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# The Private Securities Litigation Reform Act of 1995's Paradigm of Ambiguity: A Circuit Split Ripe for Certiorari

Bradley R. Aronstam

# NOTE

# THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995'S PARADIGM OF AMBIGUITY: A CIRCUIT SPLIT RIPE FOR CERTIORARI

## I. INTRODUCTION

> "Laws are a dead letter without courts to expound and define their true meaning and operation."[1]

The Stock Market Crash of 1929, which ignited the fire that fueled the destruction of the Great Depression,[2] prompted Congress as part of its New Deal legislation to enact the Securities Act of 1933[3] and the Securities Exchange Act of 1934[4] in an effort aimed at curbing a number of the fraudulent securities practices that precipitated the market's devastating demise.[5] Alleged securities fraud actions are brought frequently

1. LAWYER'S WIT AND WISDOM: QUOTATIONS ON THE LEGAL PROFESSION, IN BRIEF 153 (Bruce Nash & Allan Zullo eds., 1995) (quoting Alexander Hamilton).

2. *See* 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 167 (3d ed. 1998).

3. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77bbbb (1994)) (mandating that corporations disclose extensive information about themselves at the time they initially sell their securities).

4. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78*ll* (1994)) (mandating that corporations with outstanding stock disclose material information on an ongoing basis after the initial offering of their securities).

5. *See* ALLAN B. AFTERMAN, SEC REGULATION OF PUBLIC COMPANIES 7 (1995) (describing a wide array of abusive and fraudulent practices that misled investors and defrauded the securities markets); 1 LOSS & SELIGMAN, *supra* note 2, at 168; *infra* note 47 and accompanying text (detailing other fraudulent and abusive securities practices and schemes carried out by unscrupulous investors). By implementing the Securities Act and the Securities Exchange Act, Congress sought to regulate through procedure. *See* 1 LOSS & SELIGMAN, *supra* note 2, at 225-27. In doing so, it mandated truthful disclosure so as to empower investors with the requisite material information necessary for them to adequately make their own informed investment decisions. *See id.* at 226; THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 7-8 (2d ed. 1990). In the famous words of Louis D. Brandeis, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. BRANDEIS, OTHER PEOPLE'S MONEY ch. 5 (1914). Adopting this philosophy, the aforementioned Acts and the rules promulgated thereunder provide that in the event that

in federal court by both government and private plaintiffs under section 10(b) of the Securities Exchange Act of 1934[6] and Securities and Exchange Commission Rule 10b-5.[7]

> To state a claim under [section] 10(b) of the Securities and [sic] Exchange Act of 1934 ... and Rule 10b-5, a plaintiff must allege, in connection with the purchase or sale of securities, the misstatement or omission of a material fact, *made with scienter*, upon which the plaintiff justifiably relied and which proximately caused the plaintiff's injury.[8]

This Note centers on a circuit split interpreting the minimum burden of pleading for actions brought pursuant to section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, a rule which has been lauded as the most important of the numerous anti-fraud provisions promulgated by the Securities and Exchange Commission ("SEC")[9] under the rubric of the aforementioned laws.[10]

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material information is not disclosed, shareholders who relied on the premise of such disclosure be afforded judicial redress. *See* 1 LOSS & SELIGMAN, *supra* note 2, at 225-27.

6. 15 U.S.C. §§ 78a-78*ll* (1994).

7. 17 C.F.R. § 240.10b-5 (1998). "All states have some limits on securities issues—so-called 'blue-sky' laws, ostensibly designed to protect investors from 'speculative schemes which have no more basis than so many feet of "blue sky."'" WILLIAM A. KLEIN & J. MARK RAMSEYER, BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, AND CORPORATIONS 457 (3d ed. 1997) (quoting Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917)). It is important to emphasize at the outset of this Note, however, that the discussion and analysis contained herein deals only with securities fraud on the federal level as governed by the Securities Exchange Act of 1934. While it is certainly conceivable that a prospective plaintiff would bring a securities action against a defendant on state grounds independent of the requirements prescribed by federal law, this Note centers on the federal circuit split interpreting the minimum standard of pleading as set forth in the Private Securities Litigation Reform Act of 1995 ("PSLRA").

8. *In re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 548 (6th Cir. 1999) (emphasis added).

9. The Securities Exchange Act of 1934 established the Securities and Exchange Commission ("SEC") as the agency charged with overseeing and regulating the issuance and trading of securities in an effort aimed at protecting investors from unfair and fraudulent securities practices. *See* 15 U.S.C. §§ 78(d), 78(w).

10. *See* HAZEN, *supra* note 5, at 666; *see also* Richard L. Jacobson & Joshua R. Martin, *The Private Securities Litigation Reform Act of 1995: A Survey of the First Three Years*, 2 ALI-ABA COURSE OF STUDY: SECURITIES LITIGATION: PLANNING AND STRATEGIES 861, 868 (1999) (stating that "most private securities fraud lawsuits allege a violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder"). The impact of Rule 10b-5 has been enormous since its inception. *See generally* LARRY D. SODERQUIST & THERESA A. GABALDON, SECURITIES REGULATION 398 (4th ed. 1999) (stating that "Rule10b-5 clearly occupies the preeminent position among the anti-fraud provisions in the securities laws"). Once again, Congress sought to regulate securities through procedure, not substance. *See* 1 LOSS & SELIGMAN, *supra* note 2, at 225-27. The fundamental purpose of the Securities Exchange Act of 1934 and its companion legislative enactments is "'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*.'" Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972) (quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963)). It therefore follows that in order to maintain a cogni-

Congress' enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA")[11] purportedly created a heightened, albeit ambiguous, standard of pleading that prospective plaintiffs alleging securities fraud in contravention of the Securities Exchange Act were required to meet in order to survive a defendant's motion to dismiss.[12] Section 21D(b)(2) of the PSLRA provides in pertinent part:

> In any private action arising under [the Securities Exchange Act] 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 chapter, *state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.*[13]

Congress' failure to provide any semblance of statutory guidance in the PSLRA for interpreting first, what constitutes the "required state of mind,"[14] and second, what constitutes "a strong inference"[15] of that state of mind, has resulted in a three-way split among the federal circuit courts of appeals, the discussion of which formulates the foundation of this Note.

Part II of this Note identifies and discusses the pre-PSLRA pleading standards beginning with the Supreme Court's creation of a "scienter" requirement for private 10b-5 causes of action in the landmark decision of *Ernst & Ernst v. Hochfelder*.[16] Despite the Supreme Court's failure to articulate whether a showing of recklessness sufficed for comporting with its intentional state of mind requirement, each of the circuits uniformly interpreted the answer to that question in the affirma-

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zable action under Rule 10b-5, a plaintiff-shareholder must first make a sufficient showing of scienter inasmuch as the alleged wrongful conduct was "'manipulative or deceptive.'" Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 474 (1977). Lower than projected earnings alone, for example, is insufficient for maintaining a 10b-5 cause of action absent scienter (i.e. "manipulative or deceptive" conduct) where all material facts have been disclosed. *See id.* at 474, 476.

11. Pub. L. No. 104-67, 109 Stat. 737, 743 (1995) (codified as amended at 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999)).

12. The rationale behind Congress' raising of the burden of pleading was to reduce the burdensome level of abusive securities litigation resulting from the mass disunity among the circuits' respective scienter requirements. *See* H.R. CONF. REP. No. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740; *see also infra* note 47 and accompanying text (describing in greater detail a number of the fraudulent abusive securities practices that prompted Congress to pass the PSLRA).

13. 15 U.S.C. § 78u-4(b)(2) (emphasis added).

14. *Id.*

15. *Id.*

16. 425 U.S. 185, 194 n.12 (1976). The Court established a scienter element for private Rule 10b-5 cases by requiring plaintiffs to show that defendant acted with "a mental state embracing intent to deceive, manipulate, or defraud." *Id.*

tive.[17] What each of the courts individually defined as recklessness, however, was far from uniform and led to a circuit split predating the present one.[18] As such, the second section of this Part details the divergent pre-PSLRA recklessness interpretations of the Second and Ninth Circuits which are representative of the collective disunity among the other circuit courts interpreting that question. This Part concludes by describing a number of the problems and concerns emanating from the aforementioned disunity that motivated Congress' enactment of the PSLRA.

Part III focuses on the PSLRA's enactment and details the state of affairs and ambiguity leading to the current circuit split interpreting that Act. More specifically, this Part depicts each of the six major circuit decisions passing judgment on the scienter question under the PSLRA.[19] Each of the plaintiffs' complaints in those decisions is examined in the context of the facts averred in an effort designed to provide a rudimentary understanding of how Rule 10b-5 actions arise and the PSLRA's implications regarding each of those complaints.

Part IV of this Note encompasses a two-part hypothetical and analytical section. Specifically, Part IV identifies how different plaintiffs with identical cases and complaints would find themselves with dramatically different results based solely on the rule of jurisdiction in which they filed suit. The goal of this section is to illustrate the significant ramifications accompanying the circuit split and the serious need for that split's reconciliation.

Finally, Part V comprises a detailed analysis of the PSLRA's text and legislative history. This Part seeks to clarify the underlying issues behind the split as evidence and justification for this Note's conclusion that the disharmony among the circuits should, and will, be reconciled by the United States Supreme Court in a manner consistent with the in-

17. *See* discussion *infra* Part II.

18. *See* S. REP. NO. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 694 (concluding that "[t]he courts of appeals [had] interpreted [the preexisting Rule] in different ways, creating distinctly different pleading standards among the circuits").

