Pleading and Proving Loss Causation: Litigating Securities Fraud in a Post-*Dura* World

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In 2005, the U.S. Supreme Court handed down its first decision on federal securities laws in almost a decade. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), addressed the important issue of what a plaintiff must plead and prove to satisfy the "loss causation" element of securities fraud under the Securities and Exchange Act of 1934 (Exchange Act). By forcing plaintiffs to draw a causal connection between fraudulent acts or omissions and the subsequent loss, *Dura* demands that plaintiffs aver more than artificial price inflation. While *Dura's* transformative effect has been undeniable, it was only the beginning of the evolution of the significance of loss causation to the application of securities laws. Now, the loss causation analysis applies not only to the civil securities litigation practice, but also impacts alleged criminal securities violations as well. This article considers the approaches different circuits have taken in interpreting *Dura* and in applying it in five important areas: motions to dismiss, summary judgment, class certification, criminal sentencing, and expert testimony.

Motions to Dismiss

The first area in which loss causation has been vigorously applied is in motions to dismiss. Indeed, *Dura* itself interpreted loss causation in that context. The law concerning loss causation is easily described—a plaintiff must allege a sufficient connection between the revelation of truth following an alleged misstatement or omission to sufficiently plead loss causation. *See Dura,* 544 U.S. at 347 (stating that a complaint fails to allege loss causation if it does not "provide the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation . . ."). The Supreme Court in *Dura* stopped short, however, of identifying the extent to which plaintiffs must allege facts demonstrating loss causation to survive a motion to dismiss.

The post-*Dura* loss causation inquiry has been generally described as considering whether "the misrepresentations or omissions caused the harm." *See In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006 (9th Cir. 2005). It is clear that conclusory allegations of loss will not suffice. *See N.Y. City Employees' Retirement Sys. v. Jobs*, 593 F.3d 1018, 1024 (9th Cir. 2010) (affirming the dismissal of plaintiffs' Exchange Act claims on the ground that plaintiffs had failed to allege loss causation because plaintiffs' "dilution theory of economic loss"—whereby dilution "reduces a shareholder's percentage of ownership"—averred only inadequate "conclusory assertions of loss"); *see also Metzler Investment GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064 (9th Cir. 2008) (noting that *Dura* does not require a finding of fraud before loss causation can be properly pled, "[b]ut that does not allow a plaintiff to plead loss causation through 'euphemism' and thereby avoid alleging the necessary connection between defendant's fraud and the actual loss"); *see also Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 844 (7th Cir. 2007) (noting that the complaint must allege a "causal connection between the material misrepresentation and the loss . . . not simply that the misrepresentation 'touches upon' a later economic loss") (citing *Dura*, 544 U.S. at 342-43).

Beyond this, however, different circuits continue to grapple with the appropriate interpretation of the loss causation pleading standard set forth in *Dura*. At least one Ninth Circuit panel has adopted a plausibility standard. *See In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1056-58 (9th Cir. 2008) (holding that a more than three month gap between the time the alleged misrepresentation was revealed and a subsequent decline in stock price did not defeat loss causation because "so long as the plaintiff alleges facts to support a theory that is not facially implausible, the [district] court's skepticism [regarding the plausibility of plaintiffs' claims] is best reserved for later stages of the proceedings . . ."). *Gilead* indicates that, regardless of the temporal proximity of the misrepresentation and subsequent corrective disclosure, plaintiffs must plead facts linking the alleged misstatements to a decrease in share price so as to maintain a theory that is "not facially implausible." *See id.*

The Fifth Circuit has taken a similar approach by demanding that a plaintiff plead a "facially 'plausible' causal relationship between the fraudulent statements or omissions and plaintiff's economic loss." *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 258 (5th Cir. 2009) (requiring that plaintiff aver only "enough facts to give rise to a reasonable hope or expectation that discovery will reveal evidence of the foregoing elements of loss causation") (internal citations omitted).

