Apportionment of Liability Under the PSLRA

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The Private Securities Litigation Reform Act of 1995 (PSLRA) has received much attention for the strict requirements it places on pleading scienter in securities fraud class actions and for the safe harbor it provides to forward-looking statements. Far less attention has attached to another significant aspect of the PSLRA: its provisions for apportioning—and limiting—liability. These provisions generally limit the liability of a defendant found to have violated the securities laws (but not to have done so "knowingly") to "the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff."[1]

As discussed below, proper application of the PSLRA's apportionment provisions has the potential to substantially reduce damages in many securities cases, including those brought under § 11 of the Securities Act of 1933 and § 10(b) of the Securities Exchange Act of 1934. In part, this is due to the potential that some portion of "total fault" may be apportioned to persons who do not face liability to plaintiffs under the securities laws.

Most commentators, however, have argued that courts should fashion limits on the statute so that it is not applied as written. Rather than apportioning liability to violators based on their share of total fault, these commentators argue that liability should only be apportioned between those found to have violated the securities laws and/or those who could potentially be liable to the plaintiffs.

In this article we discuss the PSLRA's apportionment provisions and the efforts of some commentators and trial courts to limit their effect. First, we review the text of the provisions, including the limits on liability and the procedural requirements for special interrogatories and/or special findings of fact. Second, we address arguments that court-fashioned limits should be placed on the discretion of the jury in allocating responsibility for securities law violations, concluding that they find no support in either the language or policy underlying the PSLRA. Finally, we address some of the significant implications of the apportionment provisions on the trial and settlement of private securities actions.

The PSLRA's Apportionment Provisions

Before enactment of the PSLRA, persons found to have violated the federal securities laws faced joint and several liability for the entire amount of damages awarded. The threat of such liability naturally put pressure on marginal participants in the violation to settle for amounts out of proportion to their own level of responsibility.

In response to concerns raised about the coercive nature of this situation, the U.S. Congress enacted the apportionment provisions of the PSLRA. Under these provisions, a covered person against whom a final judgment is entered is jointly and severally liable for the entire amount of damages "only if the trier of fact specifically determines that such covered person *knowingly* committed a violation of the securities laws."[2] Absent such a determination, a covered person "shall be liable solely for the proportion of the judgment that corresponds to the *percentage of responsibility* of that covered person… ."[3] These provisions apply in most private actions arising under the federal securities laws, including actions brought under § 10(b) of the Securities Exchange Act and actions against outside directors under § 11 if the Securities Act.[4]

In order to effect this substantive limitation on liability, the PSLRA requires the trial court to ascertain the percentage of responsibility (and hence of liability) of each covered person through the use of special interrogatories (if the case is tried to a jury) or by making specific findings (in a bench trial).[5] The statute further sets out: (*i*) the special interrogatory topics; (*ii*) the information the interrogatories responses shall contain; and (*iii*) factors the jury shall consider in determining the percentage of responsibility.

The Subjects of the Special Interrogatories

The interrogatories must be answered not only "with respect to each covered person," but also with respect to "each of the other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including persons who have entered into settlements with the plaintiff or plaintiffs." With respect to each "such person," interrogatories shall be propounded on three subjects:

1. whether such person violated the securities laws;
2. the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff; and
3. whether such person knowingly committed a violation of the securities laws.[6]

In effect, the second category defines the denominator—the "total fault"—against which the responsibility of all "covered persons" and "claimed persons" must be "measured."

The Required Findings

After describing the interrogatory topics, the statute requires that the "responses to interrogatories… shall specify" the following information:

- the total amount of damages that the plaintiff is entitled to recover; and
- the percentage of responsibility of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.[7]

The PSLRA provides that "[i]n determining the percentage of responsibility" the trier of fact "shall consider" not only "the nature of the conduct of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs," but also "the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs."[8] Information regarding percentage of responsibility of covered persons will, presumably, be supplied in response to the second category of interrogatories specified by the statute, described immediately above. The total damages figure will require a separate interrogatory or set of interrogatories beyond those specified in the statute.

