).

³⁸ *Novak v. Kasaks*, 216 F.3d 300, 310 (2d Cir. 2000).

³⁹ *Novak*, 216 F.3d at 310; *Advanta*, 180 F.3d at 534. The Court in *Advanta* stated the "use of Second Circuit's language compels the conclusion that the [PSLRA] establishes a pleading standard approximately equal in stringency to that of the Second Circuit." *Advanta*, 180 F.3d at 534.

⁴⁰ *Novak*, 216 F.3d at 310.

⁴¹ 969 F. Supp. 238 (S.D.N.Y. 1997).

⁴² See *Novak*, 216 F.3d at 310 (stating disagreement among district courts regarding PSLRA pleading standard).

⁴³ See *In re Baesa Sec. Litig.*, 969 F. Supp. 238, 242 (S.D.N.Y. 1997) (making reference to commentators with same views). The Court in *Baesa* held that since the PSLRA omitted the "motive and opportunity" language of the Second Circuit Standard, the mere pleading of motive and opportunity will not, alone, sustain a strong inference of scienter. See *id.*

to prior case law to determine if a strong inference existed.⁴⁴ Although the Second Circuit temporarily dealt with this unrest among its own districts by suggesting the use of *stare decisis*, it remains a source of controversy in the other Circuits.⁴⁵

B. Ninth Circuit

The Ninth Circuit has had few opportunities to review securities fraud cases interpreting the PSLRA. When given the opportunity in *In re Silicon Graphics Sec. Litig.*,⁴⁶ the Ninth Circuit distinguished itself by concluding that Congress intended to heighten the pleading standards in excess of the Second Circuit requirement.⁴⁷ Therefore, a “plaintiff proceeding under the PSLRA must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct.”⁴⁸ The Ninth Circuit followed Congress’s express intent not to codify the Second Circuit Standard and thereby eliminated the availability of motive and opportunity and simple recklessness as scienter pleading standards.⁴⁹ The Ninth Circuit’s interpretation of the PSLRA is unique because its views are inconsistent and distinguishable from the other Circuit Courts.⁵⁰

C. Sixth and Eleventh Circuits

Both the Sixth and Eleventh Circuits employ similar pleading standards under the PSLRA. The similarities are exemplified by the Sixth Circuit decision *In re Comshare, Inc., Sec. Litig.*⁵¹ and the Eleventh Circuit’s holding in *Bryant v. Avocado Brands, Inc.*⁵²

⁴⁴ See *Novak*, 216 F.3d at 311 (stating prior decisions provide best indication of pleading standard).

⁴⁵ See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196-97 (1st Cir.1999) (showing motive and opportunity not acceptable pleading standard in all Circuits).

⁴⁶ 183 F.3d 970 (9th Cir. 1999).

⁴⁷ See *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 973-74 (9th Cir. 1999) (distinguishing Ninth Circuit from Second Circuit test by elevating pleading requirement).

⁴⁸ *Id.* at 974.

⁴⁹ See *id.* at 973 (stating motive and opportunity and simple recklessness may support reasonable inference of intent). In an effort to raise the pleading standard to exceed the Second Circuit standard, the Ninth Circuit held that pleading facts of motive and opportunity, or mere recklessness, does not support a finding of a “strong inference,” as the language of the PSLRA provides. *Id.*

⁵⁰ See *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 973 (9th Cir. 1999) (holding Ninth Circuit approach best “reconciles” Congress’s use of Second Circuit’s “strong inference” standard).

⁵¹ 183 F.3d 542 (6th Cir. 1999).

⁵² 187 F.3d 1271 (11th Cir. 1999).

As a case of first impression, the Sixth Circuit in *Comshare* reviewed the heightened pleading standards of the PSLRA.⁵³ The Court concluded that plaintiffs may plead scienter by alleging facts that give a strong inference of recklessness, rather than merely alleging facts that might establish the defendant possessed motive and opportunity.⁵⁴

In *Bryant*, the Eleventh Circuit considered the necessary standard to adequately plead scienter within its Circuit.⁵⁵ The Circuit, however, rejected the Second Circuit's motive and opportunity test because the clear text of the statute allows recklessness as a basis of liability.⁵⁶ Ultimately, the *Bryant* court concluded that Congress's definition of the "required state of mind" for the PSLRA included recklessness because Congress failed to expressly exclude it from the Act.⁵⁷

D. First Circuit

The First Circuit's opportunity to determine the post-PSLRA securities fraud pleading standard arose with *Greebel v. FTP Software, Inc.*^{58, 59} The *Greebel* Court noted that the PSLRA's language was inadequate because it failed to provide a specific test and did not preclude the use of different methods to establish scienter.⁶⁰ The First Circuit, however, asserted that its prior-PSLRA requirements for pleading fraud with particularity were commensurate to the intention of the PSLRA because they were both strict and rigorous.⁶¹

The Court in *Greebel* employed a narrow definition of "reckless" that could establish scienter.⁶² This definition depicts recklessness to

⁵³ *In re Comshare, Inc., Sec. Litig.*, 183 F.3d 542, 544 (6th Cir. 1999) (reviewing appeal from dismissed securities fraud action).