Under the Second Circuit's more exacting "sufficient connection" loss causation pleading standard, plaintiffs must now aver facts tending to show a very close nexus between the alleged misstatement and the ultimate economic loss. *See* Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147, 157-58 (2d Cir. 2007) (affirming dismissal of Exchange Act claims on the ground that plaintiffs had failed to allege "a sufficient connection between [defendant's] misstatements and the losses suffered" because the third-party auditors' misstatements were less numerous and consequential than similar misstatements made by the company itself); *see also Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005) ("[I]f the connection is attenuated, or if the plaintiff fails to demonstrate a causal connection between the content of the alleged misstatements or omissions and the harm actually suffered, a fraud claim will not lie") (citations omitted).

Dura formulated the rule on pleading and proving loss causation, but the contours of the rule continue to be shaped. What is clear is that *Dura's* pleading requirements have resulted in the elimination of cases alleging only artificial inflation of stock price, without an actual loss tied to a disclosure. *Dura* also forces plaintiffs to allege the particular factual revelation of an alleged false statement or omission. As discussed below, even if a plaintiff's claims survive a motion to dismiss, the loss causation requirements will be in the cross-hairs of summary judgment and loss causation arguments.

Summary Judgment

Dura has also made surviving summary judgment more difficult for plaintiffs in securities fraud cases. That does not, however, mean that courts have adopted a uniform approach regarding the precise evidentiary showing required to establish loss causation.

The Second Circuit recently addressed loss causation analysis post-*Dura* in *In re Omnicom, Inc. Sec. Litig.*, 597 F.3d 501 (2d Cir. 2010). The facts and decision in that case demonstrate that plaintiffs will not survive summary judgment without establishing a strong causal link between an alleged fraud and their loss.[1] In that case, share prices fell in the wake of news coverage surrounding a director's resignation over aggressive accounting tactics. The Court found that "[f]irms are not required by the securities laws to speculate about distant, ambiguous, and perhaps idiosyncratic reactions by the press or even by directors." Accordingly, negative news coverage regarding the director's departure—and the investor reaction to that coverage which led to a drop in stock price—was too tenuously connected to the alleged accounting fraud to support liability because the facts leading to the resignation had been public for a year. 597 F.3d at 514.

The Ninth Circuit has not yet had occasion to fully explicate, in a reported opinion, the impact of *Dura* on private securities fraud claims in the summary judgment context.[2] Thus, *Dura*'s legacy remains to be written in that Circuit. District courts in the Ninth Circuit are clear, however, that the "failure to establish that the disclosure of the relevant wrongdoing played a significant role in a loss merits entry of summary judgment for failure to show loss causation." *In re Mercury Interactive Corp. Sec. Litig.*, No. 05-CV-03395, 2007 BL 210140, at *12 (N.D. Cal. July 30, 2007); *see also In re Oracle Corp. Sec. Litig.*, No. 01-CV-00988, 2009 BL 128989, at *26 (N.D. Cal. June 16, 2009) (finding that plaintiffs failed to establish a triable issue as to whether inflation of the company's earnings per share through a purported fraudulent memo "was a substantial cause of plaintiffs' loss"). A plaintiff may, however, survive summary judgment if the defendant is unable "to establish that, as a matter of undisputed fact, the depreciation in the value of the [stock] could not have resulted from the alleged false statement or omission of the defendant." *In re REMEC Inc. Sec. Litig.*, 702 F.Supp.2d 1202 (S.D. Cal. 2010) (citing *In re Motorola Sec. Litig*., 505 F. Supp. 2d 501, 550 (N.D. Ill. 2007)).