19. This Note examines the six circuit opinions chronologically by the dates in which they were decided and are discussed herein in the following order: the Second, Third, Sixth, Ninth, Eleventh, and First Circuit. While the Fifth Circuit also decided a case involving the PSLRA, that decision assumed without analysis that the PSLRA simply adopted the preexisting pleading standard of the Second Circuit. *See* Williams v. WMX Techs., Inc., 112 F.3d 175 (5th Cir. 1997). For a more detailed explanation and analysis of the interpretations adopted by the aforementioned circuits, see *infra* Part III.A.

termediate fact-specific interpretations adopted by the First, Sixth, and Eleventh Circuits.[20]

## II. "SCIENTER" IN THE PRE-PSLRA ERA

### A. Ernst & Ernst v. Hochfelder

Prior to the enactment of the PSLRA, the United States Supreme Court, in *Ernst & Ernst v. Hochfelder*,[21] decided that a private cause of action for damages under section 10(b) of the Securities Exchange Act and Rule 10b-5 required an allegation that the defendant acted with "'scienter'" comprised of "a mental state embracing intent to deceive, manipulate, or defraud."[22] The Supreme Court in *Ernst* established, therefore, that liability for issuing materially false or misleading statements or omissions required proof that such statements or omissions be disseminated or concealed fraudulently with a state of mind comprised of the "intent to deceive, manipulate, or defraud."[23]

While the Court in *Ernst* acknowledged that reckless conduct, in certain circumstances, may rise to the level of intentionally fraudulent conduct,[24] the Court failed to pass judgment on whether a showing of recklessness satisfied the requisite burden of pleading for the purposes of actions brought under section 10(b) of the Securities Exchange Act and Rule 10b-5.[25] Notwithstanding the Supreme Court's lack of express guidance regarding the sufficiency of pleading recklessness in Rule 10b-5 actions, the circuits deciding the issue unanimously concluded that Congress had, in fact, intended for a pleading of recklessness to suffice.[26] The facts that each of the circuits required plaintiffs to plead for a

20. The complexity of this circuit split necessitates a detailed introduction of both the background underlying the split and the respective interpretations of the circuits involved in the split for a true understanding of this Note's conclusion. For a complete discussion of this Note's conclusion, see *infra* Part V.B, asserting that the Supreme Court should and will resolve the pervasive ambiguity underlying this circuit split in a manner consistent with the interpretations of the First, Sixth, and Eleventh Circuits, inasmuch as the PSLRA sought to effectuate a heightened fact specific standard stricter than the Second Circuit's "motive-opportunity" interpretation and lower than the Ninth Circuit's "deliberately reckless-conscious misconduct" interpretation.

21. 425 U.S. 185 (1976).

22. *Id.* at 194 n.12.

23. *Id.*

24. *See id.* The Court in *Ernst* explicitly stated, however, that a mere showing of "negligent wrongdoing" alone was insufficient for satisfying the scienter requirement under the Act. *See id.* at 210.

25. *See id.* at 194 n.12.

26. *See* Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023 (6th Cir. 1979) (finding that "[t]he overwhelming majority of courts to address this question after *Hochfelder* have con-

satisfactory inference of recklessness, however, were far from uniform and inevitably led to the enactment of the PSLRA in a congressional effort aimed at bringing unity to the implementation of the Rule.[27]

### B. *The Pre-PSLRA Scienter Standards of the Second and Ninth Circuits*

Viewed together, the Second and Ninth Circuits' differing preexisting standards of recklessness illustrate the original disharmony among the circuits that led to Congress' passage of the PSLRA. Prior to the enactment of that Act, Rule 9(b) of the Federal Rules of Civil Procedure[28] governed the sufficiency of pleadings for federal actions brought under the securities laws. In *In re Time Warner Inc. Securities Litigation*[29] the Second Circuit focused on the first sentence of that Rule, stating that a plaintiff alleging securities fraud must state with particularity facts giving "'rise to a "*strong inference*" of fraudulent intent.'"[30] The court then created alternative tests for establishing a sufficiently "'"strong inference" of fraudulent intent.'"[31] It concluded that a plaintiff (1) "alleg[ing] facts establishing a motive to commit fraud and an opportunity to do so"[32] or (2) "alleg[ing] facts constituting circumstantial

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cluded that recklessness satisfies the [section] 10(b)/Rule 10b-5 scienter requirement"). The *Mansbach* Court, *id.* at 1024, then cited as support for this assertion: *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir. 1978); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 44 (2d Cir. 1978); *Coleco Indus., Inc. v. Berman*, 567 F.2d 569, 574 (3d Cir. 1977); *First Va. Bankshares v. Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977). The Eleventh Circuit went even further, stating that "[e]very circuit to address the question before the passage of the Reform Act held that a showing of recklessness was sufficient to allege scienter." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1284 (11th Cir. 1999).

27. The plain text of the PSLRA leaves unchanged the "required state of mind" for pleading scienter, only mandating that plaintiffs alleging scienter "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999). As has been established, every circuit court addressing the question interpreted *Ernst* as permitting a showing of recklessness to suffice for satisfying "the required state of mind" for scienter purposes under the Securities Exchange Act. *See Bryant*, 187 F.3d at 1284. Hence, the disagreement in the circuit split interpreting the PSLRA centers on what constitutes a "strong inference" of recklessness.

28. FED. R. CIV. P. 9(b). "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *Id.*

29. 9 F.3d 259 (2d Cir. 1993).

30. *Id.* at 268 (emphasis added) (quoting O'Brien v. National Property Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991)).

31. *Id.*

32. *Id.* at 269.

evidence of either reckless or conscious behavior"[33] satisfied the Act's scienter requirement.[34] In *Shields v. Citytrust Bancorp, Inc.*,[35] the Second Circuit later articulated that an adequate pleading of "[m]otive ... entail[ed] concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged" and that a sufficient pleading of "[o]pportunity ... entail[ed] the means and likely prospect of achieving concrete benefits by the means alleged."[36] This pleading standard was viewed as the most stringent of the circuit standards predating the enactment of the PSLRA.[37]

The Ninth Circuit plainly refused to adopt the Second Circuit's stringent position that "plaintiffs in securities fraud cases [were required to] plead facts giving rise to a 'strong inference of fraudulent intent.'"[38] In contrast, that circuit viewed the latter sentence of Rule 9(b)[39] as governing federal securities actions and reasoned that because that sentence clearly provided that "'[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally,'"[40] the Second Circuit's heightened standard could not be correctly applied. Thus, in order to comport with the requirements of Rule 9(b), the Ninth Circuit enunciated its position that plaintiffs were only required "to set forth 'specific descriptions of the [allegedly false] representations made, [and] the reasons for their falsity.'"[41] A plaintiff proceeding under this approach, therefore, was able to aver scienter generally without alleging facts in his or her complaint supporting his or her allegations of wrongdoing.[42] Hence, viewed in conjunction with one another, the Second Circuit's strong inference threshold standard of recklessness[43] was significantly extended as compared to that of the Ninth Circuit's, which merely re-

33. *Id.*; *see also* Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) ("The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.").

34. *See In re Time Warner*, 9 F.3d at 268.

35. 25 F.3d 1124 (2d Cir. 1994).

36. *Id.* at 1130; *see also* Laura R. Smith, Comment, *The Battle Between Plain Meaning and Legislative History: Which Will Decide the Standard for Pleading Scienter After the Private Securities Litigation Reform Act of 1995?*, 39 SANTA CLARA L. REV. 577, 586 (1999) (stating that "the standard set by the Second Circuit was the most stringent standard employed by any circuit").

37. *See infra* note 45 and accompanying text.

38. *In re* Glenfed, Inc. Sec. Litig., 42 F.3d 1541, 1545 (9th Cir. 1994).

39. *See* FED. R. CIV. P. 9(b).

40. *In re Glenfed*, 42 F.3d at 1545 (quoting the text of FED. R. CIV. P. 9(b)).

41. *Id.* at 1548 (emphasis omitted) (second alteration in original) (quoting Blake v. Dierdorff, 856 F.2d 1365, 1369 (9th Cir. 1988)).

42. *See In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 268 (2d Cir. 1993).

43. *See id.*

quired a pleading encompassing a rudimentary explanation of the allegedly false or misleading statement(s) or omission(s).[44]

### C. Problems Prompting the Passage of the PSLRA

The Second and Ninth Circuits' pre-PSLRA standards occupied positions at opposite ends of the difficulty spectrum in pleading scienter.[45] This problem was magnified by the fact that the incongruity among those circuits was representative of the collectively divergent standards utilized by the rest of the circuit courts and district courts below them.[46] The net result of this disunity was inconsistent pleading requirements under the mandate of the same federal act, resulting in what Congress characterized as "significant evidence of abuse in private securities lawsuits."[47]

One such abuse was the frequent practice of unscrupulous investors who engaged in the filing of unsubstantiated "fishing exhibition" lawsuits[48] in circuits utilizing lenient pleading standards mirroring that of

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44. *See In re Glenfed*, 42 F.3d at 1545.

45. Once again, the Second Circuit's pre-PSLRA "strong inference" standard was regarded as the most stringent pleading requirement among the circuits, while the Ninth Circuit's general averment analysis was among the most lenient. *See* Smith, *supra* note 36, at 586, 588; *see also* John F. Olson et al., *Pleading Reform, Plaintiff Qualification and Discovery Stays Under the Reform Act*, 51 BUS. LAW. 1101, 1107-12 (1996).

46. *See* S. REP. NO. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 694 (observing that "[t]he courts of appeals . . . interpreted Rule 9(b) in different ways, creating distinctly different pleading standards among the circuits").

47. H.R. CONF. REP. NO. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730. Congress identified a number of those abuses in the PSLRA's conference report, stating:

> The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.

*Id.* Congress also observed that meritless securities fraud litigation "unnecessarily increase[d] the cost of raising capital and chill[ed] corporate disclosure, [and was] often based on nothing more than a company's announcement of bad news, not evidence of fraud." S. REP. NO. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683.

48. *See* S. REP. NO. 104-98, at 4; *see also* H.R. CONF. REP. NO. 104-369, at 37 (noting that the Committee heard testimony likening the pre-PSLRA discovery process in securities actions to one resembling a fishing expedition). The Committee continued, noting the observations of one witness who testified that "'once [a] suit is filed, the plaintiff's law firm proceeds to search through all of the company's documents and take[s] endless depositions for the slightest positive

the Ninth Circuit's.[49] Assume that in response to a statement by a corporation that it had experienced lower than projected sales figures, that corporation's stock experienced a significant decrease in market value. By pleading generalized averments of fraud in those jurisdictions, disgruntled shareholders could survive dismissal and gain entry into discovery with only the "faint hope" of finding pieces of evidence legitimizing their otherwise unsupported securities fraud claims.[50] Compounding this practice was the contingency system of attorneys' fees because plaintiffs engaging in this conduct had little, if anything, to lose since they did not have to risk their own money.[51]

Of even greater concern to Congress was the serious practice on the part of unscrupulous investors filing strike suits.[52] This abuse was similarly exacerbated by the structure of attorneys' fees.[53] Contingent fee arrangements created the possibility of warped incentives on the part of "entrepreneurial" attorneys to encourage plaintiffs with meritless ac-

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comment which they can claim induced the plaintiff to invest and any shred of evidence that the company knew a downturn was coming.'" *Id.* (citation omitted).

