Dura Pharmaceuticals, Inc. v. Broudo: Not Really a Loss Causation Case

Jacob M. Kantrow
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I. INTRODUCTION

Imagine a situation in which you are buying a used car and agree to a certain price because the dealer assures you the car’s engine has been replaced. Imagine that the engine in the car purchased is, in fact, old and damaged, and that the dealer was aware of this condition the entire time, but chose to mislead you to increase the price. Ignoring redhibition and the possible rescission of the sale, can you recover from the used car dealer because the price you paid was artificially inflated? After all, you could likely find a mechanic to provide his expert opinion on how inflated the price was due to the misrepresentation. Or must you first resell the car at a lower price that reflects its market value and, thereby, have objective evidence of the actual loss suffered? Such a requirement makes sense considering experts may disagree and the resale may serve as the only true, indisputable reflection of the car’s value.

The hypothetical presented, while not exactly analogous, is similar to an issue with which courts have recently grappled in addressing securities fraud actions. It is an issue courts have described as “loss causation,” a primary element of a securities fraud action that concerns the nexus between a corporation’s malfeasance and the complaining shareholder’s resulting loss. Until recently, the answer was unclear as to exactly what a plaintiff must allege and prove to recover. One United States court of appeals held that a plaintiff need only establish that a corporation’s

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1. Obviously, the face-to-face transaction involving the sale of the car differs in numerous respects from a public securities market. A security arguably has no worth outside of the market considering the security’s value can only be realized through its sale. On the other hand, a car is a consumable and will be of some value to its owner, regardless of whether or not it is sold. The car engine hypothetical is included in this note to provide a practical, day-to-day illustration of the differing ways in which a loss incurred by overpayment may be evidenced. These same possibilities for demonstrating a loss are also relevant in securities fraud actions.

misrepresentation artificially inflated the price of the stock at the
time of purchase,\textsuperscript{3} while other circuits required the plaintiff to do
more by pointing to a resulting loss and establishing a direct causal
connection between it and the defendant's misrepresentation.\textsuperscript{4}
While these courts have referred to this difference as one of loss
causation, the real disagreement lies over the very existence of the
loss: some courts believed the loss occurs upon purchase, while the
others believed loss is not inevitable; thus, something more must
be shown to evidence it.

The confusion surrounding what these courts have described as
loss causation, but would be better termed "loss existence," was
put to rest in April of 2005 when the United States Supreme Court
handed down its unanimous opinion in \textit{Dura Pharmaceuticals, Inc. v.
Broudo}.\textsuperscript{5} In \textit{Dura Pharmaceuticals}, the Supreme Court
explicitly rejected the standard of loss causation followed by the
minority of circuits by specifically holding that "an inflated
purchase price will not itself constitute or proximately cause the
relevant economic loss."\textsuperscript{6} Instead, the Court adopted the
heightened standard and held loss causation requires "that a
plaintiff prove that the defendant's misrepresentation (or other
fraudulent conduct) proximately caused the plaintiff's economic
loss."\textsuperscript{7}

In reaching its decision, the Court concluded that a purchaser
of stock at an artificially inflated price, meaning a price that has
been elevated on account of a fraudulent misrepresentation by the
issuing corporation, has not suffered a loss at that time. A loss is
only suffered if the corporation or someone else discloses the
misrepresentation, which then causes the value of the stock to
decline. This standard is significant because it essentially

\footnotesize{3. See Broudo v. Dura Pharm., Inc., 339 F.3d 933 (9th Cir. 2003), \textit{rev'd},

4. See Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc., 343
F.3d 189 (2d Cir. 2003); Semerenko v. Cendant Corp., 223 F.3d 165 (3d Cir.
F.3d 1441 (11th Cir. 1997); Bastian v. Petren Res. Corp., 892 F.2d 680 (7th

5. 544 U.S. 336.

6. \textit{Id.} at 342.

7. \textit{Id.} at 346.
precludes plaintiffs from proving that a loss existed in the absence of a market reaction, even if financial experts could testify to the loss at the time of purchase. Obviously, this theory of loss existence centered on market reliance presents a great challenge to plaintiffs because they must now point to a misrepresentation, a disclosure, and a subsequent depreciation in value of the stock tied to the misrepresentation. While imposing such a high burden on plaintiffs will curb frivolous suits and rightfully protect corporate defendants from being subject to unreasonable liability, it is likely to present a number of problems that the Court failed to acknowledge in its opinion.

This note aims to highlight the difficult issues faced by the Court and the practical effects likely to result from the decision, including those that may prove problematic. Part II begins by offering a brief explanation of the Rule 10b-5 action and its elements, focusing on transaction and loss causation, and then shifts to a discussion of the conflict within the circuits concerning the loss causation standard. Moreover, the section reiterates that the real issue at bar is not one of loss causation but rather loss existence, and notes that this issue has been afforded greater attention in scholarly circles than in courts. Part III centers on Dura Pharmaceuticals, presenting the facts of the case, the outcome, and the Court’s reasoning. Part IV provides an analysis of the opinion, detailing the persuasive aspects as well as those that are not particularly compelling. It then introduces three practical effects likely to result, including some that may not have been anticipated by the Court. Part V provides three reasons why the Court might have settled on a standard of market corroboration as evidence of loss and imposed such a demanding burden on plaintiffs. Finally, Part VI concludes by acknowledging that the Court was faced with a very difficult case and ultimately reached a sound conclusion. However, the section comments that the Court was not as persuasive as it could have been considering it framed the issue as one of loss causation rather than loss existence and supported its decision by way of statutory interpretation rather than practical considerations.
II. THE RULE 10B-5 ACTION, ITS ELEMENTS, AND THE CONFUSION SURROUNDING LOSS CAUSATION

This section begins with an overview of the Rule 10b-5 cause of action and the remedy it affords shareholders. It then introduces the requisite elements of the 10b-5 action, focusing upon loss causation, the element at issue in this note. Finally, this section addresses the conflict within the United States courts of appeals in approaching the showing of loss causation, as well as the conflict among legal scholars over how this element should be evidenced.

A. The Rule 10b-5 Action

The corporate scandals of recent years have highlighted the importance of the securities fraud action. This action is typically brought under Section 10(b) of the Securities and Exchange Act of 1934 ("1934 Act") and its accompanying regulatory Rule 10b-5, promulgated in 1942. However, neither the 1934 Act nor Rule 10b-5 provides for an express cause of action. Nevertheless, the

8. 15 U.S.C. § 78j(b) (2000). The general antifraud provision of the 1934 Act is found in Section 10(b) and reads as follows:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

9. 17 C.F.R. § 240.10b-5 (1942). The language of Rule 10b-5, Employment of Manipulative and Deceptive Devices, reads as follows:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
Rule 10b-5 securities fraud action was held to be an implied private right of action in the 1946 case of *Kardon v. National Gypsum Co.* And, while it is unlikely that today’s Supreme Court would recognize the holding in *Kardon*, earlier Supreme Court cases did, and, consequently, the Rule 10b-5 action now stands as a viable cause of action. The judicially-created action has even survived Congressional review, as Congress has failed to rescind or impede the cause of action over the years, including in its recent legislative reform of securities law.

