

NOTES AND COMMENTS

DURA'S EFFECT ON SECURITIES CLASS ACTIONS

*Scotland M. Duncan**

ABSTRACT

On April 19, 2005, the United States Supreme Court rendered a unanimous decision in Dura Pharmaceuticals, Inc. v. Broudo, which had been described as “the most important securities case in a decade.” Simply put, the decision raises the pleading standard for Rule 10b-5 cases asserting fraud-on-the-market; instead of requiring a showing of ex ante losses, such as inflation at the time of purchase, Dura requires a showing of ex post losses, such as market decline resulting from a corrective disclosure. This paper assesses the decision’s practical implications by examining and empirically testing whether the Supreme Court’s enhanced pleading requirements have impacted the frequency and magnitude of post-Reform Act (PSLRA) class action securities cases. Specifically, this paper examines Dura’s effect on the filing and settling of cases, as well as on settlement amount. In particular, the results suggest that Dura, ceteris paribus, has had a statistically significant impact on both the filing and settlement of class actions, suggesting a reduction in frivolous litigation.

* J.D. candidate, University of Pittsburgh School of Law, 2009; B.A. 2003, Allegheny College. I thank Associate Professor Peter B. Oh for his comments, suggestions, and guidance. I also thank Cornerstone Research for providing the data used in the study.

INTRODUCTION

Dura Pharmaceuticals, Inc. v. Broudo was expected to be the “most important securities case in a decade.”¹ It was to be the seminal case in which the Supreme Court would define, clearly, the operative principles of “loss causation.”² The decision was highly anticipated, in part because loss causation had been one of the most heavily litigated issues in securities actions at the time, creating a split among the circuits.³ In order to prove loss causation, plaintiffs must prove that their injury is directly attributable to both the wrongful conduct and the form and manner in which the challenged transaction occurred.⁴ Loss causation provides the necessary connection between the challenged conduct and the plaintiff’s pecuniary loss.⁵

During the months preceding the April 2005 decision, many potential litigants and corporate defendants postponed related procedures in anticipation of the Court’s verdict.⁶ For example, NERA, an economic consulting firm, suggested that the decline in federal filings in the first half of 2005 was due to a sharp drop in Ninth Circuit filings, likely caused by plaintiffs’ firms

1. Patti Waldmeir, *Supreme Court to Rule on ‘Most Important Securities Case in a Decade’: The Justices Will Decide Whether Shareholders Need to Lose Money Before They Can Sue a Company*, *Reports Patti Waldmeir*, FIN. TIMES, Jan. 10, 2005, at 5.

2. John C. Coffee, Jr., *Loss Causation After Dura: Something for Everyone*, 231 N.Y. L.J. 5 (2005) [hereinafter Coffee, *Something for Everyone*].

3. See Richard A. Spehr & Joseph De Simone, *The Battleground After ‘Dura’ Decision: Differences Remain over Implementing Standard for Pleading Loss Causation*, 234 N.Y. L.J. S6 (2005). Compare *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 198 (2d Cir. 2003) (inflation of purchase price alone cannot satisfy loss causation), and *Semerenko v. Cendant Corp.*, 223 F.3d 165, 184-85 (3d Cir. 2000) (“Where the value of the security does not actually decline as a result of an alleged misrepresentation, it cannot be said that there is in fact an economic loss attributable to that misrepresentation.”), and *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (“Rule 10b-5 has been interpreted to authorize the creation of a federal common law of securities fraud, and common law fraud is not actionable without proof of harm. No reason is given why Rule 10b-5 should be an exception to this principle.”), and *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997) (“Our decisions explicitly require proof of a causal connection between the misrepresentation and the investment’s subsequent decline in value.”), with *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 832 (8th Cir. 2003) (“[P]laintiffs were harmed when they paid more for the stock than it was worth. This is a sufficient allegation.”), and *Broudo v. Dura Pharm., Inc.*, 339 F.3d 933, 938 (9th Cir. 2003) (“[I]n a fraud-on-the-market case, plaintiffs establish loss causation if they have shown that the price on the date of purchase was inflated because of the misrepresentation.”) (quoting *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1438 (9th Cir. 1996) (emphasis in original), *rev’d*, 544 U.S. 336 (2005)).

4. THOMAS L. HAZEN, *THE LAW OF SECURITIES REGULATION* § 12.11, at 507 (5th ed. 2005).

5. *Id.*

6. See Christopher J. Dutton, Note, *Dura Pharmaceuticals, Inc. v. Broudo: Extracting Teeth from Securities Regulation*, 33 N. KY. L. REV. 153, 179 (2006).

choosing to delay certain filings until after the *Dura* decision in order to determine what was needed to plead loss causation.⁷

Commentators debated vigorously about how the Court should rule. Professor Merritt Fox concurred with the Ninth Circuit's decision merely requiring plaintiffs to plead price inflation at the time of purchase.⁸ Fox urged the Court to implement a "simple requirement, consistent with [the Court's earlier] reasoning in *Basic[, Inc. v. Levinson]*, 485 U.S. 224 (1988) that the plaintiff plead and prove that the defendant's misstatement inflated the price the plaintiff paid."⁹ In contrast, Professor John Coffee argued that the Court should adopt a heightened standard requiring market corroboration in the form of a subsequent stock market decline.¹⁰

Fox's position was based on an *ex ante* approach, under which courts would use the "out of pocket" measure for damages, specifically, the inflationary amount the purchaser paid as a result of the misstatement.¹¹ While admitting that the literal language of traditional loss causation is phrased in terms of *ex post* loss, a less strict standard would block fewer meritorious suits.¹² By focusing on the pleading stage, a mere allegation of a facially material misstatement would be sufficient, paving the way for more successful pleading within fraud-on-the-market cases.¹³ Adopting a traditional loss causation rule instead would arbitrarily cut out a portion of cases with merit, such as those where the negative impact of a disclosed misstatement is counterbalanced by positive news or where market realization, and thus declines, occur prior to the public announcement.¹⁴

In opposition, Coffee argued for a literal *ex post* approach. Fearing that the possibility of "phantom losses" and speculative court awards in an *ex ante*

7. See Elaine Buckberg, Todd Foster & Ronald Miller, *Recent Trends in Shareholder Class Action Litigation: Are WorldCom and Enron the New Standard?*, NERA Economic Consulting, September 2005, at 2 ("The drop in federal filings in the first six months of the year can be attributed to a sharp drop in Ninth Circuit filings. It may be that plaintiffs' firms in the Ninth Circuit chose to delay certain filings until after the *Dura* decision by the Supreme Court in order to determine what they would need to do to plead loss causation. . . . Ninth Circuit plaintiffs' firms may file an unusually high number of cases in the remaining months of 2005, including cases that they would otherwise have filed earlier in the year.").

8. See Merritt B. Fox, *Demystifying Causation in Fraud-on-the-Market Actions*, 60 BUS. LAW. 507, 531 (2005) [hereinafter Fox, *Demystifying Causation*].

9. *Id.* at 519.

10. See John C. Coffee, Jr., *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse* Broudo, 60 BUS. LAW. 533, 547 (2005) [hereinafter, Coffee, *Phantom Losses*].

11. Fox, *Demystifying Causation*, *supra* note 8, at 520.

12. *Id.* at 525.

13. *Id.*

14. *Id.* at 530.

system might encourage frivolous litigation, Coffee embraced a bright line rule requiring a decline in value because “[p]rice inflation that is never corrected through a market decline is too hypothetical an injury.”¹⁵ In essence, the market, and not the judicial system, should determine the extent of the loss.¹⁶ According to Coffee, to allow otherwise would force corporate defendants to act as insurers compensating shareholders for losses during a class period that could be tenuously tied to any alleged misrepresentation made.¹⁷ Eliminating the requirement that plaintiffs plead a causal connection to a subsequent stock decline would lead to a larger number of fraud-on-the-market actions than the traditional loss causation requirement.¹⁸

Ultimately, the Court sided with Professor Coffee, but not wholesale. Rather, Justice Breyer delivered a minimalist text with a narrow holding that an investor may not establish loss causation by merely alleging that a defendant’s misrepresentations caused the price of a security to be artificially inflated.¹⁹ In addition, the pleadings must provide the defendant with “some indication of the loss and the causal connection the plaintiff has in mind.”²⁰ *Dura* thus requires a plaintiff to show *ex post* losses in the form of a market decline, as opposed to *ex ante* losses in the form of price inflation at the time of purchase.²¹ The decision does not impose a higher pleading standard on loss causation than that mandated by Rule 8(a)(2).²² However, plaintiffs must abide by a “marginally stricter loss causation approach” that requires articulation of the theory of their loss at the complaint stage.²³ This tightened pleading requirement “enables courts to separate out the cases that ought to enter

15. Coffee, *Phantom Losses*, *supra* note 10, at 546-47.

16. *Id.* at 533.

17. *Id.* at 535.

18. *Id.* at 537; *see also* Fox, *Demystifying Causation*, *supra* note 8, at 529. Coffee’s argument is reinforced by the fact that both §§ 11(e) and 12(b) of the Securities Act of 1933 limit damages to “depreciation in value.” *See* 15 U.S.C. §§ 77k(e), 77l(b) (2008).

19. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342-46 (2005).

20. *Id.* at 347.

21. James C. Spindler, *Why Shareholders Want Their CEOs to Lie More After Dura Pharmaceuticals*, 95 GEO. L.J. 653, 653 (2007) (arguing that the *Dura* rule fails to adequately internalize the costs of fraud making it a profitable strategy).

22. *Dura*, 544 U.S. at 346 (conceding that “the Federal Rules of Civil Procedure require only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’”). *See also* Spehr & De Simone, *supra* note 3 (noting that the Court did not expressly decide the issue as to whether Rule 8 or 9(b) applied; rather, it assumed, arguably, that the less restrictive notice pleading standard of Rule 8 applied, and dismissed the complaint under the more liberal standard).

23. Ann Morales Olazabal, *Loss Causation in Fraud-on-the-Market Cases Post-Dura Pharmaceuticals*, 3 BERKELEY BUS. L.J. 337, 380 (2006).

discovery, thereby minimizing the risk that defendants will have to settle flimsy claims.”²⁴

Some commentators have described the *Dura* decision as an imposition of a “Herculean requirement”²⁵ for loss causation that will favor corporate defendants in a myriad of ways including reducing the damages claimed by plaintiffs, the risk posed by securities actions, and the settlement value of these actions.²⁶ Others have argued that, in failing to address loss causation in private securities fraud litigation, portions of the Court’s reasoning are confused or simply wrong.²⁷ Another has ridiculed the decision as inconsistent, incoherent, incomplete, and, ultimately, inconsequential.²⁸

This study examines whether these commentators were right; whether *Dura* has reduced the amount of frivolous litigation or if it really is inconsequential. Part I provides a brief history of the concept of loss causation within the framework of Rule 10b-5 private securities fraud actions. Part II introduces *Dura*’s factual background, procedural history, and inspects the Court’s holding. Part III reviews commentary before and after the April 2005 decision including remarks from both sides of the bar. Part IV defines the study’s hypotheses and examines the theory behind these suppositions. Part V explains the data sources and sample selection process. Part VI introduces summary statistics supporting the claim that, *ceteris paribus*, the *Dura* decision has had a statistically significant impact on the frequency of federal securities class action filings and appears to have reduced the number of

24. Larry E. Ribstein, *Fraud on a Noisy Market*, 10 LEWIS & CLARK L. REV. 137, 154 (2006).

25. Devin F. Ryan, Comment, *Yet Another Bough on the “Judicial Oak”*: *The Second Circuit Clarifies Inquiry Notice and its Loss Causation Requirement Under the PSLRA in Lentell v. Merrill Lynch & Co.*, 79 ST. JOHN’S L. REV. 485, 500 (2005).

26. See Jacob M. Kantrow, Note, *Dura Pharmaceuticals, Inc. v. Broudo: Not Really a Loss Causation Case*, 67 LA. L. REV. 257, 275 (2006) (citing Jonathan C. Dickey, Robert F. Serio & Wayne W. Smith, *Supreme Court Reverses Ninth Circuit’s Loss Causation Standard*, INSIGHTS, May 2005, at 20, 21 (2005)); see also, e.g., Jerod Neas, Note, *Dura Duress: The Supreme Court Mandates a More Rigorous Pleading and Proof Requirement for Loss Causation under Rule 10b-5 Class Actions*, 78 U. COLO. L. REV. 347, 366 (2007) (writing that the *Dura* holding, in requiring “a particular showing of loss causation at the pleading stage” has “imposed a much greater obstacle for plaintiffs in Rule 10b-5 actions.”).

27. Merritt B. Fox, *Understanding Dura*, 60 BUS. LAW. 1547, 1567-69 (2005) [hereinafter Fox, *Understanding Dura*] (noting that the Court’s reasons for reaching this conclusion “appear to be rather confused” and that its explanation of the situation where the purchaser does not sell until after the truth has come out was “simply wrong”); Spindler, *supra* note 21, at 666 (explaining that “the Court’s reasoning is confused”).

28. Michael J. Kaufman, *At a Loss: Congress, the Supreme Court and Causation under the Federal Securities Laws*, 2 N.Y.U. J.L. & BUS. 1, 1 (2005) (asserting that the “Court’s decision is inconsistent with the federal securities laws, incoherent in its reliance upon an amoebic notion of ‘economic loss,’ incomplete in its failure to address pressing causation questions and, ultimately, inconsequential.”).

frivolous settlements. Part VII concludes the study. Ultimately, this analysis demonstrates that *Dura* has had a significant impact, but not necessarily in the ways predicted by commentators.²⁹

I. A BRIEF HISTORY OF LOSS CAUSATION

Private securities fraud actions are based upon federal securities statutes and their implementing regulations.³⁰ Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to “use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of” the rules and regulations of the Securities and Exchange Commission.³¹ SEC Rule 10b-5 forbids, *inter alia*, “any untrue statement of a material fact” or the omission of “a material fact necessary in order to make the statements made . . . not misleading.”³² Courts have implied from Rule 10b-5 a private right of action³³ and Congress has imposed statutory requirements on that private action.³⁴

Causation in securities cases is analyzed according to a judicial rubric. Courts have formulated two categories: “transaction causation” and “loss causation.”³⁵ Transaction causation requires a plaintiff to prove that he would not have purchased “but for” the misstatement.³⁶ Loss causation connects a defendant’s fraud with a specific loss, functioning as a proximate cause requirement, designed to protect defendants from market fluctuations unrelated to their challenged conduct.³⁷

The Private Securities Litigation Reform Act of 1995 (“PSLRA”) expressly codified loss causation. Specifically, the PSLRA made loss causation an element of a private suit for securities fraud.³⁸ According to

29. *E.g., id.* (arguing that the “Court’s decision is . . . , ultimately, inconsequential.”).

30. *Dura*, 544 U.S. at 341.

31. 15 U.S.C. § 78j(b) (2008).

32. 17 C.F.R. § 240.10b-5 (2008).

33. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (noting that “that there was an implied private right of action under” Rule 10b-5).

34. *See, e.g., 15 U.S.C. § 78u-4(b)(4)* (2008).

35. HAZEN, *supra* note 4, § 12.11, at 506.

36. *See, e.g., Huddleston v. Herman & MacLean*, 640 F.2d 534, 549 n.24 (5th Cir. 1981) (“[T]ransaction causation’ is used to describe the requirement that the defendant’s fraud must precipitate the investment decision.”).

37. *See, e.g., Dura*, 544 U.S. at 342; Ribstein, *supra* note 24, at 150 (“[P]laintiff must show that defendant’s fraud caused . . . her specific loss—that is, . . . loss causation.”).

38. *See 15 U.S.C. § 78u-4(b)(4)* (2008) (“In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this

Judge Posner of the Seventh Circuit, “what securities lawyers call ‘loss causation’ is the standard common law fraud rule . . . merely borrowed for use in federal securities cases.”³⁹ In securities cases the term “loss causation” generally refers to the “loss produced by a discrepancy between the actual market value of a stock and what the value would have been had there been no misrepresentation.”⁴⁰

Establishing “loss causation” has long been a part of the common law.⁴¹ Courts created the loss causation element as a means of restricting liability, of requiring “something more” than just transaction causation.⁴² Prior to *Dura*, the Supreme Court had never discussed the matter, which had been heavily debated by the lower courts.⁴³

The requirement of something more first appeared in 1969 in *Globus v. Law Research Service, Inc.*, when the Second Circuit held that the challenged jury instructions on causation were sufficient since the instructions called for more than just a showing of “but for” causation (now referred to as transaction causation).⁴⁴ In 1974, in *Schlick v. Penn-Dixie Cement Corp.*, the Second Circuit adopted the terms “loss causation” and “transaction causation.”⁴⁵ Loss causation was defined as a showing that a defendant’s “misrepresentations or omissions caused the economic harm,” which could be “demonstrated rather easily by proof of some form of economic damage.”⁴⁶ Ultimately, the Fifth Circuit in *Huddleston v. Herman & MacLean*⁴⁷ provided a clear appellate court ruling that a showing of something more was required.⁴⁸ “The plaintiff must prove not only that, had he known the truth, he would not have acted, but

chapter caused the loss for which the plaintiff seeks to recover damages.”).

39. Bastian v. Petren Res. Corp., 892 F.2d 680, 683 (7th Cir. 1990) (emphasis omitted).

40. Isquith v. Caremark Int’l, Inc., 136 F.3d 531, 535 (7th Cir. 1998).

41. See Pasley v. Freeman, (1789) 3 T.R. 51, 65, 100 Eng. Rep. 450, 457 (“[If] no injury is occasioned by the lie, it is not actionable . . . attended with a damage, it then becomes the subject of an action.”). See also *Dura*, 544 U.S. at 344 (highlighting several cases and treatises regarding the common law requirement of loss causation).