49. *See supra* note 45 (opining that the Ninth Circuit's pre-PSLRA pleading standard was the most lenient among the circuits).

50. *See* H.R. CONF. REP. NO. 104-369, at 31.

51. *See* W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 378 (1999) (stating that under the contingent fee system, the client can shift the monetary "risk inherent in his case to the lawyer. If the client does not recover, the lawyer receives no fee. [Conversely,] [i]f a client who agrees to pay his lawyer an hourly fee does not recover, he incurs a negative return (the lawyer's charge)").

52. *See* H.R. CONF. REP. NO. 104-369, at 32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731. Strike suits are actions brought by parties not with the intention of prevailing on the merits at trial; but, instead with the intention of winning a profitable settlement. *See id.*; BLACK'S LAW DICTIONARY 1448 (7th ed. 1999) (defining a strike suit as "[a] suit . . . often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement"); *see also* Douglas C. Buffone, Note, *Predatory Attorneys and Professional Plaintiffs: Reforms Are Needed to Limit Vexatious Securities Litigation*, 23 HOFSTRA L. REV. 655, 663-64 (1995) (analyzing the varying stages of a securities law strike suit).

53. *See* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 84 (1991) (concluding that "[t]he principal beneficiaries of [shareholder] litigation . . . appear to be attorneys, who win fee awards in 90 percent of settled suits"); *see also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7 (1991). Macey and Miller state:

> [T]he single most salient characteristic of class and derivative litigation is the existence of "entrepreneurial" plaintiffs' attorneys. Because these attorneys are not subject to monitoring by their putative clients, they operate largely according to their own self-interest, subject only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities.

*Id.* at 7-8.

tions to file generalized complaints in those circuits permitting them to do so with the calculated hope of achieving a profitable settlement.[54]

Congress passed the PSLRA in a self-proclaimed effort to bring about consistency in the law and, in the process, dispel much of the confusion and injustice precipitating that Act's enactment.[55] Unfortunately, while the PSLRA unquestionably succeeded in raising the burden of pleading scienter throughout the circuits to a level at least as high as the Second Circuit's preexisting approach, the ambiguity in that Act's statutory language and legislative history has had the opposite effect. This has created such confusion and inconsistency among the circuits that it appears inevitably destined and ripe for the United States Supreme Court to determine the meaning of the elusive scienter standard once and for all.[56]

## III. THE ENACTMENT OF THE PSLRA

After examining the relevant statutes at the heart of this split, it is no surprise that the circuits have divided in attempting to identify and carry out Congress' intent.[57] Under the PSLRA, "the mental state required for securities fraud liability is distinct from the level of pleading required to infer that mental state."[58] It therefore bears repeating that a court interpreting this Act "must make two separate determinations: (1) what is the required state of mind; and (2) what constitutes a strong inference of that state of mind."[59]

In enacting the PSLRA, Congress failed to take advantage of the opportunity for clarifying the "state of mind"[60] requirement of the Securities Exchange Act as interpreted by the Supreme Court in *Ernst* some twenty years before.[61] In fact, not only did Congress fail to statutorily affirm or proscribe the adequacy of pleading facts inferring recklessness

54. *See* Macey & Miller, *supra* note 53, at 7.

55. *See* H.R. CONF. REP. NO. 104-369, at 31.

56. For this Note's conclusion that the circuit split will be reconciled in a manner consistent with the interpretations of the First, Sixth, and Eleventh Circuits, see *infra* Part V.B.

57. Once again, the PSLRA fails to articulate in its statutory text (1) what the "required state of mind" is and (2) what constitutes a sufficient showing of that "state of mind" for pleading scienter. *See* 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999).

58. *In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 975 (9th Cir. 1999).

59. *Id.*

60. 15 U.S.C. § 78u-4(b)(2).

61. *See supra* Part II.A (discussing the Court's landmark *Ernst & Ernst* decision and the confusion resulting therefrom).

for scienter purposes as interpreted collectively by the circuit courts,[62] assuming that its silence on *Ernst's* holding and that case's progeny signified a legislative acquiescence to the circuits' universal recklessness interpretation, Congress failed to provide any statutory guidance regarding what level of facts was necessary for inferring recklessness in the context of Rule 10b-5 pleadings and actions.[63] This Note posits that this precise ambiguity proximately caused the present circuit split among the circuit courts of appeals interpreting the PSLRA.[64]

### A. *The Circuits Comprising the Split*

#### 1. The Second Circuit

The Second Circuit[65] was the first circuit court to pass judgment on the "scienter" question after the enactment of the PSLRA. In *Press v. Chemical Investment Services Corp.*,[66] a buyer of a treasury bill brought a federal securities fraud action against his broker-dealers alleging that they had violated Rule 10b-5 by having failed to disclose the fact that the funds purportedly due him upon the maturity of his bill would not be immediately available.[67] It was the plaintiff's contention that "the period over which the yield should have been calculated was longer than the [defendants] represented, [thereby making] the yield advertised ... fraudulently inaccurate."[68]

Applying the scienter requirement under the PSLRA, the *Press* court stated that a plaintiff is required to "either (a) allege facts to show that 'defendants had both motive and opportunity to commit fraud' or (b) allege facts that 'constitute strong circumstantial evidence of con-

62. *See supra* notes 26-27 and accompanying text (explaining that every circuit circuit and an overwhelming majority of district courts addressing *Ernst's* scienter requirement interpreted recklessness as sufficing).

63. *See supra* notes 26-27 and accompanying text.

64. Recklessness is generally defined as "[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk." BLACK'S LAW DICTIONARY 1277 (7th ed. 1999). Inasmuch as the proper showing of recklessness under the PSLRA is the ultimate issue underlying this split, however, this Note is unable to postulate a uniform definition of that state of mind in the context of securities actions brought under Rule 10b-5. The varying approaches of the six circuit decisions are detailed in the proceeding sections.

65. The Second Circuit is comprised of Connecticut, New York, and Vermont. *See* 28 U.S.C. § 41 (1994).

66. 166 F.3d 529 (2d Cir. 1999).

67. *See id.* at 533.

68. *Id.* The court continued, stating that the plaintiff contended that the defendants "structured the transaction in this manner to allow themselves more time to use [the plaintiff's] funds." *Id.*

scious misbehavior or recklessness.'"[69] Applied to the facts in the case, the court in *Press* held that the plaintiff's bare pleading of motive on the part of his broker to withhold his funds and his concomitant opportunity to "float"[70] or use the funds for his own economic gains sufficed for the purposes of adequately alleging scienter.[71]

Thus, in *Press*, the Second Circuit, proceeding without analysis, implicitly reasoned that Congress' enactment of the PSLRA universally adopted its circuit's pre-PSLRA "strong inference" approach.[72] More specifically, because the Second Circuit's pre-PSLRA interpretation of scienter required a plaintiff to plead facts supporting a "strong inference" of fraudulent intent,[73] the court in *Press* interpreted Congress' codification of its identical language in the statutory text of the PSLRA as congressional intent signifying the adoption of that circuit's entire two-prong approach for eliciting the "required state of mind" under the PSLRA.[74]

2. The Third Circuit

The Second Circuit's interpretation of the PSLRA in *Press*[75] was adopted a few months later by the Third Circuit[76] in *In re Advanta Corp. Securities Litigation.*[77] In that case, a class of Advanta shareholders brought a securities fraud action against the corporation alleging that the corporation, a leading issuer of MasterCard and VISA credit cards, had "made false and misleading statements and material omissions regarding the company's earnings potential and value of its stock."[78] The class alleged that the company's twenty million dollar first quarter losses

69. *Id.* at 538 (quoting Shields v. Citytrust Bancorp., Inc., 25 F.3d 1124, 1128 (2d Cir. 1994)).

70. *Id.* (internal quotation marks omitted).

71. *See id.*

72. *See In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 269 (2d Cir. 1993). Additionally, the Fifth Circuit, in *Williams v. WMX Technologies, Inc.*, 112 F.3d 175 (5th Cir. 1997), similarly reached a decision that comported with the Second Circuit's conclusion in *Press* by holding, without a detailed analysis or discussion, that Congress intended to codify the Second Circuit's preexisting approach in the PSLRA. *See id.* at 178. The jurisdictions in the Fifth Circuit include Louisiana, Mississippi, and Texas. *See* 28 U.S.C. § 41 (1994).

73. *See In re Time Warner*, 9 F.3d at 268.

74. *See* 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999) (requiring a plaintiff to "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind") (emphasis added).

75. *See* discussion *supra* Part III.A.1.

76. The Third Circuit consists of Delaware, Pennsylvania, New Jersey, and the Virgin Islands. *See* 28 U.S.C. § 41 (1994).

77. 180 F.3d 525 (3d Cir. 1999).

78. *Id.* at 528.

were the byproduct of "Advanta's decision to implement aggressive techniques to attract new credit card customers,"[79] the substance and risk of which the company failed to disclose to its shareholders.[80] The plaintiffs also pointed to statements made by Advanta executives predating the company's first quarter losses, which projected that the company would experience substantial increases in its revenue.[81] The plaintiffs contended that even if the defendants lacked the subjective belief that the forecasts were false, the executives acted recklessly in forming their conclusions and communicating the incorrect "forward looking statements" to the public.[82]

After a detailed analysis of what the Third Circuit deemed to be "inconclusive" legislative intent,[83] that court in *In re Advanta* concluded that the Second Circuit's interpretation of the PSLRA in *Press*[84] was correct.[85] The court reasoned that because the Second Circuit's motive-opportunity test under the PSLRA "must now be supported by facts stated 'with particularity,'"[86] the burden of pleading was sufficiently heightened to "address the previous ease of alleging motive and opportunity on the part of corporate officers to commit securities fraud" without any further showing.[87] The Third Circuit emphasized the fact that the Second Circuit's preexisting approach was regarded as the most stringent of all the pleading standards.[88] Thus, by codifying that circuit's "strong inference" language, the Third Circuit reasoned that Congress must have intended to codify that circuit's approach.[89] The *In re Advanta* court nevertheless found that the plaintiffs had failed to allege

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79. *Id.*

80. *See id.* Some of these "techniques" included:

> [I]ssuing cards with lower teaser rates and longer introductory periods than standard industry practice, resulting in riskier customers and, ultimately, a decrease in revenues as many of the new customers defaulted on their repayment obligations. The increased delinquency rates produced greater "charge-offs," which are the costs incurred by the credit card company when a card holder's balance becomes uncollectible.