Even before *Dura,* the Seventh Circuit drew a clear line between loss causation and transaction causation, an issue which helped lead to the Supreme Court's decision to grant certiorari in *Dura*. *See, e.g.*, *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 683-84 (7th Cir. 1990); *see also Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648-49 (7th Cir. 1997). The Eleventh Circuit also recognized the clear difference between those concepts prior to the decision in *Dura*. *See Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997). Given *Dura*'s requirement that plaintiffs must establish loss causation—not just a misrepresentation, or reliance upon the misrepresentation, but a causal nexus between the misrepresentation and the actual loss suffered—it may be increasingly difficult for plaintiffs to establish liability for stock price drops against the backdrop of a volatile or down market. *See, e.g.*, *Ray v. Citigroup Global Markets, Inc.*, 482 F.3d 991 (7th Cir. 2007) (affirming summary judgment in favor of defendants because, despite plaintiffs' attempts to establish that a broker had omitted material facts and that investors had relied on the omission, the investment losses occurred at a time when the stock market as a whole was declining).

Class Certification

Dura has set off a vigorous discussion of the application of loss causation in the class certification context, and fractured circuit treatment may soon land the issue in the Supreme Court. Many of the more progressive decisions surrounding the loss causation principles set forth by *Dura* have come from the Fifth Circuit. In *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007), plaintiffs relied on the fraud-on-the-market theory in certifying a securities fraud class action based on alleged Exchange Act violations. The Court observed that a "certification order often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it." *Id.* at 267. Recognizing that certification was proper only if plaintiffs could demonstrate class-wide reliance under the fraud-on-the-market theory, the Fifth Circuit became the first to require "that loss causation [as an issue of predominance] must be established at the class certification stage by a preponderance of all admissible evidence." *Id.* at 264.

Recognizing that such a demanding pleading requirement would render the fraud-on-the-market theory impotent, the Fifth Circuit sought to temper *Oscar* in *Alaska Electric Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009). In *Alaska Electric*, the Court rejected a "fact-for-fact" disclosure requirement, in which the corrective disclosure specifically reveals the alleged fraud, and instead held that a plaintiff need only show that subsequent disclosures "reflect part of the 'relevant truth'—the truth obscured by the fraudulent statements." *Id*. at 230. Most recently, in *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010), the Fifth Circuit reaffirmed the principles set forth in *Oscar* and *Alaska Electric* by affirming the district court's denial of class certification on the grounds that plaintiffs failed to prove that the purported disclosures had a *corrective* effect linked to a specific misrepresentation as opposed to simply a *negative* effect. *Id.* at 338.

The Second Circuit has similarly considered loss causation principles in the context of motions for class certification but has largely disapproved of *Oscar*'s holding. *See, e.g., In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 483 (2d Cir. 2008) (holding that, at the class certification stage, "plaintiffs do not bear the burden of showing an impact on price" or loss causation to establish reliance)[3]; *see also In re Am. Int'l Group, Inc. Sec. Litig*., 265 F.R.D. 157, 181 (S.D.N.Y. 2010) (rejecting the argument that plaintiffs must establish loss causation to establish the fraud-on-the-market presumption and reliance at the class certification stage). Other district courts in the Second Circuit have comparably dismissed the *Oscar* decision as an outlier. *See, e.g., Darquea v. Jarden Corp.*, No. 06-CV-00722, 2008 BL 52930, at *7 (S.D.N.Y. Mar. 6, 2008) (noting that *Oscar* was "limited to the Fifth Circuit"); *Wagner v. Barrick Gold Corp.*, 251 F.R.D. 112, 119 (S.D.N.Y. Feb. 15, 2008) (finding that proof of loss causation is not a prerequisite for class certification and that *Oscar* is a "drastic" departure from the clear principles established in *Basic*).