The Rule 10b-5 securities fraud action is significant because it serves as a vehicle by which shareholders can ensure that corporate directors do not perpetrate fraud in securities transactions, thus safeguarding their interests as well as those of the public at large. In fact, the Rule 10b-5 action is recognized as the “principal means used by private investors to recover for fraudulent misconduct in private actions.” Specifically, these actions target fraudulent misrepresentations corporate management may make “in connection with the purchase or sale of any security,” whether these misrepresentations or omissions concern expected earnings, anticipated product releases, or other material news. In doing so, the Rule 10b-5 action provides shareholders with an avenue to recover whatever losses they may suffer should the corporation’s stock value decline on account of the misrepresentation.

**B. Elements of the Rule 10b-5 Action**

In *Dura Pharmaceuticals*, the Court laid out the six basic elements required of a Rule 10b-5 plaintiff: (1) he must point to a material misrepresentation on the part of the defendant; (2) he must show the defendant acted with scienter; (3) he must show the

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transaction in question involved the purchase or sale of a security; (4) he must show "transaction causation;" (5) he must show he suffered an economic loss; and (6) he must show "loss causation." \(^\text{15}\)

When evaluating the causation elements of Rule 10b-5 actions, courts and scholars alike have focused upon two distinct kinds of causation: transaction and loss. \(^\text{16}\) Because a cause of action under Rule 10b-5 is not expressly provided, \(^\text{17}\) one will not find these two elements specifically enumerated or defined in any statute. However, the precise terminology was introduced by the Second Circuit in *Schlick v. Penn-Dixie Cement Corp.* \(^\text{18}\) and is now widely accepted. \(^\text{19}\)

To establish transaction causation, a plaintiff must show that the defendant's fraud affected the plaintiff's engagement in the transaction. \(^\text{20}\) Typically, plaintiffs meet this element by demonstrating that they would not have entered into the transaction at issue, i.e., purchased or sold the security, if not for the misrepresentation or omission on the part of the defendant. \(^\text{21}\) However, a "but for" showing is not a prerequisite to establishing transaction causation. The more appropriate tort analogy is "reliance," meaning the plaintiff must demonstrate that he relied on the misrepresentation in choosing to act as he did. \(^\text{22}\)

Loss causation involves an additional showing on the part of the plaintiff, specifically, one in which the plaintiff establishes a

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20. *Id.* at 1790.
22. *Id.*
causal link between the misrepresentation at issue and the economic loss suffered. Some have equated this additional requirement to the delictual concept of "proximate causation," arguing that the plaintiff ultimately must establish that the defendant's conduct was legally responsible for the loss at issue.

The following example better illustrates the distinction between transaction and loss causation. Suppose a seller of a home misrepresents its condition by failing to tell the prospective buyer that it is infested with termites. Suppose the buyer goes ahead and purchases the home. Then, suppose a tornado hits the town and destroys the home. In such a situation, the buyer, if he chose to sue the seller on account of the misrepresentation, would be able to prove transaction causation because he would not have engaged in the transaction if the seller had not lied about the termites. However, the purchaser would not succeed in proving loss causation because the loss he has suffered, namely, the destruction of the home, was caused by a tornado, not the fraudulent misrepresentation regarding the termites. With or without the termites, the loss suffered from the tornado would have been the same. The imposition of the loss causation requirement on top of transaction causation prevents the seller from becoming an insurer with respect to all risks associated with an investment based on his lying about a single one.

C. Conflict within the United States Courts of Appeals

In accordance with the twin requirements set forth in Schlick, courts have consistently held that both transaction and loss causation must be shown with Rule 10b-5 actions, but there has been confusion and conflict over the interpretation of loss causation. In short, courts have disagreed over exactly what the plaintiff must allege and ultimately prove to satisfy the loss causation element. While some courts contend it is akin to proximate causation, others maintain it only requires a plaintiff to

23. Fox, supra note 16, at 511.
24. Ryan, supra note 21, at 509.
25. Fox, supra note 16, at 515.
show "some causal nexus" between the misrepresentation and the loss suffered.\textsuperscript{27} The difficulty in ascertaining the precise nature of loss causation has led some courts to refer to the requirement as "ungainly, exotic, confusing, and even unhappy."\textsuperscript{28}

While this inability to pin down the element of loss causation has received a great deal of attention from various courts, the issue confronted in \textit{Dura Pharmaceuticals} differs in that it relates to the very existence of a loss, rather than causation itself, and, hence, it has not received as much attention. Specifically, the issue is whether a loss occurs upon the purchase of a security at an artificially inflated price or whether it occurs when the market realizes the misrepresentation and the security's price decreases. The Supreme Court in \textit{Dura Pharmaceuticals} referred to the case as one of loss causation, but that is somewhat misleading since the issue differs from loss causation. The Court, in classifying the issue as loss causation, suggested it was one many circuits have addressed. However, the following subsections reveal that the precise issue of loss existence has not been addressed by many courts but, instead, has received greater attention in scholarly circles.

1. \textit{Circuits Requiring Market Corroboration as Evidence of a Loss}

After framing the problem as one of loss causation, the Supreme Court referred to a circuit split and pointed out that the Second, Third, Seventh, and Eleventh Circuits endorsed the position it ultimately adopted.\textsuperscript{29} The common thread between the

\textsuperscript{27} Escoffery, \textit{supra} note 13, at 1790. \textit{See also In re Control Data Corp. Sec. Litig.}, 933 F.2d 616, 619 (8th Cir. 1991).
\textsuperscript{28} Escoffery, \textit{supra} note 13, at 1794.
\textsuperscript{29} \textit{Dura Pharm., Inc. v. Broudo}, 544 U.S. 336, 340 (2005). The following cases were cited by the Supreme Court in \textit{Dura Pharmaceuticals, Inc. v. Broudo} as evidence of this position: \textit{Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.}, 343 F.3d 189 (2d Cir. 2003); \textit{Semerenko v. Cendant Corp.}, 223 F.3d 165 (3d Cir. 2000); \textit{Robbins v. Koger Props., Inc.}, 116 F.3d 1441 (11th Cir. 1997); and \textit{Bastian v. Petren Res. Corp.}, 892 F.2d 680 (7th Cir. 1990). Some of these cases are easily distinguishable from \textit{Dura Pharmaceuticals} and will not be discussed in this section. Instead, this section will focus on the circuits that have addressed the tough issues that most resemble the one faced by the
circuits is that each required plaintiffs to do more than merely allege that a corporation's fraudulent misrepresentation artificially inflated the stock price at the time of purchase; instead, they required plaintiffs to prove that the misrepresentation caused an actual loss. The apparent concern of these courts was the possibility of a windfall recovery by plaintiffs. These particular circuits feared that a plaintiff would recover from a corporation when factors other than the misrepresentation were ultimately responsible for the loss suffered. Therefore, they have essentially required plaintiffs in securities fraud actions to show that an actual economic loss was proximately caused by the misrepresentation at issue. Only by imposing this burden of proof on plaintiffs can courts adequately protect corporations from being liable for what one author terms "phantom losses."