*Id.*

81. *See id.*

82. *See id.* at 539.

83. *See id.* at 533.

84. *See* Press v. Chemical Inv. Servs. Corp., 166 F.3d 529, 537-38 (2d Cir. 1999) (interpreting the PSLRA as adopting the Second Circuit's preexisting motive-opportunity test as satisfying the scienter requirement).

85. *See In re Advanta*, 180 F.3d at 534.

86. *Id.* at 535 (quoting the PSLRA, 15 U.S.C. § 78u-4(b)(2) (West Supp. 1999)).

87. *Id.*

88. *See id.* at 534.

89. *See id.* at 533-35; *see also supra* note 45 and accompanying text (noting that the Second Circuit's pre-PSLRA scienter approach was the most stringent pleading standard among the federal circuit courts of appeals).

sufficient facts constituting a "strong inference" of scienter and dismissed their complaint.[90]

3. The Sixth Circuit

The Sixth Circuit[91] was the first circuit to deviate from the interpretations of the Second and Third Circuits, ruling that Congress had not intended for the PSLRA to codify the Second Circuit's preexisting motive-opportunity test. In *In re Comshare, Inc. Securities Litigation*,[92] the Sixth Circuit adjudicated a suit brought by nine plaintiff-shareholders alleging that the defendant-corporation had committed securities fraud in contravention of the Securities Exchange Act after having engaged in accounting practices that violated not only their own corporate revenue recognition polices, but also generally accepted accounting principles ("GAAP").[93] In reaction to the corporation's announcement that it was delaying the release of one of its quarterly reports after discovering the questionable recording practices of one of its foreign subsidiaries, Comshare's stock plummeted in value over forty percent.[94] The shareholders alleged that the revenue recording practices "were more than mere negligence[] and were instead part of a scheme to defraud the public."[95]

After the corporation moved to dismiss, the Sixth Circuit held that "plaintiffs may plead scienter in [section] 10b [sic] or Rule 10b-5 cases by alleging facts giving rise to a strong inference of recklessness, but not by alleging facts merely establishing that a defendant had the motive and opportunity to commit securities fraud."[96] In *In re Comshare*, the court relied on the premise that "those courts addressing motive and opportunity in Securities Act cases have held only that facts showing a

90. *See In re Advanta*, 180 F.3d at 539-40.

91. Kentucky, Michigan, Ohio, and Tennessee are the states located in the Sixth Circuit. *See* 28 U.S.C. § 41 (1994).

92. 183 F.3d 542 (6th Cir. 1999).

93. *See id.* at 546. Generally accepted accounting principles ("GAAP") are defined as "[t]he conventions, rules, and procedures that define approved accounting practices at a particular time. These principles are issued by the Financial Accounting Standards Board for use by accountants in preparing financial statements. The principles include not only broad guidelines of general application but also detailed practices and procedures." BLACK'S LAW DICTIONARY 692 (7th ed. 1999).

94. *See In re Comshare*, 183 F.3d at 546.

95. *Id.* at 547. More specifically, the plaintiff-shareholders alleged that the fraudulent scheme enabled the defendants "to inflate stock prices so that [the] individual Defendants could sell their own shares at high prices. Plaintiffs also claim[ed] that [the] individual Defendants profited from this scheme because their compensation plans were tied to the price of Comshare's stock." *Id.*

96. *Id.* at 549.

motive and opportunity *may* adequately allege scienter, not that the existence of motive and opportunity may support, as scienter itself, liability under [section] 10b [sic] or Rule 10b-5"[97] as necessary for comporting with the heightened scienter standard prescribed by the PSLRA. The Sixth Circuit recognized that "facts regarding motive and opportunity may be 'relevant to pleading circumstances from which a strong inference of fraudulent scienter may be inferred,'"[98] but reiterated its position that motive and opportunity alone do not sufficiently establish "a strong inference of reckless[ness]," as mandated by Congress' passage of the PSLRA.[99]

Applying its interpretation to the facts of the case, the court held that the plaintiffs had "failed to plead facts that show[ed] that the revenue recognition errors at Comshare's . . . subsidiary should have been obvious to Comshare or that Comshare consciously disregarded 'red flags' that would have revealed the errors prior to their inclusion in public statements."[100] Consequently, the court concluded that the shareholders' complaint contained insufficient facts which did not "give rise to a strong inference of scienter" and granted the defendant's motion to dismiss.[101]

4. The Ninth Circuit

In *In re Silicon Graphics Inc. Securities Litigation*,[102] the Ninth Circuit[103] built upon the Sixth Circuit's decision in *In re Comshare, Inc.*[104] and, in the process, effectuated the most stringent burden of pleading among the circuits under the PSLRA to date.[105] In that case, both a securities class action and a shareholders' derivative suit were filed against Silicon Graphics, Inc. and six of its top officers.[106] The plaintiffs' complaint alleged that the company had issued a number of

97. *Id.* at 551 (emphasis added).

98. *Id.* (quoting *In re* Baesa Sec. Litig., 969 F. Supp. 238, 242 (S.D.N.Y. 1997)).

99. *Id.*

100. *Id.* at 554.

101. *Id.*

102. 183 F.3d 970 (9th Cir. 1999).

103. The jurisdictions covered by the Ninth Circuit include Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. *See* 28 U.S.C. § 41 (1994).

104. 183 F.3d 542, 549 (6th Cir. 1999).

105. At the time this Note was written, no additional cases were pending in any of the Circuit Courts of Appeals.

106. *See In re Silicon Graphics*, 183 F.3d at 979-80. This Note only focuses on the securities fraud cause of action and not the shareholders' derivative cause of action. The latter deals with issues concerning the fiduciary duties that the directors and officers of the company owed to Silicon Graphics and its shareholders. *See id.* at 980.

misleading statements in an effort to inflate the value of the company's stock while engaging in "'massive' insider trading."[107] The thrust of the securities fraud allegations centered on statements made by the company reporting forty-five percent growth for the corporation's 1995 fiscal year and projecting similar growth for the following fiscal year.[108] After the company failed to meet those projections, the plaintiffs alleged that the corporation's officers had engaged in a scheme "to restore investor confidence by downplaying" the corporation's problems.[109] In carrying out this "'conspiracy,'" the company's officers issued a number of statements, which plaintiffs asserted were designed to inflate the value of the company's stock.[110] When the statements subsequently turned out to be incorrect, the plaintiffs filed suit alleging federal securities fraud pursuant to Rule 10b-5.[111]

In affirming the lower court's dismissal of the plaintiffs' complaint, the court in *In re Silicon Graphics* held "that a private securities plaintiff proceeding under the PSLRA must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct."[112] After analyzing the aforementioned post-PSLRA decisions of the Second, Third, and Sixth Circuits, the Ninth Circuit reasoned "that because the joint committee expressly rejected the 'motive and opportunity' and 'recklessness' tests when raising the standard, Congress must have intended a standard that lies beyond the Second Circuit standard."[113] The court stated that although the plaintiffs had alleged "facts giving rise to some inference of fraudulent intent, [the] factual allegations [were] insufficient to create a *strong* inference of deliberate recklessness."[114]

Hence, the standard enunciated in the court's decision in *In re Silicon Graphics* exceeded even that of the Sixth Circuit's rejection of the two-part test adopted by the Second Circuit in *Press* and the Third Cir-

107. *Id.* at 980.
108. *See id.*
109. *Id.* at 981.
110. *See id.*
111. *See id.* at 975.
112. *Id.* at 974.
113. *Id.* at 979. The court continued, stating:

> Had Congress merely sought to adopt the Second Circuit standard, it easily could have done so. . . . It follows that plaintiffs proceeding under the PSLRA can no longer aver intent in general terms of mere "motive and opportunity" or "recklessness," but rather, must state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent.

*Id.* For a more detailed examination of the PSLRA's legislative history, see *infra* Part V.A.2.a.
114. *In re Silicon Graphics*, 183 F.3d at 980.

cuit in *In re Advanta.*[115] In doing so, the Ninth Circuit's interpretation, requiring that a plaintiff give detailed pleadings of facts constituting "strong circumstantial evidence of deliberate[] reckless[ness] or conscious misconduct,"[116] resulted in a circuit split ironically resembling the one originally prompting Congress to enact the PSLRA in the first place.[117]

5. The Eleventh Circuit

The Eleventh Circuit[118] was the next circuit court to pass judgment on the PSLRA issue. In *Bryant v. Avado Brands, Inc.*,[119] the court was unwilling to follow the "strong circumstantial evidence of deliberately reckless or conscious misconduct"[120] standard established by the Ninth Circuit only a few days earlier.[121] In *Bryant*, a class of Apple South, Inc. shareholders brought a lawsuit against the corporation and several of its officers, alleging that the defendant had made a number of "false and misleading statements and material omissions in order to inflate the value of the company's stock in violation of the Securities and [sic] Exchange Act of 1934."[122] The defendant later announced that a number of its recent acquisitions had negatively impacted Apple South's business, that its earnings per share would be well below the thirty to thirty-five percent growth that it had originally forecasted, and that it was scaling back on expansion plans.[123] As a result, Apple South's stock plummeted by over forty percent in value, prompting the shareholders to file suit.[124] After the plaintiffs sought to have the district court adopt a standard

115. *See In re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 549 (6th Cir. 1999) (holding only that facts encompassing a mere showing of motive and opportunity were insufficient under the PSLRA for supporting a strong inference of recklessness).

116. *In re Silicon Graphics*, 183 F.3d at 974.