There is one circumstance in which an unknowing violator's liability may exceed his proportionate responsibility: where all or part of a judgment against a codefendant is not collectible from that codefendant or from knowing violators jointly and severally liable with that codefendant.[9] In that circumstance, proportionately liable defendants could become liable for some or all of the uncollectible share. Such "additional" liability will generally be subject to a cap: Each defendant will be liable only for a percentage of the uncollectible share equal to his own percentage of responsibility, up to a maximum of 50% above his original proportionate share.[10]

Efforts to Limit Defendants' Statutory Right to Proportional Damages

The most significant aspect of the provisions discussed above is their impact on the liability of covered persons whom the jury concludes violated the securities laws but did not do so "knowingly." This category will often include outside directors who face strict liability with a due diligence defense under § 11 and corporate officers who are

found to have made a reckless misrepresentation in violation of § 10(b).

As discussed above, the PSLRA provides explicitly how liability for such persons is determined. In effect, the covered person is liable for a fraction of total damages with the numerator being the responsibility of the covered person and the denominator being the "total fault of all persons who caused or contributed to the loss." In this manner, a nonknowing violator's liability is generally capped at his fair share, regardless of other considerations.

The majority of commentators have advocated a significant limitation upon the ability of the jury to consider the relative fault of all responsible parties. In particular, they argue that the "total fault" of those who "caused or contributed" to the loss—the denominator—should be restricted to fault attributable to persons who "violated the securities laws." As one commentator put it, "[c]ourts should reject any argument that the PSLRA does not require that the jury find that a person violated the securities laws in order to allocate fault to that person."[11]

The trial court in *In re Enron Corp. Securities, Derivative & ERISA Litigation* (the *Enron* securities fraud class action)—the only court to have discussed the proportionate liability limitation in a published opinion—took this position.[12] Several trial courts seem to have followed *Enron*, without explaining their reasoning in a written opinion, by including narrowing instructions as part of the special interrogatories.[13]

Those who advocate substituting "fault of violators" for "total fault" advance three arguments in support of their position. First, that allowing the jury to consider total fault—especially fault attributable to persons from whom plaintiffs cannot recover—would risk watering down the damages award so that plaintiffs are not "made whole." Second, that the statute as written would open the door for defendants to present evidence and argument directing blame against a multitude of persons who are not parties to the lawsuit, which could make the trial longer and more complex. Third, that a reading of the proportionate liability provisions as a whole shows that Congress *intended* to impose this limitation (whether they actually did or not). As discussed below, none of the rationale for reducing the denominator stands up under close scrutiny. They all invalidly disregard the specific requirements of the statute, and the policy grounds advanced in their favor are unpersuasive.

The Apportionment Provisions of the PSLRA Should be Applied as Written

The Goal of Making Plaintiffs Whole Does Not Support Judicial Revision of the PSLRA's Apportionment Provisions

The first argument against a literal reading of "total fault"—to include fault attributable to persons from whom plaintiffs cannot recover, such as aiders and abettors of securities violations or those who did not "make" the statements that were in violation of the securities law—is that it would risk watering down the damages award so that plaintiffs are not made whole. After expressing concern that the PSLRA's plain language could encompass those "whom plaintiffs could not sue," the *Enron* trial court imposed requirements on defendants that are nowhere to be found in the PSLRA itself: It required defendants to submit "factual statements" before arguing that any nonparty had "caused or contributed to the plaintiff's loss," and to demonstrate "that the nonparty could have been sued by plaintiffs."[14] It then required the defendants to *prove* that those nonparties violated the securities laws as a prerequisite to allowing the fact-finder to consider those nonparties in the apportionment calculus.[15] These nonstatutory limits, the trial court concluded, would be fairer to the *Enron* purchaser class. Several commentators have similarly argued that considering the fault of nonviolators can water-down the judgment so that defrauded investors are not "made whole."[16]

The goal of making investors whole, however, is not the only goal of the federal securities laws. The PSLRA strikes a balance between that objective on the one hand and limiting the exposure of less culpable, unknowing defendants on the

other. With these provisions, Congress sought to obviate "the most manifestly unfair aspects of the [pre-PSLRA] system of securities litigation," particularly "its imposition of liability on one party for injury actually caused by another."[17]