In framing the issue as one of loss causation, the Court overlooked a subtle distinction presented in *Dura Pharmaceuticals*. The main question presented by the case is: "When does the loss occur?" Specifically, the Court sought to determine whether the loss occurs upon purchase or whether it occurs following market corroboration. On the other hand, the element of loss causation presupposes that a loss has already been suffered by the plaintiff and, instead, focuses on the nexus between the loss and the misrepresentation. Obviously, the two concepts are related since the existence of a loss is encompassed within the loss causation analysis. However, the distinction between the two related issues is important and should be noted. The Court

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Supreme Court in *Dura Pharmaceuticals*, that being the issue of loss existence rather than the broader issue of loss causation. See also Ryan, supra note 21, at 513.

30. Ryan, supra note 21, at 513.
31. See, e.g., Bastian, 892 F.2d at 684–85.
32. See, e.g., Semerenko, 223 F.3d at 185.
33. Professor Coffee describes a phantom loss as "one simply too speculative and indefinite in the absence of any evidence that the market considered the stock to have been overvalued because of the alleged patent problem." John C. Coffee, Jr., *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse Broudo*, 60 BUS. LAW. 533, 538 (2005). Coffee argues for reliance on market corroboration rather than expert testimony, and that is the position the Court adopts. *Id.* at 534.
compounded its oversight when it grouped the Second, Third, Seventh, and Eleventh Circuits together and suggested that they maintain the same position on loss causation. In doing so, the Court failed to note the subtle differences between the cases addressed by each circuit. This subsection addresses only the relevant issue of loss existence and ignores the cases involving loss causation.\footnote{34}{See supra note 29 (referencing the circuit cases cited by the Supreme Court in \textit{Dura Pharmaceuticals} and also pointing out the fact that the majority of those cases addressed the causal nexus between a presupposed loss and the corporate misrepresentation, rather than the issue of loss existence which is at the forefront of \textit{Dura Pharmaceuticals}). In addition, it should be pointed out that this note's consideration of cases relating to loss existence and loss causation is limited to the cases and circuits mentioned by the Supreme Court. There are likely other federal cases relevant to these issues. However, such cases are beyond the scope of this note since its focus is on \textit{Dura Pharmaceuticals} and the Supreme Court's analysis and reasoning in that specific case.}

The Third Circuit in \textit{Semerenko v. Cendant Corp.}\footnote{35}{223 F.3d 165.} was not faced with a situation directly analogous to that in \textit{Dura Pharmaceuticals}, but it did, perhaps unintentionally, address the issue of loss existence when it held that the plaintiffs in question set forth a viable cause of action. Like the Supreme Court in \textit{Dura Pharmaceuticals}, the Third Circuit categorized the issue at hand as one of loss causation.\footnote{36}{Id. at 169.} In \textit{Semerenko}, the plaintiffs alleged that the defendant corporation had made various misrepresentations about itself, including its financial condition, its willingness to complete a tender offer, and its willingness to complete a proposed merger, all of which contributed to an artificially inflated stock price.\footnote{37}{Id.} The plaintiffs further alleged that they suffered a loss when the stock price dropped immediately after the misrepresentations were disclosed.\footnote{38}{Id.} This additional allegation of a market drop following the disclosure distinguishes \textit{Semerenko} from \textit{Dura Pharmaceuticals} since the plaintiffs failed to make such an allegation in \textit{Dura Pharmaceuticals}. The Third Circuit, in holding that the plaintiffs had adequately alleged loss causation,
relied upon the corrective disclosure and the market's reaction as evidence that the misrepresentations proximately caused the decline in the security's value. This focus on market corroboration meant loss existence was at issue because it was only when the market reacted to the misrepresentation that the Third Circuit concluded a loss was actually suffered. This analysis is distinct from that typically involved with loss causation, which focuses upon establishing a nexus between a presupposed loss and the misrepresentation. Again, it is important to acknowledge that Semerenko is distinct from Dura Pharmaceuticals because the Third Circuit was not addressing the precise issue of whether the purchase alone of an artificially inflated stock constituted a loss. However, the fact that the Third Circuit relied upon a market reaction in concluding that plaintiffs suffered a loss is relevant to the issue of loss existence confronted in Dura Pharmaceuticals.

The distinction between loss existence and loss causation is better illustrated by looking at the Eleventh Circuit case of Robbins v. Koger Properties, Inc. In Robbins, investors filed a 10b-5 claim against the defendant corporation and its accounting firm alleging that misrepresented financial statements led the investors to purchase stock shares at artificially inflated prices. While the trial court found the allegations sufficient to support the cause of action, the Eleventh Circuit reversed, concluding that there was no demonstration that the defendants' actions actually caused the decline in the value of the plaintiffs' investment. In Robbins, there was a misrepresentation and a loss suffered, but the plaintiffs failed to effectively tie them together. In essence, they failed to negate the possibility that something else might have contributed to the loss suffered. The Eleventh Circuit's analysis in Robbins centered on the nexus between the loss incurred and the misrepresentation perpetrated, rather than on determining whether a loss was suffered at all. This analysis is distinct from that in Semerenko, which focused on ascertaining if and when a loss occurred.

39. Id. at 183–87.
40. 116 F.3d 1441 (11th Cir. 1997).
41. Id.
42. Id. at 1448–49.
2. Circuits Contending a Loss Occurs Upon Purchase

In contrast to the Third Circuit's holding in *Semerenko* which required market corroboration, the Ninth Circuit held that a loss was established if the plaintiffs merely showed that the corporation's fraudulent misrepresentation artificially inflated the stock price on the date of purchase. The Ninth Circuit in *Broudo v. Dura Pharmaceuticals, Inc.* the opinion on which the Supreme Court ultimately granted writs, objected to the requirement of market corroboration. Instead, it reasoned that the injury to the stockholder occurs at the time of purchase; thus, the plaintiffs need not point to a precipitous decline in the stock's value following the revelation of the corporate wrongdoing. While the Ninth Circuit did not discuss how the loss would be calculated, the loss would likely be determined by the court and jury based on their evaluation of expert testimony valuing the amount of inflation. In short, all the Ninth Circuit required to evidence a loss was a showing that the price of the security was overstated at the time of purchase, and that the overstatement was caused by a corporate misrepresentation.