117. This Note concludes that the current circuit split is ironic insofar as the Second and Ninth Circuits have switched their pre-PSLRA positions, with each at opposite ends of the spectrum of difficulty in pleading scienter in federal securities fraud cases. *See supra* note 45 and accompanying text. Today, the Ninth Circuit has effectively created the most stringent pleading standard while the Second Circuit's adoption of its pre-PSLRA standard has become the most lenient. *See supra* note 45 and accompanying text.

118. The Eleventh Circuit encompasses Alabama, Georgia, and Florida. *See* 28 U.S.C. § 41 (1994).

119. 187 F.3d 1271 (11th Cir. 1999).

120. *In re Silicon Graphics*, 183 F.3d at 974.

121. *See Bryant*, 187 F.3d at 1283.

122. *Id.* at 1273.

123. *See id.* at 1274.

124. *See id.*

consistent with the one adopted by the Second Circuit in *Press*,[125] "the district court recommended that [the Circuit] Court permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)."[126]

After allowing the appeal,[127] the Eleventh Circuit retreated from the Ninth Circuit's stringent pleading requirement, holding that "a securities fraud plaintiff must plead scienter with particular facts that give rise to a strong inference that the defendant acted in a severely reckless manner."[128] Expressing its "basic agreement"[129] with the Sixth Circuit's holding in *In re Comshare, Inc. Securities Litigation*,[130] the Eleventh Circuit rejected the Second Circuit's position that the Act codified the motive and opportunity test as sufficient for adequately pleading scienter under the PSLRA.[131] The court in *Bryant* further agreed with the Sixth Circuit's rationale that while evidence of motive and opportunity on the part of defendants to commit fraud might be relevant to showing severe evidence of recklessness, that alone was insufficient for pleading scienter under the PSLRA in Rule 10b-5 actions.[132] Unlike the Sixth Circuit, though, the Eleventh Circuit's holding required plaintiffs pleading scienter to allege facts giving "rise to a strong inference that the defendant acted in a *severely reckless* manner."[133] While facially this appears to raise the Eleventh Circuit's burden of pleading to a higher level than that of the Sixth Circuit's pleading requirement,[134] in reality, the two holdings are the same in that both delegate to the trial judge the discretion for assessing the merits of each case based on the fact sensitive nature of the particular circumstances surrounding each case.[135] The case was then remanded to the district court for proceedings consistent with that interpretation.[136]

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125. *See* Press v. Chemical Inv. Servs. Corp., 166 F.3d 529, 537-38 (2d Cir. 1999) (interpreting the PSLRA as adopting the Second Circuit's preexisting motive-opportunity approach).

126. *Bryant*, 187 F.3d at 1275.

127. *See id.*

128. *Id.* at 1287.

129. *Id.* at 1283.

130. *See* 183 F.3d 542, 549 (6th Cir. 1999) (holding "that plaintiffs may plead scienter . . . by alleging facts giving rise to a strong inference of recklessness, but not by alleging facts merely establishing that a defendant had the motive and opportunity to commit securities fraud").

131. *See Bryant*, 187 F.3d at 1287.

132. *See id.* at 1285; *see also In re Comshare*, 183 F.3d at 551.

133. *Bryant*, 187 F.3d at 1287 (emphasis added).

134. Again, the Sixth Circuit only announced a standard that precluded plaintiffs from alleging motive and opportunity by itself without any reference to the Eleventh Circuit's "severely reckless" language. *Compare In re Comshare*, 183 F.3d at 549, *with Bryant*, 187 F.3d at 1287.

135. *See Bryant*, 187 F.3d at 1287; *In re Comshare*, 183 F.3d at 554.

136. *See Bryant*, 187 F.3d at 1287.

6. The First Circuit

The next and final circuit to pass judgment on the PSLRA's elusive pleading requirement to date[137] was the First Circuit[138] in *Greebel v. FTP Software, Inc.*[139] After FTP's stock reached a trading high of more than thirty-eight dollars per share, the company announced that its sales growth had declined and that the company would be experiencing lower than projected earnings.[140] That same day, FTP's stock lost more than fifty percent of its value.[141] Less than nine months later, the stock was trading at only eight dollars per share.[142] A number of disgruntled investors in the defendant-corporation's publicly traded stock filed suit alleging, among other things, violations of section 10(b) of the Securities Exchange Act and Rule 10b-5, accusing the defendants of orchestrating a scheme to inflate the company's stock by disseminating materially false statements and omissions.[143] The defendants then moved to dismiss.[144]

In *Greebel*, the First Circuit announced a pleading standard consistent with and similar to those adopted by the Sixth and Eleventh Circuits, respectively. The First Circuit held that the facts alleged in a Rule 10b-5 complaint "must now present a *strong* inference of scienter."[145] More specifically, the court rejected the motive-opportunity test as being sufficient in and of itself to create a strong inference of scienter, instead adopting a more fact-specific inquiry.[146] Pursuant to the court's new standard, lower courts retained their equitable powers and discretion to assess the fact specific details of each case[147] subject to the caveat that "[a] mere reasonable inference is insufficient to survive a motion to dismiss."[148] Like that of the Sixth Circuit,[149] the First Circuit's holding[150]

137. Once again, as of the time that this Note was written, no additional cases were pending in any of the Circuit Courts of Appeals.

138. The jurisdictions located in the First Circuit are Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. *See* 28 U.S.C. § 41 (1994).

139. 194 F.3d 185 (1st Cir. 1999).

140. *See id.* at 188.

141. *See id.*

142. *See id.*

143. *See id.* at 189-91.

144. *See id.* at 191.

145. *Id.* at 196.

146. *See id.*

147. *See id.*

148. *Id.*

149. *See In re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 549 (6th Cir. 1999).

150. *See Greebel*, 194 F.3d at 196.

was free from any reference to the "severely reckless" standard enunciated by the Eleventh Circuit in *Bryant*.[151]

The plaintiffs' case in *Greebel* centered on factual allegations that the defendants consistently inflated the company's earnings by engaging in accounting and recording practices that were improper under GAAP.[152] The plaintiffs reasoned that because their complaint contained facts establishing that the defendants had "unlimited return rights" tied to the company's sales figures, they had pleaded sufficient circumstantial evidence inferring not only motive and opportunity on the part of the defendants to commit fraud, but also conscious wrongdoing.[153] The court, though, dismissed the plaintiffs' complaint after finding that the claims were "either insufficiently particularized or, where particularized, [did] not permit a strong inference of scienter."[154]

## IV. THE SIGNIFICANCE OF THE CIRCUIT SPLIT

The differing interpretations of the circuits involved in this split translate into serious uncertainties for prospective plaintiffs. As demonstrated below,[155] different groups of parties bringing identical cases under the same federal law could conceivably find themselves with dramatically different results, namely, some proceeding into discovery and others having their complaints dismissed, depending on the jurisdiction in which they filed their respective actions.

### *A. An Illustrative 10b-5 Hypothetical*

To illustrate the significance of this problem, assume that on March 30, 2000, less than two months before the end of XYZ Corporation's fiscal year, the corporation's Chief Executive Officer and President, Mr. Phillip Alexander, reported to its shareholders that the company pleasingly anticipated that upon year's end it would easily reach its strategic goals of achieving forty percent growth and generating annual earnings in excess of two hundred million dollars for the first time

151. *See* Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1287 (11th Cir. 1999). In fact, not only was the First Circuit's holding free from any reference to the Eleventh Circuit's severely reckless language, the court in *Greebel* appeared to view its decision in a manner that was consistent with the holding of the *Bryant* court. *See Greebel*, 194 F.3d at 196.

152. *See Greebel*, 194 F.3d at 201; *see also supra* note 93 (defining GAAP as the procedures governing accountants in the preparation of financial statements).

153. *See Greebel*, 194 F.3d at 201.

154. *Id.*

155. *See infra* Parts IV.A, IV.B (illustrating how the varying interpretations of the PSLRA can unevenly impact identical plaintiffs suing in different jurisdictions).

in that corporation's ten year history of producing digital widgets and gadgets. Furthermore, assume that XYZ's officers and directors had stock incentive and bonus programs that were directly tied to the market value of that company's stock, which is a common practice.[156]

Suppose further that immediately following this release, the market value of XYZ's publicly traded stock increased from thirty dollars per share on March 30th to a trading high of forty-eight dollars per share some four weeks thereafter in late April. On April 28th, after speculative media reports surfaced probing into questionable internal practices of XYZ's officers and employees, the corporation's stock experienced a brief period of decline. This prompted XYZ's board of directors to authorize its President to once again issue a public statement assuring its shareholders that XYZ's strategic goals and forecasts were indeed correct and that there was absolutely no reason for concern. This temporarily restored stability to XYZ's stock.

Less than two weeks later, however, suppose that XYZ announced that the company had delayed the release of its annual growth and earnings reports for the fiscal year 2000 pending the investigation of certain accounting discrepancies in the corporation's financial statements and procedures. This delay triggered a downward plunge in the value of XYZ's stock from its trading high of forty-eight dollars per share to an eventual low of twenty-three dollars per share, when the actual reports were released a month and a half later.

Assume further that the actual reports revealed that contrary to XYZ's projections and manifestations, the corporation had failed to even approach their forty percent growth goal (in actuality only having achieved twenty-two percent growth) and that the company was well off of its projected earnings of two hundred million dollars (instead generating only one hundred seventy-five million dollars). In reaction to this information, the market devalued XYZ's shares to a five year low of fourteen dollars per share and a number of disgruntled shareholder-plaintiffs, upon certification of a class, brought suit against XYZ, its of-

156. *See In re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 547 (6th Cir. 1999) (stating that the directors' "compensation plans were tied to the price of [the company's] stock"); *see also, e.g.*, Chalverus v. Pegasystems, Inc., 59 F. Supp. 2d 226, 236 (D. Mass. 1999) ("[O]fficers . . . ha[ve] a motive [to] keep stock prices high because their compensation packages [often] include[] stock and stock options."); Malin v. IVAX Corp., 17 F. Supp. 2d 1345, 1358 (S.D. Fla. 1998) ("[O]btaining performance-based bonuses [and] increasing the value of an officer's stock options or stock sales . . . [are] common[] day-to-day goals of corporate management . . . ."); Salinger v. Projectavision, Inc., 934 F. Supp. 1402, 1414 (S.D.N.Y. 1996) ("It is true that officers and directors typically have part of their compensation linked to the price of the company's shares and will naturally have an interest in a high stock price.").

ficers, and its directors alleging, among other claims, securities fraud in violation of section 10(b) of the Securities Exchange Act and Rule 10b-5. The officers and directors responded by filing a motion to dismiss the plaintiffs' complaint.