42. Fox, *Demystifying Causation*, *supra* note 8, at 515.

43. See *id.*; see also *supra* note 3.

44. Fox, *Demystifying Causation*, *supra* note 8, at 509-10. *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1291-92 (2d Cir. 1969) (The instructions were that “the plaintiff is required to prove . . . that he or she suffered damages as a proximate result of the alleged misleading statements and purchase of stock in reliance to them. In other words, the plaintiff must show that the misleading statement or omission played a substantial part in bringing about or causing the damage suffered by him or her and that the damage was either a direct result or a reasonably foreseeable result of the misleading statement.”).

45. *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380 (2d Cir. 1974).

46. *Id.*

47. *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981).

48. Fox, *Demystifying Causation*, *supra* note 8, at 510-11.

in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss.”⁴⁹ Loss causation, the court added, “refers to a direct causal link between the misstatement and the claimant’s economic loss.”⁵⁰

Loss causation is more precise than transaction causation.⁵¹ If only a showing of inducement based on a misstatement or omission is required, the plaintiff would be insured from any risk that could possibly depress price below the purchase price, including risks wholly unrelated to the misstatement.⁵² Permitting allegations of mere price inflation thus would convert Rule 10b-5 into a scheme of investors’ insurance.⁵³ Such insurance would effectively modify the risk characteristics for investors speculating on changes in general market, or macroeconomic, conditions.⁵⁴ As a result, a policy without loss causation would be tantamount to granting investors a protective put option,⁵⁵ or downside protection, should the stock price decline without a corrective disclosure establishing the necessary link between economic loss and actionable conduct by the defendant.⁵⁶

II. *DURA PHARMACEUTICALS, INC. v. BROUDO*

A. *Background and Procedural History*

On January 27, 1999, a class of plaintiffs commenced suit against Dura Pharmaceuticals, Inc. (“Dura”).⁵⁷ The plaintiff class comprised investors who

49. *Huddleston*, 640 F.2d at 549.

50. *Id.* at 549 n.24. See MICHAEL J. KAUFMAN, *SECURITIES LITIGATION DAMAGES* § 11.1 (West 2004) (“The notion that a Rule 10b-5 plaintiff must show that the defendant’s conduct caused his losses is unremarkable. Yet, Huddleston’s language goes farther. The Court declares: ‘The causation requirement is satisfied in a rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment’s decline in value.’ Under this formulation of loss causation, the federal courts have required plaintiffs to prove that the misrepresentation caused all of the investment’s decline in value before they can recover any loss at all. This is remarkable.”).

51. *Cf.* Fox, *Demystifying Causation*, *supra* note 8, at 515 (“Remember that the loss causation requirement is a follow on to transaction causation.”).

52. *Id.*

53. *Dura*, 544 U.S. at 345.

54. Allen Ferrell & Atanu Saha, *The Loss Causation Requirement for Rule 10b-5 Causes-of-Action: The Implication of Dura Pharmaceuticals v. Broudo*, at 12 (Harv. Law & Econ. Discussion Paper No. 08/2007, 2007), available at <http://ssrn.com/abstract=1006088>.

55. See generally RICHARD A. BREALEY, STEWART C. MYERS & ALAN J. MARCUS, *FUNDAMENTALS OF CORPORATE FINANCE* 698-701 (3d ed. 2001).

56. Ferrell & Saha, *supra* note 54, at 12.

57. Complaint for Violation of the Securities Exchange Act of 1934, *Broudo v. Dura Pharm., Inc.*, 1999 WL 34771282 (S.D. Cal. Jan. 27, 1999) (No. 99 Civ. 0151).

had purchased securities of Dura between April 15, 1997 and February 24, 1998.⁵⁸ The suit named Dura, several of its managers, and directors as defendants.⁵⁹ The complaint alleged that Dura made false statements concerning both the company's drug profits and future Food and Drug Administration ("FDA") approval of a new asthmatic spray device during the relevant period.⁶⁰ More specifically, plaintiffs alleged that the Company falsely claimed that it expected its drug sales to prove profitable and that the FDA would soon approve the asthmatic device.⁶¹ On February 24, 1998, Dura announced that its earnings would be lower than expected due in part to slow drug sales.⁶² As a result, the Company's shares declined in value by 47% the following day.⁶³ Then, in November 1998, Dura revealed that the FDA would not approve the asthmatic device due to reliability issues and other concerns.⁶⁴ The next day the Company's share price temporarily declined, but almost fully recovered within a week.⁶⁵

Plaintiffs filed several class actions, which were consolidated, alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act ("Exchange Act") and Rule 10b-5.⁶⁶ The complaint claimed, with respect to the spray device statements, that the plaintiffs had relied "on the integrity of the market" and "paid artificially inflated prices for Dura securities" that resulted in damages.⁶⁷ The District Court for the Southern District of California dismissed the complaint on the basis that the allegations of loss causation were inadequate.⁶⁸

The Court of Appeals for the Ninth Circuit reversed.⁶⁹ Siding with the Second and Eighth Circuits, the Ninth Circuit held that loss causation could be satisfied by allegations that defendants' misrepresentations or omissions caused the investor to purchase securities at an artificial price.⁷⁰ However, as the Supreme Court later points out in *Dura*, the Second Circuit rejected the

58. *Broudo v. Dura Pharm., Inc.*, 339 F.3d 933, 935 (9th Cir. 2003), *rev'd*, 544 U.S. 336 (2005).

59. *Dura*, 544 U.S. at 339.

60. *Id.*

61. *Id.*

62. *Broudo*, 339 F.3d at 936.

63. *Id.*

64. *Id.*

65. *Dura*, 544 U.S. at 339.

66. *Id.*

67. *Id.* at 340.

68. *Id.*

69. *Id.*

70. *Broudo*, 339 F.3d at 938 (holding that loss causation "merely requires pleading that the price at the time of purchase was overstated and sufficient identification of the cause").

Ninth Circuit's "inflated purchase price" approach to loss causation shortly after *Broudo* was filed in 2003.⁷¹

The Ninth Circuit's holding, the court recognized, conflicted with the position held by the Third and Eleventh Circuits that required demonstration of a corrective disclosure followed by a subsequent stock price decline.⁷² According to the Eleventh Circuit, loss causation requires plaintiffs to give "proof of a causal connection between the misrepresentation and the investment's subsequent decline in value."⁷³ Similarly, the Third Circuit held that, "where the claimed loss involves the purchase of a security due to an alleged misrepresentation, there is a sufficient causal nexus between the loss and the alleged misrepresentation to satisfy the loss causation requirement," provided "that the artificial inflation was actually 'lost' due to the alleged fraud."⁷⁴

B. Court's Holding

To resolve the circuit split, the Supreme Court granted *certiorari*.⁷⁵ In a unanimous opinion written by Justice Breyer, the Supreme Court reversed the Ninth Circuit's judgment.⁷⁶ According to the Court, mere allegation and proof of an inflated purchase price "will not itself constitute or proximately cause the relevant economic loss" in fraud-on-the-market cases.⁷⁷ This is because, at the time of purchase, "the plaintiff has suffered no loss" since "the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value."⁷⁸ "Moreover, the logical link between the inflated share purchase price and any later economic loss is not invariably strong . . . if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss."⁷⁹ Rather, a plaintiff must demonstrate that the alleged misrepresentation actually did

71. *Dura*, 544 U.S. at 344; *see also Emergent*, 343 F.3d at 198 ("[I]nflation of purchase price alone cannot satisfy loss causation.").

72. *Broudo*, 339 F.3d at 938 (noting that "other circuits are less favorable to plaintiffs and do require demonstration of a corrective disclosure followed by a stock price drop to be alleged in the complaint").

73. *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997).

74. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 184-85 (3d Cir. 2000).

75. *Dura*, 544 U.S. at 340.

76. *Id.* at 348.

77. *Id.* at 342.

78. *Id.* (emphasis in original).

79. *Id.*

“cause a loss.”⁸⁰ To hold otherwise “would permit a plaintiff ‘with a largely groundless claim . . . representing an *in terrorem* increment of the settlement value” to transform a private securities action into a partial downside insurance policy.⁸¹ The Court’s concern with the abusive practice of frivolous suits is one theme this study explores in more detail, *infra* Parts III and IV.

This actual loss requirement for private securities fraud actions is based on an analogy to the common-law tort actions for deceit and misrepresentation.⁸² The *Restatement (Second) of Torts* refers to the loss sustained by a purchaser as occurring when the facts surrounding a misrepresentation become known and the share value depreciates.⁸³ The Court noted that the Second, Third, Seventh, and Eleventh Circuits all require something more than “the Ninth Circuit’s ‘inflated purchase price’ approach to proving causation and loss.”⁸⁴ The PSLRA imposes on plaintiffs the burden of proving that the defendant’s misrepresentations caused the loss for which the plaintiff seeks to recover.⁸⁵ Having held that “plaintiffs need to *prove* proximate causation and economic loss” the Court determined that the plaintiffs’ “complaint here failed adequately to *allege* these requirements.”⁸⁶ In doing so, the Court stressed that the pleading requirements “should not prove burdensome for a plaintiff who has suffered an economic loss”⁸⁷ Plaintiffs, they said, need only “provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind.”⁸⁸

III. COMMENTARY ON *DURA*’S HOLDING

While *Dura* was expected to clear up the confused state of loss causation jurisprudence in the circuits, the Court declined to articulate a clear loss causation standard.⁸⁹ Critics of the opinion contend that the Court’s rationale,

80. *Id.* at 343 (emphasis in original).