Although the Ninth Circuit has not had occasion to rule on the application of *Dura* in the securities fraud class certification context, it has recently opined on the proper standards governing a district court's adjudication of a motion for class certification under Federal Rule of Civil Procedure 23. In *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 594 (9th Cir. 2010), the Ninth Circuit found that, "when considering class certification under Rule 23, district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims").[4] In reaching its ruling, the Ninth Circuit approved of the approach taken by the Third Circuit in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009). In that case, the Third Circuit overruled a district court's application of an improperly lax proof standard in its Rule 23 analysis and explained that "denying or granting class certification is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . ." *See id.* at 310 (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)).[5]

Consequently, the Ninth Circuit's apparent willingness to permit merit-based inquiries at the class certification stage (albeit expressed in the context of a labor case) has cast doubt on several pre-*Dukes* district court decisions disapproving of *Oscar* and its progeny as injecting "what is fundamentally a merits inquiry into the class-certification inquiry through the back door . . . ." *In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 530 (N.D. Cal. 2009) ("This order declines to adopt *Oscar's* loss-causation requirement for class certification. *Oscar* placed the Fifth Circuit in a minority—indeed, apparently solitary—stance among the circuits . . . and although the Ninth Circuit has yet to address the issue specifically in the context of class certification, this circuit's precedent strongly suggests it would reject such a rule."); *In re Micron Techs., Inc. Sec. Litig.*, 247 F.R.D. 627, 634 (D. Idaho 2007) ("*Oscar* has not been considered or adopted by the Ninth Circuit. It is unlikely that it would be adopted in this Circuit because it misreads *Basic*."); see also *In re Connetics Corp. Sec. Litig.*, 257 F.R.D. 572, 579 (N.D. Cal. 2009) (considering loss causation in the context of the Rule 23 predominance of common issues and affirming *LDK Solar and Micron* in finding that, at the class certification stage, the "lead plaintiff need show only that it traded on an efficient market"). It remains to be seen if, and the extent to which, *Dukes'* permissive treatment of merits-based inquiries will impact plaintiffs' burden to prove loss causation at the class certification stage.

In *Schleicher v. Wendt*, No. 09-CV-02154, 2010 BL 193632 (7th Cir. Aug. 20, 2010), the Seventh Circuit recently weighed in on the appropriate application of loss causation principles to class certification. Affirming the district court's certification of a securities fraud class, the Seventh Circuit expressly disapproved *Oscar's* "go-it-alone strategy" on the grounds that *Oscar's* holding "would make certification impossible in many suits." *Id.* at *13. Specifically, "[u]nlike the fifth circuit," the Seventh Circuit does "not understand *Basic* to license each court of appeals to set up its own criteria for certification of securities class actions or to 'tighten' Rule 23's requirements." *Id.* at *12. In fact, distancing itself from the Ninth Circuit's decision in *Dukes*, the Seventh Circuit placed even greater restrictions on the propriety of conducting merits-based inquiries into loss causation at the class certification stage. *Id.* at *11 (finding that "[u]nder the current rule [23], certification is largely independent of the merits . . . and a certified class can go down in flames on the merits"). The *Schleicher* decision only exacerbates the fractured state of cross-circuit treatment of the issue and makes clarification by the Supreme Court all the more likely.

Criminal Sentencing

The loss causation principles enumerated in *Dura* have also had a pronounced effect on sentencing in criminal securities fraud cases, especially where the amount of loss caused by the fraudulent activity is a driving consideration under the Federal Sentencing Guidelines. Just as in the class certification context, circuit interpretation of *Dura* in the criminal sentencing context is quite disparate and signals potential resolution in the Supreme Court.

Two Courts of Appeals have now explicitly imported the loss causation framework recognized in civil securities fraud cases to the criminal sentencing context. *See United States v. Olis*, 429 F.3d 540, 546-47 (5th Cir. 2005) (finding that "the civil damage measure should be the backdrop for criminal responsibility both because it furnishes the standard of compensable injury . . . and because it is attuned to stock market complexities" and reasoning that "there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines"); *see also United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007) (finding "no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly, to a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence"). *Id*.

Other circuits, while not explicitly adopting *Dura*, have opined that its loss causation principles would be applicable in the appropriate criminal sentencing context. *See United States v. Nacchio*, 573 F.3d 1062, 1071-75 (10th Cir. 2009) (noting that there must be a causal link between a criminal defendant's gain from the sale of stock and his "criminally culpable conduct" and that defendant's "increased prison sentence should be linked to the gain actually resulting from the offense, not to gain attributable to legitimate price appreciation and the underlying inherent value . . ." of the shares).