### *B. Applying the PSLRA to this Hypothetical*

It is not disputed among the circuits that the PSLRA mandates that in order to survive XYZ's motion to dismiss, the class of plaintiffs in this case must "state with particularity facts giving rise to a strong inference"[157] of recklessness on the part of XYZ and the other defendants in disseminating what turned out to be materially false information.[158] In reality, the circuit split centers on what constitutes such a showing, and this is where the plaintiffs would encounter dramatically different realities depending on the jurisdictions in which they filed suit.

#### 1. The Second and Third Circuit Approach

If the plaintiffs filed suit in a federal court located in New York, New Jersey, or Delaware, for example, the Second and Third Circuit approaches of *Press*[159] and *In re Advanta*[160] would govern in assessing the sufficiency of the plaintiffs' complaint for PSLRA pleading purposes. Based on the limited facts that have been outlined in the above hypothetical, the plaintiffs would likely allege that the defendants had both the motive and opportunity to disclose the misstatements concerning the company's performance and to subsequently remain silent concerning the speculation surrounding the company's problems. More specifically, they would assert in their complaints facts inferring that the corporate insiders possessed both (1) the opportunity to disseminate the materially false statements from the inherent nature of their positions and (2) the motive to do so inasmuch as their bonuses, in addition to their personal stock holdings, were directly tied to XYZ's stock value. Therefore, a federal court in these circuits would likely find that a complaint pleading these boilerplate facts established a satisfactory showing that XYZ and its officers and directors "'had both motive and opportu-

157. 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999).

158. For the purposes of this illustrative hypothetical, this Note assumes that the other elements of Rule 10b-5 private causes of action have been satisfied. For identification of those elements, see 15 U.S.C. § 78j (1994); 17 C.F.R. § 240.10b-5(b) (1998) (requiring a plaintiff alleging securities fraud under Rule 10b-5 to show, in addition to scienter, the: (1) misstatement or omission, (2) of a material fact, (3) on which plaintiff relied, (4) proximately causing his or her injury).

159. *See* discussion *supra* Part III.A.1.

160. *See* discussion *supra* Part III.A.2.

nity to commit fraud'"[161] for the purposes of surviving the defendants' motion to dismiss.

2. The First, Sixth, and Eleventh Circuit Approach

Supposing that the plaintiffs filed suit in Massachusetts, Ohio, or Florida, a federal district court presiding over the case would be precluded from allowing as sufficient a complaint containing mere factual allegations of motive and opportunity to commit fraud for the purposes of surviving XYZ's motion to dismiss.[162] A court in these jurisdictions would be bound by its circuit court's mandate requiring the shareholder-plaintiffs to allege facts giving rise to a "strong inference" of scienter above and beyond the inferences emanating from mere averments of motive and opportunity.[163] Perhaps the class could successfully allege facts concerning the following as additional evidence for supplying a judge with enough facts to tip the equitable scales of discretion in favor of allowing their action to proceed into discovery: (1) the timing of the releases; (2) the subjective or objective knowledge of the directors in authorizing the President to speak; or (3) the fact that the public speculation regarding the 'questionable practices' of XYZ created a duty on the part of the company to fully investigate the status of XYZ's affairs before disclosing to the public in late April that there was no reason for concern.

3. The Ninth Circuit Approach

If the class of plaintiffs in this hypothetical filed suit in California, however, they would be hard-pressed to survive the defendants' motion to dismiss based on the limited information available to them as prescribed by the facts detailed in the scenario above. Adhering to the Ninth Circuit's interpretation of the PSLRA,[164] a district court would be bound to require the 10b-5 plaintiffs in this case to plead facts in great detail that constituted "strong circumstantial evidence of deliberately reckless or conscious misconduct,"[165] in order to enable them to survive dismissal and gain entry into discovery, where they would hope to ascertain the requisite facts needed to prevail at trial. Unfortunately for the

161. Press v. Chemical Inv. Servs. Corp., 166 F.3d 529, 538 (2d Cir. 1999) (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994)).

162. *See* discussion *supra* Parts III.A.3, III.A.5, III.A.6.

163. *See* Greebel v. FTP Software, Inc., 194 F.3d 185, 196 (1st Cir. 1999); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1287 (11th Cir. 1999); *In re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 549 (6th Cir. 1999).

164. *See* discussion *supra* Part III.A.4.

165. *In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

plaintiffs, they possess, at best, tenuous circumstantial evidence speaking to the necessary inference that the defendants acted deliberately recklessly or consciously in orchestrating the alleged fraudulent scheme of disseminating materially false information.

### C. Summary

This basic hypothetical illustrates the serious implications of the PSLRA circuit split and makes apparent the serious need for the split's clear redress. Simple fairness seems to mandate that the plaintiffs in the above scenario should not be barred outright from segueing into discovery where it appears likely that they would find more concrete facts substantiating their initial assertions. One must also, however, remain cognizant of the concerns and potential abuses accompanying the Second Circuit's two-part approach insofar as "[g]reed is a ubiquitous motive, and corporate insiders and upper management always have opportunity to lie and manipulate."[166] In seeking to reconcile the ambiguous scienter requirement at the center of this split, though, one must not confuse notions of what should be with those of what Congress intended the PSLRA to be.[167] In proceeding in the search for congressional meaning, one must carefully parse the canons of statutory construction in a fashion similar to the approaches taken by a number of the circuits described above so that the true legislative intent of Congress may be discerned and carried out.[168]

## V. RECONCILING THE CIRCUIT SPLIT

Insofar as Congress, by drafting and adopting the PSLRA, intended to effectuate a heightened burden of pleading for prospective plaintiffs

166. *Bryant*, 187 F.3d at 1286.

167. *See* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 135 (1995) (Ginsburg, J., concurring).

168. One caveat—many experts believe that canons of construction are nonsense and that for every canon there is a counter-canon. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950) (stating that "there are two opposing canons on almost every point"); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (asserting that while Professor Llewellyn's criticism of the canons are correct, "most of the canons are [also] just plain wrong"). Each of the circuits involved in this split, however, sought to utilize the canons of construction in delving into the PSLRA's legislative history in an effort aimed at effectuating and carrying out Congress' intent. This Note, therefore, will proceed under the presumption that a statute's legislative history bears, at a minimum, some probative value in discerning the legislative intent behind an ambiguously worded statute like the PSLRA.

seeking redress for alleged securities fraud,[169] this Note posits that the United States Supreme Court should, and will, resolve the disunity among the circuit courts in a manner consistent with the collective decisions of the First,[170] Sixth,[171] and Eleventh[172] Circuits. More specifically, the Supreme Court should take the position that in having consciously refrained from codifying the Second Circuit's motive-opportunity test,[173] Congress manifested an intent that plaintiffs be required to plead facts establishing a "stronger inference" than that circuit's requisite two-part showing in order to survive dismissal and segue into the discovery phase of the litigation process. Furthermore, this Note concludes that the Supreme Court should take the position that while Congress intended to effectuate a standard surpassing that of merely pleading facts inferring motive and opportunity, the Ninth Circuit erred in interpreting the PSLRA as requiring plaintiffs to allege facts strongly inferring that the defendant acted with deliberate recklessness or conscious knowledge of its misconduct.[174]

### *A. Effectuating Congress' Intent in Enacting the PSLRA*

It is axiomatic "that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."[175] The PSLRA provides in its statutory text that a prospective plaintiff bringing a Rule 10b-5 action must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[176] The ambiguity of the PSLRA[177] arises by way of Congress' failure to provide in the text of the Act both what the "re-

169. *See supra* note 47 and accompanying text (discussing the problems and abuses prompting Congress to draft and enact the PSLRA).

170. *See* Greebel v. FTP Software, Inc., 194 F.3d 185, 196 (1st Cir. 1999) (holding that under the PSLRA, plaintiffs are required to plead facts "present[ing] a *strong* inference of scienter" above and beyond that of mere motive and opportunity).

171. *See In re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 549 (6th Cir. 1999) (holding that a pleading containing facts inferring motive and opportunity did not, in and of itself, give "rise to a strong inference of recklessness" for the purposes of meeting the heightened pleading standard created by the PSLRA).

172. *See* Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1287 (11th Cir. 1999) (holding that "securities fraud plaintiff[s] must plead scienter with particular facts that give rise to a strong inference that the defendant acted in a severely reckless manner").

173. *See infra* notes 200-06 and accompanying text.

174. *See In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

175. Caminetti v. United States, 242 U.S. 470, 485 (1917).

176. 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999).

177. *See supra* notes 57-64 and accompanying text.

quired state of mind" was and what constituted a sufficient showing of that state of mind in the context of Rule 10b-5 causes of action.[178]

1. Identifying the "Required State of Mind" Under the PSLRA

The plain text of the PSLRA speaks only to the "required state of mind" and does not on its face purport to change that state of mind.[179] The overwhelming consensus of the circuit courts prior to the enactment of the PSLRA was that a pleading of facts inferring recklessness sufficed for the purposes of pleading scienter in Rule 10b-5 cases.[180] Assuming, as all of the circuits involved in this split have, that Congress' silence in the text of the PSLRA regarding the circuits' collective interpretation of *Ernst*[181] signifies a legislative acquiescence to that interpretation, this Note concludes that the plain meaning of the PSLRA reasonably embraces a showing of recklessness as sufficient for establishing "the required state of mind."[182]

2. Identifying the Minimum Showing of the "Required State of Mind" Under the PSLRA

Ironically, ambiguity surfaces by way of the precise confusion that prompted Congress to adopt the PSLRA in the first place—namely, the disunity among the circuit courts regarding the requisite showing of facts required of a plaintiff alleging recklessness in order to create a sufficiently "strong inference" of that recklessness and survive dismissal.[183] Once again, the search for the answer to this question begins with the

178. *See supra* notes 57-64 and accompanying text.

179. *See supra* notes 57-64 and accompanying text.