81. *Id.* at 347-48.

82. *Id.* at 341, 343-44 (noting that “the common law has long insisted that a plaintiff in such a case show . . . that he suffered actual economic loss”).

83. *Id.* at 344 (citing RESTATEMENT (SECOND) OF TORTS § 548A cmt. b (1977)).

84. *Id.*

85. *Id.* at 345-46 (citing 15 U.S.C. § 78u-4(b)(4) (2008)).

86. *Id.* at 346 (emphasis in original).

87. *Id.* at 347.

88. *Id.*

89. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 399 F. Supp. 2d 298, 301 (S.D.N.Y. June 28, 2005) (“*Dura* did not establish what *would* be a sufficient loss causation pleading standard; it merely established what was *not*.”) (emphasis in original); Olazabal, *supra* note 23, at 341.

when scrutinized, appears confused and, at times, simply wrong.⁹⁰ Fox argues that the Court's suggestion that a share's value equals its price contradicts its own jurisprudence on damages,⁹¹ which employs the "out of pocket" measure, or the extra amount that the plaintiff pays at the time of purchase because of the misstatement.⁹² If a share's value always equals its price there can never be an excess amount paid due to a misrepresentation or omission. Fox also challenges the Court's argument that a sale after disclosure of the truth "*might* mean a later loss,"⁹³ noting that such a statement flies in the face of the foundation of fraud-on-the-market theory, the efficient market hypothesis.⁹⁴ Under the efficient market hypothesis once the truth is revealed the inflated price *will* inevitably result in a loss.⁹⁵

Representatives of both the plaintiffs' and defendants' bar claimed *Dura* as a victory.⁹⁶ Patrick Coughlin, the plaintiffs' attorney in *Dura*, stated that despite the adverse outcome, the Court's ruling was not hostile to investors;⁹⁷ on the contrary, the Court had adopted sensible rules for pleading and proving loss causation that would be less burdensome for investors.⁹⁸ On the flip-side, a member of the defendant's bar greeted the decision as one that "closes the door to what could have been a flood of speculative new lawsuits for recovery of stock losses unrelated to the defendant's alleged fraud."⁹⁹

Defendants have quickly seized on *Dura*. Arguments that complaints fail to allege loss causation now feature prominently in motions to dismiss.¹⁰⁰ As

90. E.g., Fox, *Understanding Dura*, *supra* note 27, at 1567-69 (2005) (noting that the Court's reasons for reaching this conclusion "appear to be rather confused" and that their explanation of the situation where the purchaser does not sell until after the truth has come out was "simply wrong"); Spindler, *supra* note 21, at 666 (explaining that "the Court's reasoning is confused . . .").

91. *Randall v. Loftsgaarden*, 478 U.S. 647, 661-62 (1986).

92. Fox, *Understanding Dura*, *supra* note 27, at 1568.

93. *Dura*, 544 U.S. at 342 (emphasis in original).

94. Fox, *Understanding Dura*, *supra* note 27, at 1569.

95. *Id.*

96. See Fox, *Demystifying Causation*, *supra* note 8, at 507. See also Spehr & De Simone, *supra* note 3, at S6 (noting that "the *Dura* decision appeared to be a significant victory for the defense bar").

97. Patrick J. Coughlin, Eric Alan Isaacson & Joseph D. Daley, *What's Brewing in Dura v. Broudo? The Plaintiffs' Attorneys Review the Supreme Court's Opinion and its Import for Securities-Fraud Litigation*, 37 LOY. U. CHI. L.J. 1, 2 (2005).

98. *Id.* at 2.

99. Latham & Watkins, *Supreme Court in Dura Pharmaceuticals Unanimously Endorses "Loss Causation" Requirement in Fraud-on-the-Market Cases*, Client Alert No. 455, Apr. 28, 2005, at 1, available at http://www.lw.com/upload/pubContent/_pdf/pub1258_1.pdf.

100. Richard A. Rosen, *Pleading and Proving "Loss Causation" after Dura Pharmaceuticals: What's Happening in the Lower Courts?*, 37 SEC. REG. & L. REP. No. 48, at 2043 (Dec. 12, 2005) (observing "[a]rguments that a complaint fails to allege loss causation now feature prominently in motions to dismiss."). See, e.g., *Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 617 (S.D.N.Y. 2008) (failure to

a practical matter, since claims unaccompanied by a market decline are readily dismissible, *Dura's ex post* measure may reduce the number of frivolous lawsuit filings, thereby resulting in administrative ease.¹⁰¹ A limited study of cases from the time *Dura* was decided through June 2006 found that all cases in which loss causation was satisfied pointed to an absolute price decline following disclosure of the truth.¹⁰² In cases in which loss causation was not satisfied, plaintiffs alleged mere price inflation or alleged an absolute decline but still failed for reasons such as an inability to link the decline to the corrective disclosure.¹⁰³

Arguably, *Dura* has something for both sides of the bar.¹⁰⁴ According to Coffee, *Dura* favors plaintiffs in its suggestion that price inflation can be recovered when the stock fails to rise and in its relaxed pleading standard for proximate causation.¹⁰⁵ On the other hand, Coffee also asserts that the real significance of *Dura* is that defendants can now scale back the class at the outset of litigation, thereby improving their position in settlement negotiations.¹⁰⁶ Prior to *Dura*, individuals who purchased and sold shares for a loss during the class period, but prior to any corrective disclosure, could litigate their loss as part of the damages determination.¹⁰⁷ *Dura* explicitly disallows any stock price decline that precedes a corrective announcement by a defendant.¹⁰⁸ As a result, plaintiffs have smaller potential damages estimates that translate into less leverage during settlement negotiations. Generally, plaintiffs have a large economic incentive to plead the longest class period, typically encompassing the date when the issuer's share price peaked, so that

plead loss causation as an independent basis for dismissing plaintiffs' claims); *Lopes v. Vieira*, 543 F. Supp. 2d 1149, 1193 (E.D. Cal. 2008) (concluding that "our holding about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed to adequately *allege* these requirements") (emphasis in original); *60223 Trust v. Goldman, Sachs & Co.*, 540 F. Supp. 2d 449, 451 (S.D.N.Y. 2007) (granting motion to dismiss on the ground that the complaint fails to adequately plead loss causation).

101. Spindler, *supra* note 21, at 665.

102. *Id.* at 671.

103. *Id.* at 672-73.

104. Coffee, *Something for Everyone*, *supra* note 2 (concluding that "Dura Pharmaceuticals is a decision that has something for everyone").

105. *Id.* (mentioning the Court's dictum in which they do not consider the case where a share's higher price is lower than it would otherwise have been creates the danger of "phantom losses").

106. John C. Coffee, Jr., *Litigation: New Doctrine Spawns New Tactics*, 235 N.Y. L.J. 5 (2006) [hereinafter Coffee, *Litigation*].

107. *Id.*

108. *See, e.g.*, Rosen, *supra* note 100, at 2043 (noting that "a plaintiff must plead and prove that 'the truth became known' *before* the stock price drop from which the plaintiff claims a loss").

the plaintiff class is maximized.¹⁰⁹ Such a tactic increases potential damages estimates and provides greater leverage in settlement discussions. But as *Dura* recognized, the longer the period between the purchase and sale, the more likely that the alleged loss may be due to other factors.¹¹⁰

IV. HYPOTHESES

A. Filings

In theory, class actions ameliorate the collective action problem confronting shareholders.¹¹¹ Rather than pursue individual actions, which can be prohibitively expensive, the class can pursue a single action.¹¹² Strong pressure from both plaintiffs and defendants to settle has caused some commentators to argue that plaintiffs' attorneys have a strong incentive to file frivolous lawsuits,¹¹³ even when the expected value of litigation is negative.¹¹⁴ The large market capitalizations of many firms combined with high trading volumes can lead to potentially high damage awards and provides further incentive to plaintiffs' counsel to pursue numerous class actions annually.¹¹⁵

This study does not delve into specific allegations in an attempt to distinguish cases with merit from those that are frivolous. The determination of a lawsuit's merit or frivolity is difficult to assess, in part because plaintiffs' attorneys are not likely to admit to filing frivolous lawsuits.¹¹⁶ Frivolous suits, often referred to as "strike suits," are defined by the Court as an action that is brought "not to redress real [corporate] wrongs, but to realize upon their nuisance value" through settlement.¹¹⁷ As noted in *Dura*, these largely

109. *Id.* at 2048 (which "[n]ot only yields a class that is larger in absolute terms . . . but the longer class period will often encompass the date when the issuer's share price was at its peak").