The Ninth Circuit, by contrast, has taken the minority—and perhaps less persuasive—position that *Dura* should not be extended to the criminal sentencing context. Specifically, in *United States v. Berger*, 587 F.3d 1038 (9th Cir. 2009), the Ninth Circuit expressly declined to apply "*Dura Pharmaceuticals'* civil principle to criminal securities fraud . . ." for sentencing enhancement purposes.

Id. at 1043. In that case, the Court rejected defendant's argument that the district court erred by failing to measure shareholder loss based on civil loss causation principles. The Court reasoned that *Dura's* reticence to allow loss calculation based on the overvaluation method was based on the requirement that a particular plaintiff establish his or her economic losses, and such a consideration is inapplicable in the criminal context, where the *aggregate* societal loss caused by the defendant's fraud—and not the extent of a harm to a particular individual—is operative. *Id.* at 1044. As a result, the Court declined to extend *Dura's* civil loss causation framework and instead reiterated only its broader rule that "[t]he Guidelines' 'relevant conduct' provision requires a defendant's sentence to be based on 'all harm that resulted from the acts or omissions' of the defendant." *Id.* (alteration in original) (internal citations omitted).

Expert Testimony

It has long been recognized that the complex and multi-faceted nature of market dynamics can pose difficulties for courts in analyzing stock price movements, and because "[m]any variables have the potential to and do affect a stock price. . . . expert testimony may be helpful because of the utility of statistical event analysis for this inquiry." *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005). However,the absolute requirement that loss causation be proven under *Dura* has enhanced reliance on expert testimony in effectively litigating and adjudicating securities fraud cases. Courts maintain that demonstrating loss causation in securities fraud cases "should not . . . be an exercise in *post hoc*, *propter hoc* logic." *Id.* Consequently, the event study—a regression analysis of the effect of a particular event on a stock's price—has emerged as "the tool most often used by experts to isolate the effect of a corrective disclosure on a stock price. . . ." *See In re Apollo Grp., Inc. Sec. Litig.*, No. 04-CV-02147, 2008 BL 169111, at *3 n.1 (D. Ariz. Aug. 4, 2008) (citation omitted).

While courts have long embraced the event study as a means of pinpointing stock price movement that is attributable to non-fraudulent factors, certain courts now require a comprehensive event study to be part of an expert's testimony. *Compare In re Imperial Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d. 1005, 1014 (C.D. Cal. 2003) (describing the event study as an "accepted method for the evaluation of materiality damages to a class of stockholders in a defendant corporation"); *with Fener v. Operating Engineers Constr. Indus. and Misc. Pension Fund (Local 66),* 579 F.3d 401, 409 (5th Cir. 2009) ("Although analyst reports and stock prices are helpful in any inquiry for securities fraud cases, the testimony of an expert—along with some kind of analytical research or event study—is required to show loss causation."); *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352, 364 (S.D.N.Y. 2009) (describing the event study as "almost obligatory").

Expert testimony has always been vitally important at the summary judgment phase. *Dura*, however, has also prompted the introduction of expert testimony during earlier stages of a securities fraud litigation. The Fifth Circuit in *Oscar* and the Third Circuit in *In re Hydrogen Peroxide* have indicated that competing expert testimony should be considered at the class certification stage. More recently, the Ninth Circuit's decision in *Dukes* has opened the door to greater merits-based analysis—and the related need for expert testimony—before certifying a class. As courts continue to resolve the extent to which merits-based inquiries are permitted (or required) at the class certification stage, securities litigators should remain sensitive to jurisdictional differences in determining how early, and with what force, to introduce expert testimony. So, too, should litigators consider using expert testimony to support arguments, such as refuting market efficiency by showing that a statement or event was not material. Indeed, market efficiency and loss causation may go hand-in-hand.