D. Competing Scholarly Views on Loss Existence

While the Supreme Court implied that a great many courts have addressed the issue in *Dura Pharmaceuticals*, the relevant jurisprudence was fairly limited as only the Third and Ninth Circuits took up the precise issue of loss existence. Between these two circuits, the split boiled down to a fundamental disagreement over whether the loss occurred at the time of purchase, or whether market corroboration was required to establish the loss. In light of the conflict among the circuits, legal scholars eagerly awaited a Supreme Court opinion that would pin down the incurrence of a

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43. It should be noted that the Ninth Circuit, like the Third Circuit and the Supreme Court, also classified the issue as one of loss causation, although it is distinct and better termed loss existence.  
44. 339 F.3d 933 (9th Cir. 2003), rev'd, 544 U.S. 336 (2005).  
46. *Broudo*, 339 F.3d at 938.  
47. Coffee, *supra* note 33, at 534.
loss, which, in turn, would help clarify the element of loss causation.

In fact, a number of scholars, divided on the optimal outcome to be reached by the Court, prepared notes and comments, some of which called for the adoption of the heightened standard requiring market corroboration, and some that argued that the Ninth Circuit got it right. Those that favored the adoption of the heightened standard claimed that market corroboration better ensures that an actual loss was suffered and caused by the defendant before a plaintiff is allowed to recover. In this sense, it guards against "causation by presumption," which arguably could arise if the plaintiffs only had to show they purchased a security at an artificially inflated price. Without a market corroboration standard, some scholars feared a presumption of loss might enable a plaintiff to recover when he did not suffer a loss, or when he suffered a loss that was not caused by the misrepresentation. Moreover, these advocates maintained that the stock market is better suited than a court to determine the extent of a loss, should one be suffered. Allowing juries to weigh conflicting expert testimony offered to evidence or refute a loss, rather than relying on the market, might lead to speculative awards. Finally, advocates of the market corroboration standard thought it would help limit recovery under Rule 10b-5 actions and, consequently, minimize the expensive and inefficient transaction costs that accompany Rule 10b-5 awards.

On the other hand, those scholars who felt that a loss occurred upon purchase at an artificially inflated price expressed concern with a standard reliant on market corroboration. These advocates noted that a market's reaction is not always self-evident, which could make it difficult to establish that a particular reaction is related to the disclosure of the corporate misrepresentation.

48. See generally Coffee, supra note 33.
49. Fox, supra note 16, at 530–32.
50. Coffee, supra note 33, at 534.
51. Id.
52. Id. at 535.
53. Id. at 539.
54. Id. at 534.
Moreover, adopting a standard that requires a security's value to decrease might prevent some deserving plaintiffs from recovering, considering it is possible that a loss caused by a misrepresentation could be offset by some other market force, leaving the price the same.56

In short, there was sophisticated debate between scholars concerning the precise issue of loss existence and how it must be shown leading up to *Dura Pharmaceuticals*. These scholars eagerly awaited the opinion and, on April 19, 2005, it was handed down.

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

A. Facts of the Case

The plaintiffs in *Dura Pharmaceuticals* were individuals who bought stock in the company between April 15, 1997, and February 24, 1998. In their securities fraud action against the corporation and some of its corporate officers, the plaintiffs alleged that Dura Pharmaceuticals, Inc. ("Dura") made misrepresentations about the company's profits as well as future Food and Drug Administration ("FDA") approval of its new asthmatic device.57 Specifically, the plaintiffs alleged that Dura falsely claimed it expected the FDA to soon approve its new asthmatic spray product.58 In November of 1998, Dura revealed that the FDA would not approve its device.59 This announcement was followed by a temporary dip in Dura's share value, but one that was erased within a week.60 While the plaintiffs alleged that the misrepresentation made by Dura concerning the spray device artificially inflated the stock price, their complaint did not point to any market corroboration as evidence of a loss suffered.

56. *Id.* at 524.
57. The portion of the litigation involving Dura's false profits report was resolved prior to this case. Therefore, the Court's analysis, as well as this note's, is limited to the controversy surrounding the misrepresentation of the FDA's expected approval of the spray device. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 339–40 (2005).
58. *Id.* at 339.
59. *Id.*
60. *Id.*
B. The Supreme Court's Holding and Reasoning

The Ninth Circuit originally held that the plaintiffs asserted a viable cause of action, but the Supreme Court unanimously reversed, holding that the complaint failed to adequately allege loss causation with respect to the misrepresentation concerning the spray device.\(^\text{61}\) Again, it is important to note that the Supreme Court classified the issue as one of loss causation when it could be better termed loss existence. In dismissing the claim for failure to demonstrate loss causation, the Court explicitly rejected the stance taken by the Ninth Circuit by insisting that an investor may not establish a loss merely by alleging that the price of the security was artificially inflated at the time of purchase.\(^\text{62}\)

The Court essentially concluded that the plaintiffs had not suffered a loss at the time of purchase because an artificially inflated price does not invariably lead to a future loss. It noted that an investor may sell his stock before the misrepresentation is disclosed, meaning before the information related to the misrepresentation becomes public, or the stock price might not decline following such a disclosure.\(^\text{63}\) In both of these instances, the Court explained that no loss would be suffered by the investor; therefore, to allow recovery would unjustly enrich the plaintiffs. The Court went on to mention that, even if there is a decline in the share value, other factors may be responsible for the loss, in which case it would be unfair to hold the corporation liable.\(^\text{64}\) In short,

\(^\text{61. Id. at 338.}\)

\(^\text{62. Justice Breyer's opinion in Dura Pharmaceuticals is actually divided into two parts. This note is concerned with only Part A, the section addressing the substantive issue of loss causation or, more precisely, loss existence. Part B, on the other hand, deals with the procedural issue of exactly what a plaintiff in a Rule 10b-5 action must allege. In Part B, Justice Breyer emphasized that a plaintiff must allege in his complaint the requisite elements of economic loss and causation, the very elements the Court clarified in Part A. Justice Breyer noted that a failure to allege the relevant loss suffered in the complaint does not adequately provide the defendant with notice of the claims he will face.}\)

\(^\text{63. Dura Pharm., 544 U.S. at 342–43.}\)

\(^\text{64. A perfect example of this scenario can be seen in Bastian v. Petren Res. Corp., 892 F.2d 680 (7th Cir.), cert. denied, 496 U.S. 906 (1990), one of the cases cited by the Supreme Court to illustrate the circuit split concerning loss causation. In Bastian, the plaintiffs were fraudulently induced to invest in an oil and gas limited partnership, which soon thereafter became worthless. Id. at 682. However, the plaintiffs were denied recovery because they failed to allege that}\)
the Court wanted to avoid what some have called a "causation by presumption" in which a loss would be presumed merely because the stock price was artificially inflated at the time of purchase. The Court accomplished this objective by suggesting that plaintiffs must point to a decline in the market value of the stock as evidence of their loss, and then tie this market reaction to the misrepresentation.