Congress also sought to dispel the distorting and coercive effect that joint and several liability can have on settlement negotiations. As the joint conference committee explained, "[t]he current system of joint and several liability creates coercive pressure for entirely innocent parties to settle meritless claims rather than risk exposing themselves to liability for a grossly disproportionate share of the damages in the case."[18] Congress was well aware that adding peripheral defendants to a suit could significantly increase the settlement value of potentially meritless claims.[19] It sought to stem this common practice and avoid situations in which "parties who are central to perpetrating a fraud… pay little, if anything" while "those whose involvement might be only peripheral and lacked any deliberate and knowing participation in the fraud often pay the most in damages."[20]

For the apportionment provisions effectively to limit coercive settlement pressure, defendants must expect that their liability at trial will be limited to their proportionate fault. Judicial revisions of the apportionment process providing that the fact-finder can consider only those who are proven violators of the securities laws, or who could have been sued by the plaintiffs, do not provide this assurance. This is most obviously the case in § 11 cases, where outside directors face the potential for massive personal liability simply by virtue of holding their positions on the board at the time a registration statement becomes effective. It is also true in securities fraud cases because the U.S. Supreme Court gives "narrow dimensions" to the class of entities that can ultimately be held liable in private actions for violations of § 10(b); *e.g.*, liability will not extend to anyone besides "the person or entity that ultimately has authority over the false statement."[21] That does not mean, of course, that only persons who "make" statements are at "fault," or bear "responsibility" for the plaintiffs' losses. Indeed, the person "making" a statement may have far *less* involvement in the violation as a whole, or even in the preparation of the statement itself, than others.

Rewriting the PSLRA's proportionate liability provision as suggested would also impede a second objective of Congress in enacting the PSLRA: eliminating "the chilling effect of unlimited exposure to meritless securities litigation on the willingness of capable people to serve on company boards."[22] The conference committee concluded that joint and several liability had dissuaded qualified people from serving on boards and, thereby, "injured the entire U.S. economy."[23] The PSLRA attempted to limit the liability of such individuals through its broad proportionate fault provisions.

Further, Congress was aware of, and displayed willingness to compromise on, the goal of making injured plaintiffs whole. As described above, the PSLRA specifically addresses shortfalls that result when liable defendants are insolvent, and thereby create an "uncollectible share" of the total liability.[24] If Congress was solely concerned with making plaintiffs "whole," it could have placed the entire burden of this "uncollectible share" on the unknowing violators. Instead, Congress split the burden between the unknowing violators and plaintiffs by imposing a cap on most proportionately liable defendants' additional liability.[25] Court-imposed rules that narrow the apportionment provisions so as to make plaintiffs whole effectively overwrite the balance struck by Congress.

The Goal of Trial Efficiency Does Not Support Judicial Revision of the PSLRA's Apportionment Provisions

The second argument advanced in favor of limiting "total fault" to "fault of violators" is that the literal reading would open the door for defendants to direct blame against a multitude of nonparties. Several commentators have expressed concern that this could "vastly extend the trial," linked with suspicion that "defendants most likely will attempt to designate any person or entity that might conceivably have any responsibility for the plaintiffs' loss in an effort to minimalize their own liability in the apportionment of fault."[26] As one put it, "the defendants' best story is one of mass diffusion of responsibility."[27]

This argument is unpersuasive for at least four reasons. First, it takes the goal of judicial efficiency a step too far. The quest for quicker, simpler trials is laudable, but it is not a license to disregard the statutory rights of the litigants; here, a defendant's right to have proportionate liability "measured as a percentage of the total fault of *all persons* who caused or contributed to the loss incurred by the plaintiff."[28]

Second, the hypothetical efficiency gains from curtailing the apportionment process are dubious and speculative. The assertion that "the defendants' best story is one of mass diffusion of responsibility," will, in most cases, be wrong. To the contrary, the defendants' best story will generally not involve fraud or liability on the part of *anybody*—defendants in many cases will be *disserved* by extensive arguments that focus on blaming others. Moreover, the potential class of at-fault nonparties in any given case is likely to be small. Strategic considerations—in particular the defendants' desire to present a coherent, compelling and credible narrative—will deter defendants from making ridiculous accusations or introducing an unmanageable number of players into the trial.