Outside the civil litigation context, *Dura* has led to increased reliance on expert testimony in criminal proceedings. *See, e.g.*, *United States v. Schiff*, 602 F.3d 152, 172 (3d Cir. 2010) (discussing how expert testimony can be helpful in assessing whether a particular disclosure was, in fact, the cause of a stock price drop). Indeed, lower share prices are not necessarily the result of alleged misrepresentations because there are multiple potential explanations for variations in stock price. *Id*. Thus, expert opinion can provide needed clarity for courts addressing difficult questions in complex securities actions.

Conclusion

After only five years, *Dura* has left an indelible mark on federal securities fraud cases in a variety of important contexts. While it is clear that pleading and proving securities fraud is now more difficult for plaintiffs, courts have not distilled a uniform approach to loss causation. As the cases above demonstrate, plaintiffs must now establish a causal link between the alleged fraud and their loss; beyond that, however, courts have and will continue to apply various methods to test the sufficiency of securities fraud claims.

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[1] It bears noting that in *Omnicom*, the Second Circuit raised the issue that "[u]se of the term 'loss causation' is occasionally confusing because it is often used to refer to three overlapping but somewhat different concepts." 597 F.3d at 509. Those concepts are (1) whether plaintiff relied upon the alleged misrepresentation, which is properly known as transaction causation; (2) the requirement that the wrong be a but-for cause or cause in fact of the losses suffered; and (3) whether events that are a cause-in-fact of losses are within the group of events that Section 10(b) was intended to prevent. *Id.* at 509-10.

[2] This does not mean that the Ninth Circuit has never addressed *Dura* in the summary judgment context. *Compare Mortensen v. Snavely*, No. 03-55547, 145 Fed. App'x 218 (9th Cir. 2005) (affirming district court grant of summary judgment where plaintiffs "failed to introduce the testimony of a qualified residuals valuation expert, or any other proof of an actionable misrepresentation or transaction or loss causation") *with Huberman v. Tag-It Pac. Inc.*, No. 07-55648, 314 Fed App'x 59 (9th Cir. 2009) (holding district court's entry of summary judgment improper where, in part, "drops in stock price directly followed the press releases that disclosed for the first time the extent of [defendant's] deteriorating financial condition.").

[3] In *In re Flag Telecom Holdings, Ltd. Securities Litig.*, 574 F.3d 29 (2d Cir. 2009), the Second Circuit affirmed the district court's order granting class certification of a single class of plaintiffs alleging claims under both the Securities Act of 1933 (Securities Act) and the Exchange Act. The Court rejected the defendants' argument that, under *Dura*, loss causation and negative causation add up to a "zero sum game" and that by establishing loss causation, the Exchange Act plaintiffs would necessarily undermine the Securities Act plaintiffs' ability to rebut the negative causation defense. *Id.* at 36. Decertification was not necessary because it is "not inconsistent with *Dura* to permit both the '33 and '34 Act Plaintiffs to proceed as a single class in establishing that each of the misstatements alleged in the complaint was the proximate cause of some portion of Plaintiffs' losses." *Id.* at 36-37.

[4] Importantly, the Ninth Circuit potentially narrowed the scope of such merits-based inquiries by stating that "district courts retain wide discretion in class certification decisions, including the ability to cut off discovery to avoid a mini-trial on the merits at the certification stage." *Dukes*, 603 F.3d at 594.

[5] Notably, the Ninth Circuit in *Dukes* noted the prevalence of securities fraud cases, especially the fraud-on-the-market presumption, in the evolution of class certification. *See Dukes*, 603 F.3d at 591 (citing *Oscar*, 487 F.3d at 264; *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 30-31 (2d Cir. 2006); *Bowe v. PolyMedica Corp*., 432 F.3d 1, 6-7 (1st Cir. 2005); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323-24 (5th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 364-66 (4th Cir.

2004); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937-38 (7th Cir. 2002)).