Besides citing instances when an inflated purchase price does not lead to an inevitable loss, the Court cited three authorities in support of its position. First, it referred to the "common-law roots" of the securities fraud action as evidence that loss causation cannot be proven solely by an artificially inflated purchase price. It noted that with the tort of misrepresentation, a party who misrepresents the financial condition of the corporation when selling stock does not become liable to the purchaser until the facts become known, thereby causing the share value to depreciate. Second, the Court suggested to hold otherwise, i.e., to allow recovery under the circumstances, may undermine an important objective of securities law: to maintain public confidence in the market. The Court acknowledged that private securities actions may deter fraud and, thereby, provide the public with confidence, but it emphasized that this protection only covers those economic losses actually caused by corporate misrepresentations. Third, and lastly, the Court relied on the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which codified the requirement of loss causation in

the misrepresentation caused the loss. Id. at 686. This result was likely a fair one considering that oil prices steadily declined following the plaintiffs' investment and the loss was most likely attributable to this downturn. While the focus in Bastian is the broader issue of loss causation rather than the precise issue of loss existence, it is helpful in demonstrating how other factors, besides a corporate misrepresentation, may contribute to a loss.

65. Coffee, supra note 33, at 534.
66. The impact of establishing a standard reliant upon a market reaction will be discussed in-depth in Part IV.B.
67. Dura Pharm., 544 U.S. at 344.
68. Id. (citing RESTATEMENT (SECOND) OF TORTS § 548A cmt. b (1965)).
69. Id. at 345.
securities fraud actions. While the statute does not explicitly state how loss causation must be shown, the Court concluded it evidenced Congressional agreement with the position the Court assumes in its holding.

IV. ANALYSIS OF DURA PHARMACEUTICALS, INCLUDING THE PRACTICAL EFFECTS AND IMPLICATIONS OF THE DECISION

The most compelling justification offered by the Court in support of its decision to reverse the Ninth Circuit opinion is that the purchase of a security at an artificially inflated price does not always lead to a loss. The Court aptly pointed out the various ways in which plaintiffs may avoid incurring a loss, and the Court’s adoption of a standard of market corroboration ensures that an actual loss will be suffered before a plaintiff can recover. Another persuasive aspect of the Court’s opinion is its reliance on the common law history of the tort of misrepresentation. Considering that the tort is recognized by some as the predecessor to the securities fraud action, as well as the fact that the tort calls for some form of market corroborations, this particular justification is sound.

Unfortunately, not all aspects of the Court’s reasoning are as compelling. For one, the Court’s contention that its holding supported an important objective of securities law is not particularly persuasive. The Court argued that public confidence might be undermined if corporations were held liable when losses


Loss causation. In any private action arising under this chapter [15 USCS §§ 78a et seq.], the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter [15 USCS §§ 78a et seq.] caused the loss for which the plaintiff seeks to recover damages.

Id.

72. Dura Pharm., 544 U.S. at 346.
73. Id. at 342–43.
74. Id. at 344.
75. Id.
76. Id.
were not incurred,\textsuperscript{77} which is a fair point. However, it failed to acknowledge that some people might want higher standards of corporate accountability that call for imposing liability whenever a company misrepresents itself. Consistent with this thought, these people might view a ruling allowing Dura to avoid liability after lying to its shareholders as contrary to the tenets of securities law. In short, the Court's discussion of the objectives of securities law and how its holding comports with those objectives is somewhat conclusory and one-sided.

A second facet of the Court's reasoning which is unconvincing is its reliance on the PSLRA. The Court argued that the PSLRA's codification of the requirement of loss causation evidenced Congressional agreement with its holding.\textsuperscript{78} However, this argument is unpersuasive. First of all, the precise issue in \textit{Dura Pharmaceuticals} is loss existence, which means Congressional reiteration of loss causation is not exactly on point. Moreover, the PSLRA's codification of loss causation does not speak to how the showing must be made, which is the point of contention dividing the circuits that have actually addressed the issue of loss causation. Whether the issue in \textit{Dura Pharmaceuticals} is classified as loss existence or loss causation, the PSLRA does not explicitly resolve whether a plaintiff's assertion that he purchased stock at an artificially inflated price is a viable cause of action. Considering this unanswered question, the Supreme Court's argument that the PSLRA provides statutory authority for its holding is not persuasive.

The precise issue faced by the Court in \textit{Dura Pharmaceuticals} was a narrow one that had not been addressed by many courts. Considering this lack of existing authority, it appears the Court may have been forced to rely upon some sources that are not particularly supportive of its conclusion. The Court's reasoning would have been more convincing if it had been more explicit about the policy considerations that supported its conclusion. Therefore, this note will explore some of the considerations that would have strengthened the resolution reached. However, the

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.} at 345.
following subsections first explore the practical effects and implications of the decision on future litigants.

A. Corporate Defendants' Liability Will Be Limited

The most obvious practical effect of the *Dura Pharmaceuticals* opinion is that it establishes a limit on corporate defendants' civil liability in Rule 10b-5 actions. By requiring plaintiffs to do more than merely point to an artificially inflated purchase price by demonstrating that a market reaction occurred, the Court helps corporations avoid liability for losses that do not occur. Also, by requiring plaintiffs to establish a nexus between the market reaction and the misrepresentation, the Court ensures that corporations will not be found liable for losses for which they are not responsible. The now-clarified loss causation (or loss existence) standard means that plaintiffs will have to provide evidence that an actual loss was suffered and that it resulted from the corporate misrepresentation, not from general, unrelated market forces. This imposition of what some have described as a "Herculean requirement" for loss causation will favor corporate defendants in a number of ways, most notably by reducing the damages claimed by plaintiffs, the risk posed by securities actions, and the settlement value of such actions.