110. *See id.*; *Dura*, 544 U.S. at 342-43 (noting that "when the purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions or other events, which taken separately or together account for some or all of that lower price").

111. Steven J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1466 (2004).

112. *Id.*

113. *Id.*

114. *See* Lucian A. Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 437 (1988) (noting that "the negative expected value of litigation might not deter the plaintiff from suing"); Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 25 (1990) (concluding that "[b]ecause the defendant does not know whether a given lawsuit is frivolous or genuine, he may choose a strategy that leads to the settlement of frivolous claims").

115. Choi, *supra* note 111, at 1467.

116. *Id.* at 1477 & n.36.

117. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949).

groundless claims represent no more than an “*in terrorem* increment of the settlement value”¹¹⁸ “in which the plaintiffs have no expectation of finding any evidence of fraud or culpability on the part of defendants.”¹¹⁹ Tests of the incidence of frivolous litigation have focused on a number of indirect measures such as the use of event studies, examining corporate governance changes, and exploration of the filing of suit and settlement outcomes.¹²⁰ The present study uses the latter method, similar in some respects to a 2003 study by Bajaj, Muzumdar, and Sarin that provided analysis of summary statistics related to securities filing and settlement data to examine trends following the passage of the PSLRA.¹²¹

Bajaj et al. examined both filing and settlement data obtained from *Securities Class Action Alert* from 1988 to 1999.¹²² Using a sample of 2,167 federal court securities filings, the Bajaj study found that federal court filings dropped immediately following the passage of the PSLRA.¹²³ Markedly, federal court filings went from 191 in 1995 down to 119 filings in 1996, a 39% decline in one year.¹²⁴ These results “are consistent with the hypothesis that post-PSLRA, plaintiffs’ attorneys shifted their focus toward cases where fraud is more easily proven, avoiding more ambiguous instances of fraud that may cost more to prosecute and face a higher risk of dismissal pursuant to the heightened pleading requirements under the PSLRA.”¹²⁵

With respect to class action filings, this study hypothesizes that post-*Dura* plaintiffs’ attorneys have again narrowed their focus to cases with market corroboration in the form of a price decline subsequent to a corrective disclosure. As such, it is likely that the number of frivolous filings, and thus

118. *Dura*, 544 U.S. at 347.

119. Choi, *supra* note 111, at 1466.

120. See generally Choi, *supra* note 111, at 1477-99. See, e.g., D. Katherine Spiess et al., *The Private Securities Litigation Reform Act of 1995: The Stock Market Casts its Vote . . .*, 18 MGMT. DEC. ECON. 545, 554 (1997) (finding that an entire sample of firms experienced a significant negative abnormal return on December 18, 1995, a date that corresponded to rumors that President Clinton would veto the PSLRA); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation*, 7 J.L. ECON. & ORG. 55 (1991) (testing the hypothesis that litigation acts as an ex-post mechanism to discipline managers of companies with relatively weak ex-ante corporate governance control); James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903 (1996) (using regression analysis to test whether the incidence of litigation as well as settlement outcomes are driven by factors related to the merits of the litigation).

121. Mukesh Bajaj et al., *Securities Class Action Settlements*, 43 SANTA CLARA L. REV. 1001, 1002-03 (2003).

122. *Id.* at 1003.

123. *Id.*

124. *Id.*

125. See Choi, *supra* note 111, at 1496.

the total number of class action filings, have declined following the Court's decision. These anticipated declines are most likely to occur in jurisdictions, like the Ninth Circuit, that permitted a relaxed pleading standard for loss causation.

Dura moves exclusively to an *ex post* loss rule, which James Spindler posits may result in fewer frivolous lawsuits being filed, since claims unaccompanied by hard market evidence of price declines are readily dismissible.¹²⁶ And while *Dura*'s standard is suited to reduce the impact of frivolous litigation, the decision also may have chilled meritorious cases;¹²⁷ this is because *Dura* raises the expected costs of litigation while diminishing the probability of success, thereby diminishing the number of cases in which the expected return will justify filing suit.¹²⁸ Since the stricter pleading requirements would reduce the amount of preparation later needed at trial, the *Dura* rule does not necessarily change the total cost of litigation for genuine plaintiffs.¹²⁹ In other words, costs initially incurred by plaintiffs with meritorious claims would arguably result in reduced costs needed in the eventual preparation for trial. Total costs of litigation stay the same; the stricter requirement simply increases the fraction of total costs initially incurred.¹³⁰ A model by Avery Katz found that increasing the fraction of total litigation costs incurred when filing (one result of stricter proof and pleading requirements) results in a reduction of "strike" or frivolous suits.¹³¹ Settlement becomes more frequent as costs are shifted toward the beginning of the lawsuit,¹³² as the *Dura* holding arguably does. Thus, a stricter pleading rule, like the one in *Dura*, has no effect on total expected costs because such a rule reduces the number of strike suits and trials, increases the costs in all suits that settle before trial, and the three effects balance precisely.¹³³

126. Spindler, *supra* note 21, at 665-66.

127. See, e.g., Choi, *supra* note 111, at 1472.

128. *Id.* (noting that this is especially true for companies that have small market capitalizations). The stricter pleading requirement forces plaintiffs to engage in a higher degree of preparation before filing suit. For example, in cases where price falls prematurely, after the false statement but prior to any corrective statement made by the company, plaintiffs' counsel will have to employ more careful pleading. Another example requiring more care and preparation before filing would occur where the market does not react, or reacts modestly after the corrective announcement, followed later by a larger price decline. *Dura* thus arguably raises the cost of bringing frivolous claims relative to valid ones and may raise the average merit of cases brought. See, e.g., Katz, *supra* note 114, at 16; Coffee, *Litigation*, *supra* note 106, at 1.

129. Katz, *supra* note 114, at 16.

130. *Id.*

131. *Id.* at 17.

132. *Id.*

133. *Id.*

B. Settlements

Private securities class actions produce strong incentives for both sides to avoid trial.¹³⁴ Cases that survive pretrial dismissal tend to be settled.¹³⁵ In other words, plaintiffs need only survive a motion to dismiss to gain financial reward.¹³⁶ Accordingly, there is a very real incentive for plaintiffs to file strike suits. Professor Coffee suggested that if the Ninth Circuit's *Broudo* rule had been affirmed by the Supreme Court, more specifically Professor Fox's interpretation of it, it would have been "adverse to defendants and would have raised the settlement value of securities class actions."¹³⁷ In expanding upon that argument, Professor Coffee claims that "to the extent causation is presumed based only on a showing of materiality, the likelihood grows that cases will settle for substantial recoveries where the actual cause of the stock market decline [is] unrelated."¹³⁸ He contends that such costs would fall like a tax on all shareholders as unfocused deterrence would do more harm than good.¹³⁹

As a reference point, the Bajaj et al. study on PSLRA settlements¹⁴⁰ found that the fraction of cases settling within 4 years of the filing date dropped from 57.59% pre-PSLRA to 26.06% after the passage of the Act, a 55% decline.¹⁴¹ The lower frequency of quick settlements post-PSLRA arguably provides some evidence that frivolous suits were reduced because of the enactment of the legislation.¹⁴² In further examination of settlement amounts, Bajaj et al. found higher mean and median settlement amounts post-PSLRA.¹⁴³

134. See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlement in Securities Class Actions*, 43 STAN. L. REV. 497, 528 (1991) (noting that substantive and procedural rules, relationships among the parties, the lawyers on both sides, and the insurance carriers all encourage settlement of securities law class action suits).

135. Coffee, *Phantom Losses*, *supra* note 10, at 540.

136. See, e.g., Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064 (1995) (noting that "if a class action survives motions to dismiss and motions for summary judgment, though, it is practically certain to result in a fee award to the attorneys for the plaintiff class").

137. Coffee, *Phantom Losses*, *supra* note 10, at 540.

138. *Id.* at 543.

139. *Id.*

140. See Bajaj et al., *supra* note 121, at 1012-31.

141. *Id.* at 1010.

142. See Choi, *supra* note 111, at 1497.

143. *Id.* at 1022-23 (noting that "the mean settlement amount for the pre-PSLRA period is \$8.01 million, compared to \$18.09 million in the post-PSLRA period. Similarly, the median settlement is \$3.5 million in the pre-PSLRA period compared to \$4.24 million in the post-PSLRA period") (citation omitted).

Additionally, the mean and median settlement amounts increased as the amount of time between filing and settlement increased.¹⁴⁴ Cases settling within one year of filing, possibly representing frivolous suits, thus tended to settle for the lowest amount of money.¹⁴⁵ Such a finding supports the hypothesis that defendants settle such suits quickly to rid themselves of the nuisance and associated costs of defending such a suit.¹⁴⁶

Predicting similar findings, this study hypothesizes a drop in the number of frivolous settlements following the *Dura* decision. More specifically, a proxy for frivolous settlements—i.e., cases settling for smaller amounts relatively quickly—should decline. Accordingly, this hypothesis would result in an increase in the average and median settlements post-*Dura*, a reduction in the number of smaller settlements, and a decline in the number of filings settling relatively quickly.