Third, attempts to curtail the apportionment process may, in fact, complicate rather than simplify a securities action. If the court restricts jurors to considering the fault of persons who violated the securities laws, a mechanism must be created to test whether every person or entity on the verdict form committed a violation of the securities laws. At trial, additional evidence will be necessary to establish that the nonparties meet the threshold; *i.e.*, not just evidence to show that the nonparties were "at fault" or "responsible," but also to show, element by element, their conduct constituted a violation of the securities laws. The *Enron* court, for example, required the defendants to collect and present evidence to "demonstrate the non-part[ies'] scienter… and causation under § 10(b)."[29] This could have effects that reach far beyond trial—litigants who face the prospect of proving or disproving the scienter of nonparties can look forward to far more expensive and burdensome discovery.

Fourth, even assuming that the PSLRA's apportionment provisions posed a threat to efficiency, trial courts have many resources at their disposal to minimize that threat. For example, it may be appropriate in some cases to bifurcate the trial so that the issue of the defendants' liability is determined in the initial phase. In the event that no liability is found, or that liability is found based on knowing violations, then the court has entirely avoided the need to consider proportionate fault. In the event that liability is found based on recklessness, the question of proportionate fault could be determined during a later phrase through the presentation of additional evidence and argument.

Judicial Revision of the PSLRA's Apportionment Provisions is not Necessary to "Make Sense" of the Statute's Language

The third argument for restricting "total fault" to "fault of violators" is that a reading of the proportionate liability provisions as a whole shows that Congress *intended* to impose such a limit (even if it did not, literally, do so). According to this argument, the PSLRA "expressly requires the fact-finder to determine *first* 'whether such person violated the securities laws… .'"[30] From this ordering, these commentators discern Congressional intent that *only* the fault of violators should be included in the denominator. Otherwise, they contend, why ask the jury whether or not nonparties violated the securities laws? According to this argument, limiting "total fault" to the "fault of violators" is "[t]he only interpretation of this provision that makes sense… ."[31]

One obvious problem with this argument is that it disregards the plain statutory language. In fact, the statute requires the court to pose all three interrogatory topics to the jury (in no particular order) with respect to *the same set of persons*: "each of the other persons *claimed by any of the parties* to have *caused or contributed to* the loss incurred by the plaintiff, including persons who have entered into settlements with the plaintiff or plaintiffs."[32] While Congress could have written the statute to provide that interrogatories concerning fault be limited to persons found to have violated the securities laws, Congress did not, in fact, do so.

Moreover, when the statute defines the denominator for the apportionment equation, it does not limit the fact-finder to considering the "total fault" of all "persons who violated the securities laws." Rather, it explicitly directs the fact-finder to "measure" each individual's percentage of responsibility against the "total fault" of "*all persons who caused or contributed to the loss* incurred by the plaintiff."[33] If Congress had intended to limit the fact-finder to the consideration of the "total fault" of those who could be liable to the plaintiff, it could have done so, but it did not.

The argument that the statute as written might result in the jury making a finding (with respect to whether a nondefendant violated the securities laws) that would have no apparent significance is, at best, an observation that the statute may function inelegantly under certain circumstances. Inelegant drafting, however, is hardly grounds upon which a court may decline to apply a statute. In any event, *no interpretation* of the interrogatory provisions can save the fact-finder from having to make apparently superfluous findings. For example, the statute explicitly requires the trier of fact to determine whether every "such person knowingly committed a violation of the securities laws."[34] This "knowing" inquiry will have no relevance whatsoever when applied to settled defendants and nonparties—but even the narrowest interpretation of these provisions cannot free the fact-finder from these inquiries.