⁵⁴ *Id.* at 549. See also *Baesa*, 969 F. Supp at 242 (questioning establishment of scienter merely by alleging facts of motive and opportunity).

⁵⁵ See *Bryant v. Avocado Brands, Inc.*, 187 F.3d 1271, 1275 (11th Cir. 1999) (stating Court's intention to establish pleading standard).

⁵⁶ See *id.* at 1273-74 (stating review of PSLRA legislative history unnecessary because of plain statutory text).

⁵⁷ *Id.* at 1284.

⁵⁸ 194 F.3d 185 (1st Cir. 1999).

⁵⁹ See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 191-92 (1st Cir. 1999) (reviewing Second Circuit test to determine pleading standard for First Circuit).

⁶⁰ See *id.* at 195 (stating legislative history of PSLRA failed to clearly state pleading standard). Similar to many other Circuits review of the legislative history of the PSLRA, the First Circuit stated that Congress was inconclusive on whether the PSLRA meant to codify or reject the Second Circuit's standard. *Id.* at 195. In addition, the Court discounted the legislative history by stating there "appears to be an agreement to disagree." *Id.*

⁶¹ See *id.* at 193 (noting that PSLRA raised pleading standard consistent with First Circuit's standard). The First Circuit simply adhered to a strict interpretation of Fed. R. Civ. P. (9)(b). *Id.*

⁶² See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 198 (1st Cir. 1999) (using Seventh Circuit's strict definition of recklessness). The Seventh Circuit's definition of

exclude ordinary negligence by calling for an “extreme” departure from the standards of ordinary care.⁶³ The First Circuit expressed that its narrow construction of the PSLRA’s pleading standard was justified because other provisions of the Act, such as the elimination of recklessness as a basis for joint and several liability, were also constricted.⁶⁴

E. Fourth Circuit

In *Phillips v. LCI International, Inc.*,⁶⁵ the Fourth Circuit noted that Congress intended to heighten the pleading standard for scienter in a securities fraud action; however, the Court failed to establish a solid precedent.⁶⁶ Subsequent to reviewing the history of the PSLRA, the Court proceeded to dismiss the shareholders’ claim because it failed to meet even the most lenient standard promulgated by the Second Circuit.⁶⁷ Furthermore, the Court’s dicta in *Phillips* alluded that recklessness will be sufficient as a pleading standard for scienter.⁶⁸ The Fourth Circuit, however, will abstain from deciding the new PSLRA pleading standard until it is presented with an appeal that would give rise to a strong inference of scienter established through a genuine factual basis.⁶⁹

V. CONCLUSION

The scienter pleading standard of the PSLRA is vague, which creates inconsistent interpretations among the federal courts. Primarily, Congress can be held responsible for creating the uncertainty among the

recklessness provides, in pertinent part:

Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable, negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious the actor must have been aware of it.

Id. (citing *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

⁶³ *See id.* at 197 (stating “reckless” more like lesser form of intent than merely greater degree of negligence).

⁶⁴ *See id.* (mentioning “safe harbor” provision of PSLRA also amended 1933 Act). The “safe harbor” provision allows a defendant to make forward-looking statements, unless he/she had actual knowledge that the statement was false and misleading. *Id.*

⁶⁵ 190 F.3d 609 (4th Cir. 1999).

⁶⁶ *See Phillips v. LCI International, Inc.*, 190 F.3d 609, 620 (4th Cir. 1999) (expressing PSLRA establishes higher standards to survive motion to dismiss).

⁶⁷ *Id.* at 620-21.

⁶⁸ *See id.* at 620 (quoting, “to establish scienter, a plaintiff must still prove that the defendant acted intentionally, which may perhaps be shown by recklessness”).

⁶⁹ *See id.* at 621-22 (emphasizing minimum standard to satisfy pleading requirement to overcome motion to dismiss).

courts because it failed to define the pleading standard. Congress's uncertainty in drafting the PSLRA, coupled with the courts refusal to adhere to the same pleading standards, have fostered the split among the Circuit Courts.

Moreover, only a limited number of PSLRA cases involving the interpretation of the pleading standard have reached appellate review. Thus the Fifth, Seventh, Eighth and Tenth Circuits have never interpreted the scienter element. Barring an act of Congress, it is fairly certain that these Circuits will interpret the scienter element of the PSLRA; thus, the additional uncertainty may be unavoidable.

The ambiguity with regard to the PSLRA's scienter element and the resulting disagreement among the Circuits will continue to result in inconsistent holdings in the lower District Courts. Congress must acknowledge its mistake and amend the PSLRA to clearly define the pleading standard, thereby eliminating the uncertainty and inconsistency among the Federal Courts.

To eliminate the uncertainty, Congress should take the appropriate steps to codify the Second Circuit test for scienter, thereby making the pleading standard more consistent among the federal courts. The Second Circuit test should ultimately be the standard for scienter because Congress used this test as a guide in drafting the PSLRA and the Circuits already recognize and refer to this test in their decisions. The codification of the Second Circuit test will, without fail, alleviate congestion on the courts' dockets and effectively deter frivolous law suits in the continuously evolving securities markets.

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