V. SAMPLE SELECTION

The federal filings data in this study come from the Stanford Law School *Securities Class Action Clearinghouse* (“Clearinghouse”) in cooperation with Cornerstone Research.¹⁴⁷ The Clearinghouse maintains an index of filings of named issuers in federal class action securities fraud lawsuits since the passage of the PSLRA.¹⁴⁸ This study examines the 4-year period¹⁴⁹ surrounding the April 2005 *Dura* decision, a “classic” filing as defined by the Clearinghouse.¹⁵⁰ “Classic” cases exclude “IPO Allocation,” “Analyst,” and “Mutual Fund” filings.¹⁵¹ This subset was chosen because the original *Dura* complaint, filed January 27, 1999 in the Southern District of California, was

144. *Id.* at 1012.

145. *See* Choi, *supra* note 111, at 1497.

146. *Id.*

147. The Stanford Law School Securities Class Action Clearinghouse in cooperation with Cornerstone Research, <http://securities.stanford.edu/> (last visited Feb. 4, 2008). “The Stanford Law School Class Action Clearinghouse, in cooperation with Cornerstone Research, tracks the content of the first-identified class action complaints in addition to the level of filing activity.” The information is publicly available. *See also Securities Class Action Case Filings: 2007 A Year in Review*, Cornerstone Research 2008, at 20, available at http://securities.stanford.edu/clearinghouse_research/2007_YIR/20080103-01.pdf.

148. *See* <http://securities.stanford.edu/>.

149. Data is limited to a two-year period before and after the decision due to restrictions on the settlement data requested from Cornerstone Research by the author. At the time of the request, settlements data was only available through April 2007. To maintain consistency with the filings data, it too is limited to 2 years before, and after the decision.

150. *See* <http://securities.stanford.edu/>.

151. *Id.*

classified by the Clearinghouse as a “classic” case. As Table 1 demonstrates, there were 119 “classic” federal securities class actions filed from April 20, 2003 through the end of 2003, 215 filed in 2004, 178 in 2005, 116 in 2006, and 39 filed in 2007 through April 19, 2007.¹⁵² Thus, the initial filing sample for the 4-year period surrounding the *Dura* decision (2 years prior, 2 years after) contains 667 filings for federal securities class actions.

TABLE 1
SECURITIES CLASS ACTION FILINGS

Time Period	Filings
4/20/03 - 12/31/03	119
1/1/04 - 12/31/04	215
1/1/05 - 12/31/05	178
1/1/06 - 12/31/06	116
1/1/07 - 4/19/07	39
Total	667

The settlements data come from a proprietary database prepared by Cornerstone Research, a consulting firm that provides economic and financial analysis in commercial litigation and regulatory proceedings.¹⁵³ Institutional Shareholder Services’ *Securities Class Action Services* (“SCAS”) originally identified the sample of cases prepared by Cornerstone Research.¹⁵⁴ Cornerstone has limited the larger set of cases identified by SCAS to cases alleging fraudulent inflation in the price of a corporation’s common stock (i.e., excluding cases filed by bondholders, preferred stockholders, etc.).¹⁵⁵ In addition, their database is limited to cases alleging Rule 10b-5, Section 11,

152. *Id.*

153. Cornerstone Research, <http://www.cornerstone.com/> (last visited Feb. 4, 2008).

154. Laura E. Simmons & Ellen M. Ryan, *Securities Class Action Settlements 2006 Review and Analysis*, Cornerstone Research, 2007, at 19, available at http://securities.cornerstone.com/pdfs/settlements_2006.pdf (explaining that “[i]n addition to the SCAS, data sources include Factiva, Bloomberg, the Center for Research in Security Prices at the University of Chicago, Standard & Poor’s Compustat, court filings and dockets, SEC registrant filings, SEC litigation releases and administrative proceedings, LEXIS-NEXIS, and the public press”).

155. *Id.*

and/or Section 12(a)(2) claims brought by purchasers of common stock.¹⁵⁶ Cornerstone assigns settlements to a particular year based upon the settlement hearing date.¹⁵⁷ In the instance of partial settlements, or installments, the settlement hearing date is the date the first settlement was approved unless the subsequent partial settlements are in excess of 50% of the then-current settlement fund total.¹⁵⁸ Under these circumstances, the settlement hearing date is the date that the subsequent partial settlement was approved.¹⁵⁹ Cornerstone tracks and gathers a multitude of qualitative and quantitative variables using data from a myriad of sources.¹⁶⁰ This paper focuses upon the magnitude and frequency of settlements surrounding the *Dura* decision using three variables: class action filing date, settlement hearing date, and settlement amount.

For the purposes of this study, the present settlements data set is limited to cases alleging Rule 10b-5 claims brought by purchasers of a corporation's common stock. This ensures homogeneity because *Dura* was a Rule 10b-5 case with a narrow holding that concerned only claims brought by purchasers of securities who pursue private securities fraud claims under the PSLRA based upon fraud-on-the-market claims.¹⁶¹ Limiting Cornerstone's settlements database to cases alleging Rule 10b-5 claims yields 398 cases with settlement hearing dates ranging from April 20, 2003 through April 19, 2007. The \$7.2 billion Enron and \$6.2 billion dollar WorldCom settlements were excluded from the analysis as they are the two largest settlements in history and would heavily skew the settlement averages presented here.

156. *Id.*

157. *Id.* at 1.

158. *Id.* at 20 n.5 ("For a settlement to be included in a more recent year, the subsequent partial settlement must be at least 50% of the original settlement.")

159. *Id.*

160. *Id.* at 19 ("In addition to the SCAS, data sources include Factiva, Bloomberg, the Center for Research in Security Prices at the University of Chicago, Standard & Poor's Compustat, court filings and dockets, SEC registrant filings, SEC litigation releases and administrative proceedings, LEXIS-NEXIS, and the public press.")

161. *E.g.*, Kaufman, *supra* note 28, at 42.

VI. SUMMARY STATISTICS AND EMPIRICAL RESULTS

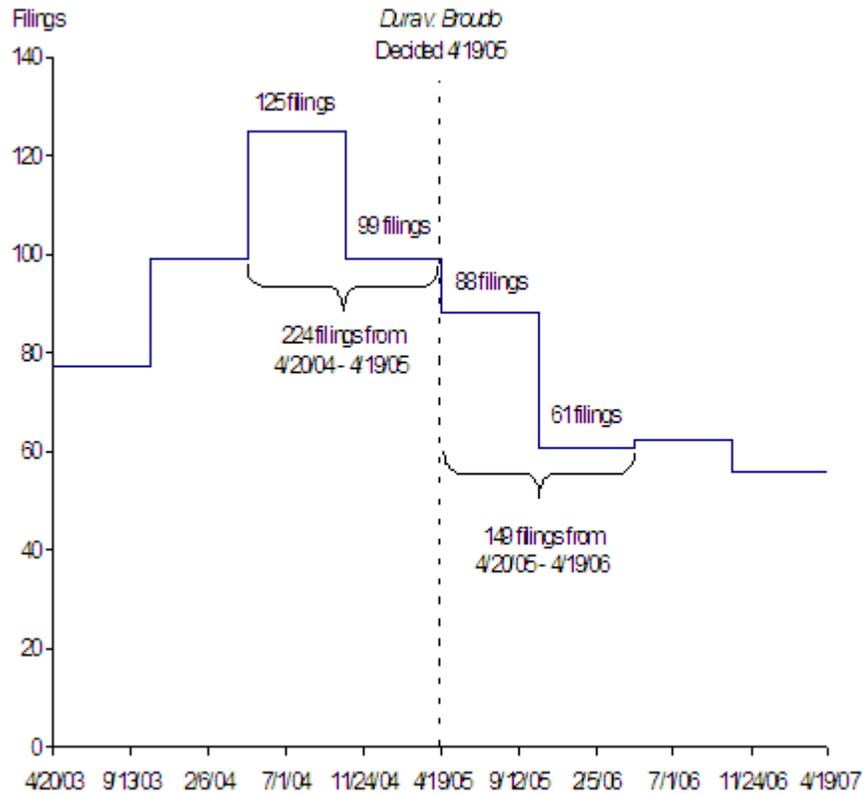
A. Filings

During the pre-*Dura* time period, from April 20, 2003 through April 19, 2005, 400 classic¹⁶² securities class actions were filed using data from the Clearinghouse. During the post-*Dura* period, from April 20, 2005 through April 19, 2007, 267 classic securities class actions were filed, a decline of more than 33% from the corresponding period. As Figure 1 demonstrates below, there were 224 filings in the year preceding *Dura*, and just 149 filings the year after the decision. More specifically, there were 125 filings from April 20, 2004 through October 19, 2004, 99 filings from October 20, 2004 through April 19, 2005, 88 filings from April 20, 2005 through October 19, 2005, and 61 filings from October 20, 2005 through April 19, 2006. Generally, aggregate 6-month filing rates exhibit an upward trend from April 2003 through late 2004 before declining slightly prior to the *Dura* decision and continuing to trend downward over the next two years. The decline prior to the decision is likely explained by the progression of the case, beginning with the Court granting the petition for writ of *certiorari* on June 28, 2004.¹⁶³

162. "Classic," as defined by the Clearinghouse. See *supra* text accompanying notes 150-51.