Finally, early drafts of the PSLRA's apportionment provisions undercut any argument that the language of the provision was intended to apply only to entities that violate the securities laws. These drafts directed the fact-finder to "determine the percentage of responsibility *of the plaintiff*, of each of the defendants, and of each of the other persons or entities alleged by the parties to have caused or contributed to the harm alleged by the plaintiff."[35] It is farfetched to argue that the fact-finder could only apportion fault to the plaintiffs if the plaintiffs violated the securities laws; consequently, the fact that the early drafts of the PSLRA grouped the plaintiffs with both "covered persons" and "claimed persons" suggests that no "violation" test was intended with respect to this group.

As the U.S. Securities and Exchange Commission (SEC) noted, the early version of the apportionment provision "appear[ed] to incorporate a contributory negligence concept into the calculation… ."[36] Although the Commission recommended deleting this provision, the specific reference to the plaintiffs was the only language that was actually deleted from the text of the final version of the statute. No language was added to create a "securities violation" threshold. The early draft's language that defines the broad scope of nonparty entities to be considered by the fact-finder—"each of the other persons or entities alleged by the parties to have caused or contributed to the harm alleged by the plaintiff"—remains intact. So does its original scope.

Practical Implications of the PSLRA'S Liability Limitations

There are substantial practical implications to the allocation issues addressed above. Obviously, proper application of the PSLRA's apportionment provisions has the potential substantially to reduce judgments against less culpable participants in securities law violations. It may also reduce aggregate damage awards, particularly in § 10(b) actions. While the Supreme Court has focused liability on persons who exercise "ultimate authority" over corporate statements—most notably, CEOs and CFOs who sign SEC filings—to the exclusion of other participants in the drafting process,[37] the apportionment provisions ensure that these "makers" do not assume liability over and above their proportionate fault.

Settlements, of course, should reflect this reality. Indeed, as discussed above, a primary purpose of the allocation provisions was to ensure that individual defendants were not coerced into settling cases for amounts out of proportion to their relative fault.

These provisions will also affect discovery. In appropriate cases, defendants must take care to gather not only the evidence they will present in defense, but also the evidence they will present to show that responsibility and fault lie with others.

Depending on the circumstances, the importance of liability apportionment may influence whether one law firm can represent multiple different parties and/or witnesses. Multiple defendants may decide that it is in their best interests not to point the finger at each other or at third parties, or they may decide otherwise. They should have the option of consulting with their own counsel in making that decision and this consultation should take place sufficiently in advance of trial so that each defendant has a meaningful opportunity to choose.

Apportionment also raises issues concerning the structure of the trial. As discussed above, commentators have noted that the apportionment process may add complexity to already complex trials. While added complexity is no grounds for disregarding the language of the PSLRA, as some have suggested, it does invite courts to consider structuring the trial so as to minimize disruptions, including by phasing the trial so that the issue of liability is determined first, independent of allocation and liability limitation concerns.

Conclusion

The apportionment provisions of the PSLRA were intended to cap the liability of non knowing violators according to their "fair share" of liability, and it sought to do so by granting fact-finders broad discretion to apportion responsibility as they see fit. These provisions are, therefore, undermined if the fact-finder is not permitted to consider the full scope of potentially responsible entities. Arguments to curtail the apportionment process are contradicted by plain statutory language and do not reflect the balanced policy considerations of Congress. Proper application of the apportionment provisions should result in settlement and trial outcomes that advance the fairness and efficiency goals underlying enactment of the PSLRA.