180. *See* Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023 (6th Cir. 1979) (holding that "[t]he overwhelming majority of courts to address this question after *Hochfelder* have concluded that recklessness satisfies the [section] 10(b)/Rule 10b-5 scienter requirement"); *see also* Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1284 (11th Cir. 1999) (stating that "[e]very circuit to address the question before the passage of the Reform Act held that a showing of recklessness was sufficient to allege scienter").

181. Again, the circuits involved in this split had each interpreted the scienter requirement in *Ernst* to include recklessness. *See Bryant*, 187 F.3d at 1284.

182. The six major circuit decisions discussed above, as well as the decision of the Fifth Circuit, all assumed as uncontroverted the conclusion that the PSLRA left unaltered their collective recklessness interpretations. *See id.* As the court in *Bryant* astutely observed, "Congress was certainly aware of [the] well-established precedent when drafting the Reform Act" that every circuit to address the question before the PSLRA had held that a showing of recklessness was sufficient to allege scienter. *Id.* The court continued, stating that "[i]ndeed, when Congress codified 'the required state of mind,' it seems . . . very clear that Congress was codifying the well-established law that recklessness was sufficient to allege scienter." *Id.*

183. *See supra* Part II.C (depicting the pre-PSLRA disunity among the circuit courts interpreting the requisite showing of facts necessary for inferring recklessness in compliance with *Ernst's* scienter threshold of intentional deception).

plain meaning of the PSLRA's statutory text.[184] Assuming, as this Note has,[185] that a pleading of recklessness is sufficient for the purposes of the PSLRA's "required state of mind,"[186] the text of the PSLRA plainly reads that a private plaintiff alleging securities fraud in violation of Rule 10b-5 must "state with particularity facts giving rise to a *strong inference* that the defendant acted with"[187] recklessness. Inasmuch as the PSLRA provides no statutory guidance in its text articulating what constitutes a satisfactory showing of a strong inference of recklessness,[188] ambiguity is created; thus, warranting an examination of the Act's legislative history for further guidance in discerning Congress' intent.[189]

a. The PSLRA's Legislative History

The PSLRA's Conference Committee's Statement of Managers articulates "that the purpose of the Reform Act was to create uniformity among the circuits and 'establish . . . more stringent pleading requirements to curtail the filing of meritless lawsuits.'"[190] Unfortunately, as with the text of the Act, that statement failed to provide express guidance for discerning the requisite strengthened pleading requirements of the PSLRA.[191] In *In re Advanta Corp. Securities Litigation*,[192] the Third Circuit concluded that the PSLRA's relevant "legislative history [addressing this question was] contradictory and inconclusive."[193] While the proceeding analysis of that history illustrates that its probative value is indeed limited, this Note finds it nevertheless helpful.

Proponents of an interpretation embracing the holdings of *Press*[194] and its progeny[195] point to the PSLRA's Senate Committee Report,

184. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917).

185. *See* discussion *supra* Part V.A.1 (concluding that it is clear that Congress intended to codify recklessness as "the required state of mind" in the PSLRA).

186. 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999).

187. *Id.* (emphasis added).

188. *See id.*

189. *See* Blum v. Stenson, 465 U.S. 886, 896 (1984). Once again, this Note is proceeding under the presumption that canons of contruction and a statute's legislative history bear, at a minimum, some probative value in discerning the legislative intent of an ambiguously worded statute. *See supra* note 168.

190. *In re* Advanta Corp. Sec. Litig., 180 F.3d 525, 532 (3d Cir. 1999) (alteration in original) (quoting H.R. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740); *see also supra* note 47 and accompanying text (laying out a number of the abusive securities fraud practices that prompted Congress to enact the PSLRA).

191. *See* H.R. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740.

192. 180 F.3d 525 (3d Cir. 1999).

193. *Id.* at 533.

194. *See* Press v. Chemical Inv. Servs. Corp., 166 F.3d 529, 538 (2d Cir. 1999).

which clearly states that the Committee chose to adopt a uniform standard fashioned upon the preexisting pleading standard of the Second Circuit.[196] Advocates of this view[197] additionally cite the comments of one of the PSLRA's co-sponsors explaining that it was Congress' intent to codify the Second Circuit's pre-Act "pleadings standards."[198] The Senate's subsequent adoption of an amendment to the original version of the Reform Act that explicitly codified the language of the Second Circuit's two-part test in the text of the PSLRA[199] supports this interpretation.

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195. *See In re Advanta*, 180 F.3d at 534; Williams v. WMX Techs., Inc., 112 F.3d 175, 178 (5th Cir. 1997).

196. *See* S. REP. NO. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 694. More specifically, the Senate Report provides in pertinent part:

> The Committee does not adopt a new and untested pleading standard that would generate additional litigation. Instead, the Committee chose a uniform standard modeled upon the pleading standard of the Second Circuit. . . . [which] 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.*

197. Aside from the circuit courts which adopted this view, the SEC, as amicus, has been a strong advocate of the position that the PSLRA did not prohibit the Second Circuit's preexisting two-prong approach. *See, e.g.*, Greebel v. FTP Software, Inc, 194 F.3d 185, 194 (stating that the SEC views Congress' intent as embodying "the prior Second Circuit methods for proving scienter"). The fact that the SEC favors this interpretation should come as no surprise inasmuch as the SEC is the body charged with promulgating the antifraud provisions under the two Securities Acts. *See supra* note 9 and accompanying text. As such, the SEC is inherently predisposed to favor this interpretation because it maximizes the number of cases surviving dismissal and thereby falling within the ambit of the Securities Exchange Act.

198. *See* 141 CONG. REC. S17,960 (daily ed. Dec. 5, 1995) (statement of Sen. Dodd). A number of the circuit decisions also make mention of Congress' passage of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (stating that neither that Act nor the PSLRA in any way altered the scienter standard in securities fraud actions brought pursuant to the Securities Exchange Act). This Note, however, questions the probative value of that Act for the purposes of discerning the legislative intent of the PSLRA insofar as it was passed over three years after the enactment of the PSLRA and was not subject to debate or criticism during the drafting and enrollment phases of the PSLRA. *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36 (1997). Mikva and Lane conclude that "[f]or a piece of legislative history to be probative of legislative intent, it must bear a significant relationship to the enactment process." *Id.* They continue: "Postenactment explanations of legislative meaning would seem absolutely taboo. . . . First, such postenactment statements are not part of the enactment process. Second, they are absolutely unreliable." *Id.* at 39; *see also* Central Bank v. First Interstate Bank, 511 U.S. 164, 185 (1994) (observing "'that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute'") (quoting Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989)); Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974) (stating that "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress").

199. *See* 141 CONG. REC. S9222 (daily ed. June 28, 1995).

This Note, however, agrees with those advocating the rejection of this interpretation, insofar as the aforementioned amendment, often referred to as the "Specter Amendment,"[200] was eliminated after the joint House and Senate Conference Committee convened to effectuate a harmonized version of the PSLRA.[201] As the Ninth Circuit reasoned in *In re Silicon Graphics*,[202] because the Conference Committee "expressly rejected the 'motive and opportunity' . . . test[] when raising the standard, Congress must have intended a standard that lies beyond the Second Circuit standard."[203]

While the PSLRA's Conference Committee stated that the language of the Act was based on the pleading standard of the Second Circuit, it expressly cautioned that "[b]ecause the Conference Committee intend[ed] to strengthen existing pleading requirements, it [did] not intend to codify the Second Circuit's case law interpreting this pleading standard."[204] An accompanying footnote to that report additionally explained that "[f]or this reason, the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness."[205] This language was interpreted by many, including President Clinton,[206] as signifying a congressional intent effectuating a heightened pleading standard, surpassing that of the Second Circuit's preexisting approach.

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200. This Amendment became known as the "Specter Amendment" in reference to the bill's sponsor and chief advocate, Senator Arlen Specter of Pennsylvania. *See* 141 CONG. REC. S9170 (daily ed. June 27, 1995); *see also* Melvin I. Weiss & Deborah Clark-Weintraub, *Private Securities Litigation Reform Act: Significant Developments Since Enactment in 1995*, 218 N.Y. L.J. 7, 9 (1997).

201. *See In re* Advanta Corp. Sec. Litig., 180 F.3d 525, 531 (3d Cir. 1999); H.R. CONF. REP. NO. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

202. 183 F.3d 970 (9th Cir. 1999).

203. *Id.* at 979. The Ninth Circuit continued:

> Had Congress merely sought to adopt the Second Circuit standard, it easily could have done so. . . . It follows that plaintiffs proceeding under the PSLRA can no longer aver intent in general terms of mere "motive and opportunity" or "recklessness," but rather, must state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent.

*Id.*

204. H.R. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740.

205. *Id.* at 48 n.23.

206. Because he believed the Statement of Managers made clear their intent to raise the pleading standard above that of the Second Circuit's pre-PSLRA approach, President Clinton vetoed the Reform Act on the grounds that it "impose[d] an unacceptable procedural hurdle to meritorious claims being heard in Federal courts." 141 CONG. REC. H15,215 (daily ed. Dec. 20, 1995). That veto was subsequently overridden by over two-thirds of both houses of Congress and the PSLRA was enacted into law. *See* 141 CONG. REC. H15,223-24 (daily ed. Dec. 20, 1995); 141 CONG. REC. S19,180 (daily ed. Dec. 22, 1995).

The Ninth Circuit adopted this position as well.[207] In the process, though, that Circuit effectuated an even higher standard requiring a detailed pleading of facts bordering on intentional misconduct.[208] After going through a similar critique of the Act and its legislative history, the Ninth Circuit reasoned that Congress had intended to "bar" those complaints failing to allege facts giving rise to a strong inference of deliberate recklessness or conscious misconduct.[209] The court reached this conclusion by focusing on the collective recklessness interpretations of the circuit courts interpreting the Supreme Court's decision in *Ernst*.[210] Reiterating that the decision in *Ernst* established that "'scienter' referr[ed] to a mental state embracing intent to deceive, manipulate, or defraud,"[211] the Ninth Circuit interpreted the PSLRA's statutory language[212] as meaning "that the evidence [alleged] must create a strong inference of, at a minimum, 'deliberate recklessness.'"[213] Hence, that circuit sought to substantiate its extended recklessness interpretation by reading *Ernst's* intentional conduct language into the language of the PSLRA.[214]

This Note is of the position, however, that while the Ninth Circuit was correct in rejecting *Press*[215] and its progeny,[216] that circuit's extended interpretation is inconsistent with the PSLRA's plain textual meaning.[217] This Note has concluded that Congress' enactment of the PSLRA signified a legislative acquiescence to the circuits' collective interpretation of recklessness as sufficient for the purposes of pleading

207. *See In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

208. *See id.* More specifically, the court in that case required a plaintiff pleading scienter to "plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct." *Id.*

209. *See id.* at 975.