The Supreme Court's unanimous decision clarifying the requisite standard of proof is sound and reflects a valid concern for extending corporate civil liability too far. Allowing plaintiffs to recover without demonstrating that a loss was suffered or that the corporation in question was responsible for a loss suffered would subject corporations to tremendous liability, which could threaten the entire securities exchange system. This concern for corporate civil liability was relied on in another seminal Supreme Court decision involving securities fraud actions: *Blue Chip Stamps v. Manor Drug Stores*.  

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In *Blue Chip*, the Supreme Court was faced with the question of whether mere offerees of a stock offering, i.e., persons who neither bought nor sold securities during the class period in question, could recover in a Rule 10b-5 action. This odd circumstance arose when Blue Chip Stamp Co. ("Blue Chip"), by virtue of a consent decree it entered into with the United States, was required to re-organize its company and, in doing so, offered a number of shares of stock to retailers who had previously used the stamp service, but were not shareholders in the former company. The plaintiffs, who fit into this category of retailers, consulted a prospectus provided by Blue Chip to assist in their decision to purchase securities, and ultimately decided not to invest. However, they alleged that the prospectus provided was "materially misleading in its overly pessimistic appraisal of Blue Chip's status and future prospects." They further alleged that this misrepresentation, which was done so that rejected shares could later be offered to the public at a higher price, ultimately caused them to incur a loss because they missed out on a fruitful economic venture. In dismissing the plaintiffs' claims, the Supreme Court held that only actual "purchasers or sellers" of securities have standing to bring a private damages action under Rule 10b-5, thus adopting the *Birnbaum* rule set forth by the Second Circuit.

In reaching its decision in *Blue Chip* to adopt the "purchaser or seller" requirement, the Court relied heavily on practical considerations and discussed at length the tremendous risk of abuse presented by Rule 10b-5 actions. The Court noted that Rule 10b-5 litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in

82. *Id.* at 725.
83. *Id.* at 725–26.
84. *Id.* at 727.
85. *Id.* at 726.
86. *Id.* at 727.
87. *Id.* at 731. The *Birnbaum* rule refers to the case, *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952), in which the Second Circuit first established that only purchasers or sellers of securities were entitled to bring securities fraud actions.
88. 421 U.S. at 739–43.
general," and then provided a laundry-list of reasons why it would be unfair to corporations to hold otherwise. Most notably, the Court remarked that adopting a lenient standing requirement would increase the number of nuisance or "strike" suits which have great settlement value, despite having little chance of success at trial. Moreover, should a corporation be reluctant to settle, it would be forced to engage in trial preparation that would be extremely time consuming, expensive, and disruptive to its normal business activity. In short, the Court noted that adopting a relaxed standing requirement would make it very difficult for corporations to dispose of cases prior to trial, thereby subjecting corporations to a tremendous amount of civil liability.

The Blue Chip opinion has been referred to as "an essay on the evils of a Rule 10b-5 allowed to go too far," because it discussed in great detail the dangers of extending corporate civil liability too far. While the Court did not give voice to this rationale in reaching its decision in Dura Pharmaceuticals, the opinion clearly has the same effect of limiting corporate liability.

B. Plaintiffs Will Have to Point to a Market Reaction Following Corrective Disclosure

The Court's refusal to acknowledge that the plaintiffs suffered a loss when they overpaid for their securities suggests a market reaction to a corrective disclosure is necessary to establish the existence of a loss. This standard of market corroboration effectively precludes plaintiffs from providing expert testimony to evidence the loss suffered upon purchase. Moreover, the standard adopted requires plaintiffs to establish a causal nexus between the depreciation of the stock value and the disclosure of the corporate misrepresentation. In other words, the implication from Dura Pharmaceuticals is that a recoverable loss is suffered only when the share price drops immediately following the corrective disclosure.

89. Id. at 739.
90. Id. at 740.
91. Id.
92. Id. at 742-43.
93. Soderquist, supra note 17, at 530.
Evidence of this implication was made apparent when the Court noted the relationship between timing and causation. For example, the Court observed that if a purchaser sells after the truth is disclosed, an initially inflated purchase price only "might mean a later loss." It is up to the plaintiff to show that the market loss was caused by the misrepresentation, instead of changed economic or investor expectations, or other market factors unrelated to the misrepresentation. The Court then made the point that the longer the time between the purchase and sale of a security, the more likely it is that other factors, besides the misrepresentation, caused the loss. Considering the Court's emphasis on timing and its effect on diluting a causal inference, one may infer that the Court would not afford much weight to a price drop as evidence of a loss if it does not immediately follow the corrective disclosure.

By relying on market reactions, the Court adopts a stringent standard of loss causation (or loss existence). Not only does it require plaintiffs to establish a loss by pointing to the market, but the Court also requires plaintiffs to tie this loss to the misrepresentation.

1. Why the Court Relies on Market Reaction

This reliance on the market likely stems from the Court's preference for objective evidence. Rather than having to choose between conflicting expert testimony offered by the plaintiffs and the defendants, the market's response provides a neutral and, supposedly, indisputable indicator of causation and loss. While the Court did not explicitly make note of its preference for objectivity, it did so in Blue Chip when it adopted the "purchaser or seller" requirement. The Court, in adopting the Birnbaum rule in Blue Chip, emphasized the fact that the class of plaintiffs under the rule would be an "objectively demonstrable fact," a condition the Court found very desirable. Without such a standing requirement, the Court pointed out that plaintiffs' testimony could be completely uncorroborated, yet still sufficient to get to trial. By

95. Id. at 343.
96. Blue Chip, 421 U.S. at 747.
97. Id. at 746.
adopting the "purchaser or seller" requirement, the Court ensures that the class of plaintiffs will be "verifiable by documentation," thus, the Court will be dealing with demonstrable recovery, rather than that which is conjectural or speculative.

2. Effects of the Court's Reliance on Market Reaction

While consistent with Blue Chip's emphasis on objectivity, the Court's reliance on the market as proof of a loss is problematic because a market correction is not always self-evident. In other words, it is sometimes difficult to ascertain what exactly is causing the market to react. The Court itself acknowledged this difficulty when it mentioned the many possibilities that may contribute to the drop in a security's value as well as the difficulty in pinpointing these causes, including "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts," and so forth. This problem of determining whether a market is responding to a particular event means it may be difficult, if not impossible sometimes, for plaintiffs to effectively establish a loss.