163. *Broudo v. Dura Pharm., Inc.*, 339 F.3d 933 (9th Cir. 2003), *cert. granted*, 542 U.S. 936 (June 28, 2004), *rev'd*, 544 U.S. 336 (2005).

FIGURE 1
SECURITIES CLASS ACTION FILINGS
TOTAL FILINGS AGGREGATED EVERY 6 MONTHS



Despite commentary that *Dura*'s loss causation standard should prove inconsequential because it is easily satisfied,¹⁶⁴ federal filings data demonstrates otherwise. Using the same Clearinghouse data incorporated in Figure 1, Table 2 explores the number of class action filings two years, one year, and six months before and after *Dura*, contrasting the comparable periods. For each of the respective periods, the number of federal filings declined.

164. Kaufman, *supra* note 28, at 5-6 ("Even in those cases in which *Dura* does apply, the Court's new loss causation standard will prove to be inconsequential because that standard can be easily satisfied. . .").

TABLE 2¹⁶⁵
SECURITIES CLASS ACTION FILINGS
PRE- AND POST-DURA

Time Period	Filings	Decline from Corresponding Period
t - 2 years	400	
t - 1 year	224	
t - 0.5 year	99	
t + 0.5 year	88	-11.11%
t + 1 year	149	-33.48%*
t + 2 years	267	-33.25%***

Table 2 indicates that *Dura* has had a statistically significant impact on the overall number of class actions filed, reducing filings by a third for the one and two year time frames.¹⁶⁶ Figure 1 and Table 2 collectively indicate, *ceteris paribus*, that *Dura* has caused a reduction in the number of securities class actions filed by plaintiffs' attorneys. These results support the hypothesis that post-*Dura* plaintiffs' attorneys have shifted focus, avoiding more ambiguous instances of fraud.¹⁶⁷ In other words, it is likely that the *Dura* rule is resulting in the avoidance of cases lacking market corroboration in the form of a price

165. Where $t = 4/19/2005$, the date of the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). The decline column compares the six months before with the six months after the decision, one year before with one year after, and two years before with two years after the decision.

166. To test whether the average monthly filings during the pre- and post-*Dura* periods are statistically similar I set up the hypothesis that the mean score is identical for the two populations, in other words that the difference between the average number of monthly filings before and after the decision is equal to zero. Two-tailed, two-sample with equal variance *t*-tests comparing means of monthly filing data between the pre- and post-*Dura* time frames proved significant at $p < 0.05$ (*) and $p < 0.001$ (***) for the one and two year time frames, respectively. *p*-value, or probability value, is a number that reflects the likelihood that statistical results have occurred by chance. Results with *p*-values equal to or less than .05 (*), .01(**) or .001(***) are labeled as statistically significant. See generally DUNCAN CRAMER, BASIC STATISTICS FOR SOCIAL RESEARCH 180-89 (1997).

167. See *supra* Part IV.

decline that would face a higher risk of dismissal pursuant to the enhanced pleading requirements mandated by the Supreme Court.¹⁶⁸

The majority of federal cases filed during the present study occurred in the Ninth Circuit, followed by the Second Circuit. Table 3 shows the severe decline in Ninth Circuit filings that immediately followed *Dura*.

TABLE 3¹⁶⁹
SECURITIES CLASS ACTION FILINGS
PRE- AND POST-*DURA*
NINTH CIRCUIT

Time Period	Filings	Decline from Corresponding Period
t - 2 years	114	
t - 1 year	77	
t - 0.5 year	34	
t + 0.5 year	9	-73.53%*
t + 1 year	19	-75.32%**†
t + 2 years	56	-50.88%**†

In the Ninth Circuit, 114 securities class actions were filed from April 20, 2003 through April 19, 2005 (the pre-*Dura* period). From April 20, 2005 through April 19, 2007 (the post-*Dura* period), only 56 class actions were filed in the Ninth Circuit, a decline of more than 50% from the corresponding time period. Strikingly, in the six months prior to *Dura*, there were 34 securities class action filings in the Ninth Circuit. In the six months following the Court's holding, which overturned the Ninth Circuit's relaxed pleading requirement, the number of filings dropped by 73.53% to just 9. Comparisons of the monthly filings rate during the pre- and post-*Dura* time periods shows

168. See Choi, *supra* note 111, at 1496.

169. See *supra* note 165.

that the six month, one year, and two year declines in the number of filings were all statistically significant.¹⁷⁰

Table 4 provides data for the Second Circuit to be compared with the data in Table 3 for the Ninth Circuit. Clearinghouse data shows that filings in jurisdictions employing strict pleading standards prior to *Dura*, like the Second Circuit,¹⁷¹ appear to have continued as if little had changed.¹⁷²

TABLE 4¹⁷³
SECURITIES CLASS ACTION FILINGS
PRE- AND POST-*DURA*
SECOND CIRCUIT

Time Period	Filings	Decline from Corresponding Period
t - 2 years	88	
t - 1 year	52	
t - 0.5 year	27	
t + 0.5 year	21	-22.22%
t + 1 year	36	-30.77%
t + 2 years	65	-26.14%

170. Two-tailed, t-tests for two samples with unequal variance were significant at $p < 0.05$ (“*”), $p < 0.01$ (“**”), and $p < 0.01$ (“***”) for the six month, one year, and two year time frames, respectively. In addition, F tests, used to return the one-tailed probability that the variances in monthly filings data are not significantly different, find that the variance in the number of monthly filings in the pre- and post-*Dura* time periods are significantly different at $p < 0.01$ (“**”), and $p < 0.001$ (“***”) for the one year and two year time frames, respectively. See generally DUNCAN CRAMER, ADVANCED QUANTITATIVE DATA ANALYSIS 146-50 (2003).

171. E.g., *Emergent*, 343 F.3d at 198 (“[I]nflation of purchase price alone cannot satisfy loss causation.”).

172. Additional support for this interpretation is sustained by filings data for the Eleventh and Third Circuits (discussed *supra* Part II.A), which both experienced increases or no change in the number of class actions filed in comparing the pre- and post-*Dura* 6 month and one year time periods. The Third Circuit had 8 “classic” filings in the six months prior to *Dura*, 11 in the six months after the decision. There were 18 filings in the year prior to the decision and 18 in the year following the decision. The Eleventh Circuit had similar results, 1 filing in the 6 months preceding the decision, and 7 filings in the six months afterward. There were 12 filings the year prior to the decision and 13 the following year. Both Circuits experienced declines in comparisons of the two-year period. See Appendix.

173. See *supra* note 165.

Generally, the number of federal filings has decreased in most circuits in the two years following the decision.¹⁷⁴ However, the Second Circuit's application of loss causation doctrine embraced in *Dura*, prior to the decision, did not produce as severe declines as the Ninth Circuit. Statistical tests establish that none of the declines for the Second Circuit was statistically significant in comparing the difference in means or variance of monthly filings data.

B. Settlements

As Table 5 displays, analysis of settlements data for the 4-year time period surrounding the *Dura* decision shows that the fraction of cases settling within 3 years of the original filing date decreased 14.46% post-*Dura*.¹⁷⁵ To the extent that defendants settle frivolous lawsuits to avoid the high cost of defending such actions, those settlements should occur relatively quickly after the filing of a suit.¹⁷⁶ From the data, one could infer that the Court's explicit concern with strike suits, which arguably factored into the calculus of the *Dura* decision, may have suppressed the filing of some frivolous litigation.

TABLE 5
SECURITIES CLASS ACTIONS SETTLED WITHIN 4 YEARS OF FILING
FOR THE TWO YEARS PRE- AND POST-*DURA*

Time from Filing to Settlement	% of Total Cases Settled Pre-<i>Dura</i>	% of Total Cases Settled Post-<i>Dura</i>	Difference
Within 3 Years	50.26%	43.00%	-14.46%
Within 4 Years	69.11%	64.73%	-6.33%

In addition, the mean and median settlement amounts increased as the amount of time between filing and settlement increased. Cases settling within the first few years of filing, possibly representing frivolous suits, thus tend to settle for the lowest amount of money.¹⁷⁷ The findings in Tables 5 and 6

174. Exceptions for the two-year time frame include the Fourth, Eighth, Tenth, and DC Circuits, all of which represent a small proportion of total filing activity. See Appendix.

175. Cases settling within four years of the filing date dropped by 6.33%.

176. See Choi, *supra* note 111, at 1496-97.

177. *Id.* at 1497 ("... cases settling within one year of the filing date, representing potentially

support the hypothesis that defendants settle these suits quickly to rid themselves of the nuisance and associated costs of defending such suits.¹⁷⁸ The higher total average and median settlements post-*Dura* could stem from an overall decline in frivolous, or negative expected value suits, which have been shown to reduce the settlement amounts offered to plaintiffs with positive expected value suits and consequently increases the proportion of those suits that go to trial.¹⁷⁹ The average settlement for the 2-year pre-*Dura* period was \$29.13 million. The average settlement for the same period, post-*Dura*, was \$64.52 million, a statistically significant increase.¹⁸⁰

frivolous suits, settled for the lowest amount of money, which supports the hypothesis that defendants settle such suits quickly to rid themselves of the nuisance of defending the suit”).