210. *See* Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023 (6th Cir. 1979) (holding that "[t]he overwhelming majority of courts to address this question after *Hochfelder* have concluded that recklessness satisfies the [section] 10(b)/Rule 10b-5 scienter requirement"); *see also* Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1284 (11th Cir. 1999) (stating that "[e]very circuit to address the question before the passage of the Reform Act held that a showing of recklessness was sufficient to allege scienter").

211. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1975).

212. *See* 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999) (requiring the pleading of "particulari[zed] facts giving rise to a strong inference that the defendant acted with the required state of mind").

213. *In re Silicon Graphics*, 183 F.3d at 977.

214. *See id.*

215. Press v. Chemical Inv. Servs. Corp., 166 F.3d 529 (2d Cir. 1999).

216. *See In re* Advanta Corp. Sec. Litig., 180 F.3d 525 (3d Cir. 1999); *see also* Williams v. WMX Techs., Inc., 112 F.3d 175 (5th Cir. 1997) (adopting the Second Circuit's pre-PSLRA approach without discussion).

217. For the reasoning articulated by this Note substantiating its conclusion that the plain text of the PSLRA leaves the collective recklessness interpretation of the circuit courts unaltered for the purposes of pleading scienter, see *supra* Part V.A.1.

scienter.[218] For this reason, the standard announced by the Ninth Circuit is inconsistent with the PSLRA's plain language.[219] By effectuating an interpretation requiring the pleading of facts constituting an inference that the defendant(s) acted with deliberate recklessness,[220] the Ninth Circuit altered the "strong inference" showing plainly codified by Congress in the PSLRA's text.[221] As such, this Note concludes that the correct pleading standard for plaintiffs under the PSLRA is logically one that lies below that court's stringent mandate.

b. The PSLRA's Plain Text

Irrespective of reaching the conclusion that Congress intended to refrain from adopting the Second Circuit's preexisting motive-opportunity test via the avenue of legislative history,[222] a careful parsing of the PSLRA's plain text supports this conclusion on alternative grounds as well. In *Bryant*,[223] the Eleventh Circuit reasoned that the text of the PSLRA, requiring the pleading of facts strongly inferring "the required state of mind,"[224] "clearly refer[red] to a substantive standard . . . like willfulness or recklessness. Motive and opportunity, on the other hand, do not constitute a substantive standard; rather, motive and opportunity are specific kinds of evidence, which along with other evidence might contribute to an inference of recklessness or willfulness."[225] Thus, a pure statutory construction analysis provides an alternatively persuasive basis for concluding that the PSLRA effectuated a heightened standard surpassing the pleading threshold of the Second Circuit's preexisting approach.

## *B. Conclusion*

The PSLRA's plain language and limited probative legislative history militate in favor of reconciling the circuit split with an intermediate pleading standard of recklessness that lies between the interpreta-

218. *See supra* Part V.A.1.

219. "Rather than changing the substantive standard, the statute explicitly incorporated the existing standard; the statute refers to 'the required state of mind.' . . . Congress plainly intended to codify the well-established law that some form of recklessness was included within the required state of mind." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1284 n.21 (11th Cir. 1999).

220. *See In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

221. *See* 15 U.S.C. § 78u-4(b)(2) (Supp. IV 1999).

222. *See supra* Part V.A.2.a.

223. 187 F.3d 1271 (11th Cir. 1999).

224. 15 U.S.C. § 78u-4(b)(2).

225. *Bryant*, 187 F.3d at 1286.

tions of the Second and Ninth Circuit Courts of Appeals. While recognizing and paying deference to the troubling ambiguity surrounding the PSLRA issue, this Note once again reverts to Congress' intent, which was aimed at establishing a fact sensitive standard that recognizes averments giving rise to a "strong inference" of recklessness[226] as sufficient for the purposes of satisfactorily pleading scienter under the PSLRA. Such a standard empowers the district judge with the discretion necessary for weighing the fact sensitive details and circumstances enveloping each case to determine whether a sufficiently "strong inference" of recklessness has been pled.

While framed in the background of a circuit split among the federal courts of appeals, the tension belying this split is one bristling with serious ramifications for both aggrieved shareholders and the overall judicial system. On one side is the clear intent of Congress to provide redress for injured plaintiffs in order to bring about consistency and legitimacy to the country's capital markets.[227] On the other side, however, is Congress' enactment of the PSLRA in an effort aimed at ameliorating the likelihood of abusive practices stemming from the manipulation of that Act.[228]

Perhaps the ambiguity of the PSLRA that prompted the split is representative of the circuits' collective effort to bring about an equitable balance to the tension of providing redress for legitimately injured plaintiffs, while minimizing the potential for fraudulent securities practices and abuses. In any event, it is not the role of the judiciary to effectuate, under the guise of its equitable powers, an interpretation of the PSLRA in a fashion not expressly within the intentions of Congress.[229]

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226. *See* 15 U.S.C. § 78u-4(b)(2).

227. This was Congress' rationale and motivation in enacting the Securities Exchange Act of 1934. *See supra* note 47 and accompanying text (outlining the abuses and conduct prompting Congress' enactment).

228. *See supra* note 47 and accompanying text (detailing the abusive securities practices stemming from the pre-PSLRA disunity among the circuits that prompted Congress to raise the level of scienter through the enactment of the PSLRA in a self-proclaimed effort to flush out and curb the excessive filing of fraudulent and meritless claims).

229. *See* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 135 (1995) (Ginsburg, J., concurring).

> Personal experience has revealed that the nearly universal view among federal judges is that when we are called upon to interpret statutes, it is our primary responsibility, within constitutional limits, to subordinate our wishes to the will of Congress because the legislators' collective intention, however discerned, trumps the will of the court.

Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281 (1989).

Tantamount to this Note's ultimate conclusion is the premise that courts evaluating complaints for the requisite strong inference of recklessness are precluded from allowing plaintiffs pleading mere motive and opportunity to survive dismissal.[230] By prohibiting as sufficient a bare showing of motive and opportunity, the abusive "strike suit" and other concerns originally prompting Congress' enactment of the PSLRA remain adequately addressed.[231] In any event, facts inferring such a showing are often relevant and helpful in establishing a sufficient pleading of scienter and, under this Note's approach, can still be utilized for these purposes.[232] Additionally, the conclusion that the PSLRA did not effectuate the "strong inference of deliberate recklessness" approach adopted by the Ninth Circuit[233] reduces the likelihood of onerously precluding legitimate shareholders from the statutory redresses of section 10(b) and Rule 10b-5, which were enacted and promulgated for their safeguard and protection.[234]

In concluding that this split should be interpreted in a manner consistent with the interpretations of the First, Sixth, and Eleventh Circuits, it must be recognized that such a conclusion is not free from speculation or debate.[235] The pervasive ambiguity in the PSLRA's text and legislative history militates in favor of either judicial or congressional clarification in order to reconcile the disunity and bring harmony to this split.[236] Upon such intervention, this Note predicts that inasmuch as the decisions of the Second Circuit in *Press* and the Ninth Circuit in *In re*

230. *See supra* notes 200-14 and accompanying text for the reasoning and analysis fortifying this conclusion.

231. *See supra* note 47 and accompanying text detailing, in addition to strike suits, a number of the abusive securities law practices that prompted Congress to enact the PSLRA.

232. *See, e.g., In re* Comshare, Inc. Sec. Litig., 183 F.3d 542, 551 (6th Cir. 1999) (holding that a pleading of facts establishing motive and opportunity may be relevant to creating a strong inference of scienter, but that such a pleading was not in and of itself enough).

233. *In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

234. *See* 1 LOSS & SELIGMAN, *supra* note 2, at 226-27 (summarizing the Securities Exchange Act of 1934 and stating that the Act's purpose was "to prevent and afford remedies for fraud in securities trading and manipulation of the markets").

235. After all, if there was a clear solution to interpreting the PSLRA question, the probability is high that the circuits would not have divided in the drastic fashion that they have. *See* Smith, *supra* note 36, at 613 (stating that "'[t]he fact that [different] courts, in well-reasoned opinions, provide different assessments of Congress' intent illustrates the inherent ambiguity of the legislative record.'" (quoting Zeid v. Kimberley, 973 F. Supp. 910, 912 (N.D. Cal. 1997) (first alteration in original)).

236. In light of the PSLRA's "inconclusive and inconsistent" legislative intent, it appears that Congress agreed to disagree on this elusive standard. *See, e.g.*, Greebel v. FTP Software, Inc., 194 F.3d 185, 195 (1st Cir. 1999) (concluding that "[a]t best, there appears to have been an agreement to disagree on the issue of Second Circuit standards (other than the strong inference standard), and perhaps, as is common, to leave such matters for courts to resolve").

*Silicon Graphics Securities Litigation* run afoul with the plain meaning of the PSLRA and that Act's limited probative legislative history, the aforementioned and described intermediate fact specific interpretation will be recognized as best effectuating and reconciling the ambiguous congressional intent underlying the enactment of the PSLRA.

*Bradley R. Aronstam**

* This Note, like all of my undertakings in life, is dedicated to the memory of my father, Robert Aronstam; a man whose courage, strength, and love I carry with me in all of my endeavors and activities, death having no dominion over what the two of us share. I would like to specifically thank Professor Julian Velasco of the Hofstra University School of Law for his invaluable assistance with the editing and revising of this Note; as well as all of the Editors and Staff Members of Volumes 28 and 29 of the *Hofstra Law Review* whose professionalism and dedication make it an absolute honor to be associated with and published in this Law Review. Finally, and most importantly, I would like to express my immeasurable gratitude and love to my family for their unconditional love, support, and guidance throughout my career in law school and in everything that I do. Their inspiration and example are treasures that mean more to me than I could ever hope to express.