Besides the difficulty in determining whether the market is responding to the misrepresentation or one of the other causes mentioned above, i.e., the difficulty in determining "if" market realization occurs, it can also be difficult to determine "when" market realization occurs. Given the multiple ways in which disclosure of a misrepresentation can take place, whether it is through a single public announcement by the corporation, nonpublic rumors, or investors becoming aware of insider trading, market realization may also happen in different ways, some of which may not operate in the open, and some of which may take longer than others. Therefore, it is not always clear whether the market has responded at all or whether it has only partially responded to the true situation. Obviously, this difference

98. Id. at 742.
99. Id. at 734–35.
100. Dura Pharm., 544 U.S. at 343.
102. Id. at 522–23.
103. Id. at 523.
between a complete and partial reaction goes a long way towards determining the value of the loss suffered and the amount recovered.

The difficulty in determining "if" or "when" the market reacts to the misrepresentation reveals the problems inherent in the Court's reliance on the market as evidence of a loss suffered. For a market reaction to accurately reflect a loss and entitle a plaintiff to recover that amount, complete realization must occur at the time of the disclosure, meaning the share price must drop immediately and reflect the entire amount of the inflation, and the drop must not be offset by "good news unrelated to the misstatement." For example, if positive news counterbalances the drop in price precipitated by the market's realization of the misrepresentation, the plaintiff will not be able to recover because he has not suffered a net value "loss," although he would have profited if the corporation had not misled him. In this break-even situation, the plaintiff has clearly suffered a loss because he has been deprived of a profit he would have had absent a corporate misrepresentation. However, the holding in Dura Pharmaceuticals precludes him from recovering. In other words, the standard adopted by the Court prevents a plaintiff from recovering in the absence of a market reaction, even though the misrepresentation may have negatively influenced the share value.

While the Court is wise to oblige plaintiffs to establish that an actual loss was suffered and to tie that loss to the corporation, requiring them to do so by pointing to a market reaction in response to a corrective disclosure presents certain problems. Given the difficulty in pinpointing exactly what is affecting the market and whether the market has responded completely, some deserving plaintiffs who have suffered a loss will be unable to recover. Had the Court come to a different conclusion in Dura Pharmaceuticals, plaintiffs would have been able to establish that a loss was incurred by way of expert testimony. These concerns over a standard of market corroboration were expressed by commentators in anticipation of the Dura Pharmaceuticals opinion, and discussed in a prior section of this note. Despite these

104. *Id.* at 524.
105. *Id.* at 530.
worries, the Court apparently concluded that other advantageous aspects of its ruling would outweigh these potential problems.

C. Corporations Will Be Encouraged to Delay Public Disclosure of the Misrepresentation Until the Market has Already Responded

The Court, in establishing a standard of loss causation in which plaintiffs have to point to a market reaction following a corrective disclosure, essentially provides corporate defendants with a perverse strategy by which they can avoid liability for fraudulent misrepresentations. The standard implicitly adopted by the Court holds corporate defendants liable for the amount of the drop in the value of the security that immediately follows the disclosure of the corporate misrepresentation. Corporate defendants are not held accountable for any price drop that precedes the corrective disclosure. For instance, Dura told investors that the FDA was about to approve one of its products. This announcement undoubtedly increased the value of the shares considering a new product would likely generate increased profits. However, when the FDA approval never materialized and disappointing earnings reports were released, the value of the stock most certainly declined. In this sense, the market already reflected the bad news prior to the disclosure, since Dura had not yet made an announcement nor had the information otherwise become public. Under the standard adopted, Dura is not liable because the market reaction did not follow the corrective disclosure.

Therefore, the effect of Dura Pharmaceuticals is that it is now in the best interests of corporations to do whatever is possible to ensure that their misrepresentation is reflected by the market before public disclosure occurs. These efforts could include delaying the disclosure as long as possible after the misrepresentation in hopes there will not be a market reaction to the disclosure, or, if there is one, that other market forces will obscure the connection. As one author notes, “it is very possible for a misstatement to inflate [the] price but for the public announcement of the true situation not to be accompanied by a discrete drop in price because the market [has] already realized...
the true situation."\textsuperscript{106} Even if there is a reaction to the disclosure, the probability of a corporation being found liable decreases the longer the misrepresentation is delayed. The Court itself made a point of emphasizing how the passage of time dilutes a causal inference,\textsuperscript{107} a point on which this note commented earlier. In addition to delay tactics, corporations would be wise to issue unrelated statements aimed at negatively influencing share value in hopes of avoiding liability for a misrepresentation. Such a tactic would further complicate the causation picture, making it even more difficult for plaintiffs to effectively tie their loss to the original misrepresentation.

V. REASONS WHY THE COURT IMPOSED SUCH A HEAVY BURDEN ON PLAINTIFFS

As alluded to in the preceding sections, the Supreme Court's opinion in \textit{Dura Pharmaceuticals} is unusual when compared with other seminal Rule 10b-5 cases, most notably \textit{Blue Chip} and \textit{Basic Inc. v. Levinson}.\textsuperscript{108} In these two opinions, the Court was very

\begin{enumerate}
\item \textit{Id.} at 524.
\item \textsuperscript{107} \textit{Dura Pharm., Inc. v. Broudo}, 544 U.S. 336, 343 (2005).
\item \textsuperscript{108} \textit{485 U.S. 224} (1988). \textit{Basic} is regarded as a seminal securities fraud case because the Supreme Court officially accepted the "fraud-on-the-market" theory—a theory that relates to a plaintiff's burden of establishing transaction causation. As mentioned before, transaction causation requires a plaintiff to show that the defendant's misrepresentation affected his engagement in the transaction that led to his loss. In this case, the issue was whether the individual class members must each make a showing of reliance. In adopting the "fraud-on-the-market" theory, the Supreme Court relieved plaintiffs of the obligation of showing that each relied on the misrepresentation at issue. \textit{Id.} at 224. Instead, a rebuttable presumption that the plaintiffs relied on the integrity of the price set by the market is established if the plaintiffs can point to a corporate misrepresentation. \textit{Id.} at 225. The rationale behind this rebuttable presumption involves financial analysis and is succinctly summarized below:

The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is
forthright in acknowledging its uncertainty in ascertaining Congressional intent with respect to Rule 10b-5 actions. Consequently, the Court was very candid in revealing the considerations affecting its decision and the weight it afforded them. On the other hand, the Court in *Dura Pharmaceuticals* did not give voice to the many potential considerations. Aside from its astute practical observation that the purchase of a security at an artificially inflated price does not lead to an inevitable loss, the Court concealed other practical and philosophical justifications and proceeded instead with an opinion which is based, predominantly, on a questionable legal rationale.

A. Danger of Extending Corporate Civil Liability

It seems likely that the overriding reason behind the Court's decision is its concern with extending corporate civil liability too far. After all, Part V of this note points out that the most apparent effect of the decision is to limit the liability of corporate defendants. While the Court did not explicitly acknowledge this motivating factor as it did in *Blue Chip*, its impact on the holding is indisputable.