178. *Id.*

179. Bebhuk, *supra* note 114, at 441.

180. Two-tailed, *t*-tests for the two samples with unequal variance were significant at $p < 0.05$ (“**”) for the two-year period. In addition, an F test finds that the variance in the settlement amounts for the 2 years pre- and post-*Dura* are significantly different at $p < 0.001$ (“***”). See *supra* note 170.

TABLE 6
SECURITIES CLASS ACTION SETTLEMENTS
FOR THE TWO YEARS PRE- AND POST-*DURA*

Time from Filing to Settlement	Pre- <i>Dura</i>			Post- <i>Dura</i>		
	Cases Settled	Average Settlement (millions)	Median Settlement (millions)	Cases Settled	Average Settlement (millions)	Median Settlement (millions)
0 - 1 year	1	\$1.70	\$1.70	1	\$9.00	\$9.00
1 - 2 years	30	\$15.82	\$5.28	32	\$8.19	\$3.16
2 - 3 years	65	\$27.56	\$6.00	56	\$45.45	\$6.88
3 - 4 years	36	\$33.15	\$8.11	45	\$118.84	\$7.00
4 - 5 years	26	\$34.91	\$5.99	38	\$40.17	\$8.88
5 - 6 years	23	\$47.74	\$7.00	19	\$118.06	\$15.00
6 - 7 years	7	\$12.39	\$4.50	4	\$312.63	\$101.50
7 - 8 years	3	\$3.67	\$2.50	8	\$18.97	\$12.03
8 - 9 years	0	-	-	1	\$10.50	\$10.50
9 - 10 years	0	-	-	2	\$4.15	\$4.15
10 - 11 years	0	-	-	1	\$0.75	\$0.75
Total	191	\$29.13	\$6.33	207	\$64.52	\$7.00

Generally, the average and median settlements also increased post-*Dura* for each of the periods demonstrated above. Near the 7-year mark after the original filing, however, settlement amounts tend to decline significantly; this implies a ceiling with regard to length of litigation resulting in monetary returns for class members. One possible explanation, despite larger litigation costs as a result of the longer time-frame, may be that both parties tend to realize a lower probability of the suit having a positive expected value,

resulting in a drop in the amount that the plaintiff can extract.¹⁸¹ Changes in relative uncertainty and informational asymmetry over longer periods of time may somehow favor defendants. This might be the case because either the chances of winning at trial are small or because the expected judgment is small relative to the expended litigation costs, and both parties have come to such a conclusion.¹⁸²

Lastly, Table 7 demonstrates the number of settlements occurring in the lower dollar amounts, ten million dollars and less. Remarkably, almost every settlement category was reduced in comparisons of the 2 years before and after the Court's decision. Most notably there were 18 settlements in the two years preceding *Dura* that settled for \$1 million or less of 191 total settlements. Following the Court's opinion, there were only 14 similar settlements out of 207 total settlements, a 28.23% decline in the fraction of cases settling for less than one million dollars.

181. See Bebchuk, *supra* note 114, at 440-41 (suggesting that the "higher the probability attached by the defendant to the suit being a PEV suit, and the greater the defendant's litigation costs, then the greater the amount that the plaintiff will succeed in extracting").

182. See *id.* at 437.

TABLE 7
SECURITIES CLASS ACTIONS BY SETTLEMENT AMOUNT
PRE- AND POST-*DURA*

Less than or Equal to Settlement Amount	% of Total Cases 2 Years before <i>Dura</i>	% of Total Cases 2 Years after <i>Dura</i>	Difference
\$1,000,000	9.42%	6.76%	-28.23%
\$2,000,000	16.75%	16.43%	-1.96%
\$3,000,000	25.65%	25.60%	-0.20%
\$4,000,000	32.98%	33.82%	2.52%
\$5,000,000	41.88%	40.58%	-3.12%
\$6,000,000	48.69%	47.34%	-2.77%
\$7,000,000	55.50%	51.21%	-7.73%
\$8,000,000	59.16%	55.07%	-6.91%
\$9,000,000	62.83%	57.97%	-7.73%
\$10,000,000	65.97%	59.90%	-9.19%

These relatively small settlement values may well represent a sample of “largely groundless claim[s]” that the *Dura* holding sought to prevent, representing no more than an “*in terrorem* increment of the settlement value.”¹⁸³ Under that assumption, *Dura* appears to have reduced the filing of strike suits, by weeding out such cases at the pleading stage. This result is consistent with Katz’s model, discussed *supra* Part IV.A, in that *Dura*’s enhanced pleading requirements increase the fraction of total litigation costs incurred when filing, resulting in a reduction of strike or frivolous suits (i.e., those with extremely low or negative expected settlement values).¹⁸⁴ The settlements data in the aggregate supports the hypothesis that *Dura* has likely

183. *Dura*, 544 U.S. at 347-48 (internal citation omitted).

184. Katz, *supra* note 114, at 17.

reduced the number of frivolous settlements resulting in an increase in the average and median settlements post-*Dura*, a reduction in the number of filings settling relatively quickly, and fewer settlements under ten million dollars.

VII. CONCLUSION

Filings and settlements data for securities class actions indicate that *Dura* was anything but inconsequential.¹⁸⁵ Rather, empirical evidence finds that the decision, *ceteris paribus*, has had a statistically significant impact on both ends of the securities litigation process. Post-*Dura* the number of class action filings has declined, the average settlement amount has increased, and the number of lower and relatively quick settlements has declined. As an indirect measure or proxy for strike suits, these results collectively indicate that the decision has reduced the amount of frivolous class action securities litigation.

Potential avenues for future research include event studies of firms involved in pending 10b-5 class action litigation to determine if they experienced a positive return as a result of the Court's April 2005 decision.¹⁸⁶ In addition, examination of disclosure-related losses with respect to filings may lend support to the proposition that plaintiffs' attorneys appear to be avoiding cases lacking market corroboration in the form of a price decline as a result of the *Dura* rule.

Like the PSLRA before it, *Dura* seeks to reduce abusive litigation and coercive settlements,¹⁸⁷ and this study indicates that the decision seems to be working. Plaintiffs can no longer merely allege that a defendant's misrepresentations caused the price of a security to be artificially inflated and succeed in extracting settlement, as cases are easily dismissed that do not plead a market decline following a corrective disclosure. While findings reveal conclusively that the number of federal securities class actions has declined post-*Dura*, the possibility exists that the decision may also have chilled some meritorious litigation.¹⁸⁸ As a result, what seemed to be simply

185. *Contra* Kaufman, *supra* note 28, at 1.

186. *See, e.g.*, Marilyn F. Johnson et al., *Shareholder Wealth Effects of the Private Securities Litigation Reform Act of 1995*, 5 REV. ACCT. STUD. 217 (2000) (investigating the reaction of stock prices to the enactment of the PSLRA).

187. *See Dura*, 544 U.S. at 347; THOMAS BLILEY, SEC. LITIG. REFORM CONF. REP., H.R. CONF. REP. No. 104-369, at 2, 23 (1995).

188. In certain circumstances, the expected return of pursuit does not exceed the expected costs that warrant filing against some companies that may have engaged in fraud. *Cf. Choi, supra* note 111, at 1472 (discussing how the PSLRA may have reduced the impact of frivolous litigation while possibly also acting

a “Pyrrhic Defeat” for plaintiffs may have in fact been more real and less symbolic than initially anticipated.¹⁸⁹ The question is whether the benefit of imposing the loss causation requirement of a drop in price at the time of disclosure is worth the cost of blocking arguably meritorious suits.¹⁹⁰ The Court in *Dura* decided that it is.¹⁹¹

to chill meritorious litigation).

189. *But see* Coffee, *Litigation*, *supra* note 106, at 1 (noting that *Dura* “initially seemed only a Pyrrhic Defeat for plaintiffs . . . more symbolic than real and has little real cost to the losing side”).

190. *See* Fox, *Demystifying Causation*, *supra* note 8, at 525.

191. *See Dura*, 544 U.S. at 347-48.

APPENDIX¹⁹²
SECURITIES CLASS ACTION FILINGS PRE- AND POST-DURA
TOTAL FILINGS BY CIRCUIT

Time Period	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC
t - 2 years	24	88	38	12	27	14	24	13	114	10	34	2
t - 1 year	8	52	18	6	17	9	11	6	77	7	12	1
t - 0.5 year	7	27	8	1	4	5	6	2	34	4	1	0
t + 0.5 year	5	21	11	5	5	5	4	9	9	6	7	1
t + 1 year	5	36	18	8	9	11	8	14	19	7	13	1
t + 2 years	11	65	26	12	19	12	9	17	56	11	26	3

192. Where $t = 4/19/2005$, the date of the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).