B. Uneasiness with the Remedy Provided by Rule 10b-5 Actions

Another reason the Court refused to allow a lenient standard of loss causation might be its uneasiness with the remedy provided

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109. *See, e.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) ("[W]e would by no means be understood as suggesting that we are able to divine from the language of [Section] 10(b) the express 'intent of Congress' as to the contours of a private cause of action under Rule 10b-5. When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it . . . but it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5.").
for Rule 10b-5 actions. This concern was expressed by commentators in anticipation of the opinion, and the Court appears to have shared such concern. In Rule 10b-5 actions, the plaintiffs are defrauded shareholders and the defendant is the corporation. Considering a corporation’s financial resources come from its shareholders, a Rule 10b-5 action pits one class of corporate shareholders against another. A finding of liability on the part of the corporation means that the shareholders who were not defrauded must pay those who were, even though the payor shareholders did not make the misrepresentation.\textsuperscript{110} Considering the shareholders are held liable rather than the corporate officers who actually did the misleading, the remedy has been criticized because it does not provide a direct deterrent effect.\textsuperscript{111}

The remedy has also been questioned because it merely calls for wealth-transfers from the non-defrauded class to the defrauded class.\textsuperscript{112} Accompanying these transfers are numerous transaction costs, including, among others, expensive legal fees.\textsuperscript{113} This concern with inefficient transaction costs and the lack of a deterrent effect might well have influenced the Court and its decision to limit corporate susceptibility to the Rule 10b-5 action.

C. Uneasiness with Reliance on Expert Testimony

The Court’s adoption of a standard of loss causation reliant on market corroboration amounts to an implicit rejection of expert testimony as evidence of loss. After all, the Court could have affirmed the Ninth Circuit holding which allowed plaintiffs to put on expert testimony that they suffered a loss at the time they purchased the security. However, the Court chose not to, instead opting for a standard by which loss is demonstrated by the market. This choice likely reflects uneasiness with expert testimony because it is more conjectural and speculative than market reliance. This advantage of objectivity provided by a market corroboration

\textsuperscript{110} Coffee, \textit{supra} note 33, at 534.
\textsuperscript{111} \textit{Id.} at 542–43.
\textsuperscript{112} \textit{Id.} at 534.
\textsuperscript{113} \textit{Id.}
standard was advanced by commentators\textsuperscript{114} and appears to have resonated with the Court.

The Court’s preference for objective evidence was made clear in \textit{Blue Chip} when it adopted the “purchaser or seller” requirement, but the Court’s concern with relying on financial experts was not new. In \textit{Basic}, the dissent expressed concern over the majority’s embrace of an expert’s economic theory.\textsuperscript{115} While Justice White, who wrote the dissent in \textit{Basic}, acknowledged the allure of basing legal decisions on purported “mathematical exactitude and scientific certainty,” he noted that an expert’s economic theories are, in the end, only theories that will not necessarily prove to be accurate.\textsuperscript{116} White also predicted that “[c]onfusion and contradiction in court rulings” would ensue because of the Court’s blending of legal analysis and economic theory.\textsuperscript{117} Combining the concern voiced in the \textit{Basic} dissent with the fact that courts are often confronted with contradictory expert testimony presented by plaintiffs and defendants, the Supreme Court’s reliance on market corroboration may reveal uneasiness with expert economic theory.

Despite the Court’s attempt to circumvent reliance on expert testimony, the standard established in \textit{Dura Pharmaceuticals} may not achieve this result. As noted in Part V(B), adopting a standard in which plaintiffs must show that the disclosure of the misrepresentation caused the value of the stock to decline presents a problem because other market forces may be affecting the share value. Given this high burden of proof, plaintiffs may have to call upon expert testimony to explain exactly what is causing the market to react. Moreover, defendants may also use experts to try and disprove the causal nexus between the misrepresentation perpetrated and the resulting market reaction. Therefore, the so-called “advantage of objectivity” of the market corroboration standard may not be as objective as initially hoped considering

\begin{itemize}
  \item \textsuperscript{114} \textit{Id.} at 534, 538–39.
  \item \textsuperscript{115} Basic Inc. v. Levinson, 485 U.S. 224, 252–54 (1988) (White, J., dissenting).
  \item \textsuperscript{116} \textit{Id.} at 254.
  \item \textsuperscript{117} \textit{Id.} at 252.
\end{itemize}
speculative expert testimony may still be relevant with respect to causation.

VI. CONCLUSION

In Dura Pharmaceuticals, the Court was faced with the difficult task of deciding when a loss occurs in situations where plaintiffs are defrauded into buying stock at artificially inflated prices. To maintain suits when plaintiffs make only this initial showing would potentially allow plaintiffs to recover when they did not suffer a loss or when the corporation was not responsible for such loss. On the other hand, to adopt a standard requiring market corroboration of a loss would prohibit all plaintiffs from recovering in the absence of a market reaction, even though some may have suffered an actual loss and are able to evidence it with expert testimony. The Court ultimately decided to favor the latter option, thereby preventing some deserving plaintiffs from recovering, but also ensuring that those who are undeserving will not recover.

The Court’s decision, while damaging to plaintiffs, is sound and reflects valid concerns about limiting the liability of corporate defendants, the problems with the Rule 10b-5 remedy, and the drawbacks of relying on conflicting, and oftentimes speculative, expert testimony. The opinion refines the Rule 10b-5 common law cause of action that originated with Kardon v. National Gypsum Co. in a way that is protective of corporate investors who typically bear the brunt of Rule 10b-5 awards, despite being free of any wrongdoing. This protection comes at the expense of some deserving plaintiffs who will no longer be able to recover, but it is a decision that favors the common good.

However, the Court was not as persuasive as it could have been in explaining and justifying its decision. Its claim that the PSLRA’s codification of loss causation provides statutory authority for its position is not convincing. After all, the precise issue in Dura Pharmaceuticals is loss existence rather than the broader issue of loss causation. Not only did the Court gloss over this distinction, but it misrepresented the amount of judicial attention that loss existence has received by grouping the two circuits that have addressed it along with the others that have
considered only loss causation. Moreover, the Court did not give voice to the many practical considerations and implications of the decision as it did in previous securities fraud cases. For example, there is no acknowledgment of the perverse incentive created by the standard of market corroboration, or that the Securities and Exchange Commission is likely to bear a greater burden in monitoring corporate activity since Rule 10b-5 actions will be more difficult to maintain. While the Court’s opinion is practical and defensible, it should have been more straightforward in its analysis like it was in *Blue Chip* and *Basic*, rather than providing a somewhat cursory and unconvincing statutory justification.

*Jacob M. Kantrow*

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