NOTES

1. The Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C.A. § 78u-4(f)(2)(B) & (f)(3)(A)(ii).
2. PSLRA § 78u-4(f)(2)(A) (emphasis added). The PSLRA liability limitations apply to "covered persons" who are found to have violated the securities laws. The term "covered persons" includes (*i*) any defendant in a private action arising under the Exchange Act of 1934; and (*ii*) any defendant in a private action arising under § 11 of the Securities Act of 1933 "who is an outside director of the issuer of the securities that are the subject of the action." PSLRA § 78u-4(f)(10)(C).
3. PSLRA § 78u-4(f)(2)(B)(i) (emphasis added).
4. *See supra*, note 2.
5. PSLRA § 78u-4(f)(3). We focus on jury trials here because they are far more common than bench trials in this area.
6. PSLRA § 78u-4(f)(3)(A).
7. PSLRA § 78u-4(f)(3)(B) (bullets added).
8. PSLRA § 78u-4(f)(3)(C).
9. PSLRA § 78u-4(f)(4)(A).
10. PSLRA § 78u-4(f)(4)(A)(ii). For example, if a defendant bears 10% responsibility for a total judgment of $1 million, that defendant will be liable for $100,000 as his original "proportionate share." If the other 90% of the judgment is uncollectible, then the defendant's liability for the uncollectible share would be capped at $50,000 (*i.e.*, 50% of his "proportionate share"), for a total liability of $150,000. The plaintiff may be forced to bear the brunt of any shortfall. Only in the case of a plaintiff with assets of $200,000 or less, and with damages of 10% or more of his net worth, will the entire burden of "uncollectible shares" be placed on the defendants. PSLRA § 78u-4(f)(4)(a)(i)-(ii).
11. Judge Amy T. St. Eve & Bryce C. Pilz, *Practitioner Note: The Fault Allocation Provisions of the Private Securities Litigation Reform Act of 1995—A Roadmap for Litigants and Courts*, 3 N.Y.U. J.L. & Bus. 187, 212 (2006) (hereinafter "Fault Allocation"); see also Stuart M. Grant & Megan D. McIntyre, *The Devil Is in the Details: Application of the PSLRA's Proportionate Liability Provisions Is So Fraught With Uncertainty That They May Be Void for Vagueness*, 1505 PLI/Corp 83, 98 (2005) (articulating "plaintiff's perspective" that "if the answer to the first question is 'no'—*i.e.*, if the jury finds that the 'other person' did not violate the securities laws—then the jury should be instructed to stop there, as the second and third questions… are moot").
12. In *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 236 F.R.D. 313 (S.D. Tex. 2006), rev'd and remanded, 482 F.3d 372, Fed. Sec. L. Rep. (CCH) P 94173, 67 Fed. R. Serv. 3d 882 (5th Cir. 2007), a district court addressed the PSLRA's apportionment provisions in a decision discussing the plaintiffs' proposed trial

plan. It concluded that, "in an effort to manage its docket and this case," it would "establish some threshold requirements about which the statute is silent or ambiguous." *Enron* at 319. The Eleventh Circuit has also commented *in dicta* on the scope of the proportionate liability provision, suggesting that it would not read the provision "to include secondary actors." *See Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 720 n.3, Fed. Sec. L. Rep. (CCH) P 94712 (11th Cir. 2008). The Eleventh Circuit did not explain its basis for this reading.

13. At least three courts have used verdict forms that suggested that responsibility should only be apportioned to those who violated the securities laws. *See, e.g.*, Special Verdict Form and Questions for the Jury at 13-14, *In re Homestore.com, Inc., Sec. Litig*, No. 01-11115 (C.D. Cal. Feb. 24, 2011) (jury should apportion fault to entities only if the entities "committed a securities violation which caused or contributed" to the plaintiffs' loss); Verdict Form, *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542 (S.D. Fla. Nov. 8, 2010) ("[y]ou cannot assign any percentage of responsibility to a Defendant for whom you did not" answer no to the question of whether the defendant acted in good faith); Verdict Form at 69, *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02-5571 (S.D.N.Y. Feb. 2, 2010) ("you must determine what percentage of responsibility, if any, to assign to each defendant whom you found to have committed a Section 10(b) violation").
14. *Enron* at 319-20.
15. *Enron* at 320.
16. *See, e.g.*, Grant & McIntyre, *supra* note 11, at 97.
17. Committee of Conference Report, H.R. Rep. No. 104-369, at 105 (1995), reprinted in *Litigating & Bespeaking Caution Under the New Securities Law*, 924 PLI/Corp 7, 105 (1996) (hereinafter "Sweeping Reform").
18. *Sweeping Reform*, *supra* note 17, at 105-06.
19. As U.S. Sen. Pete Domenici (R-N.M.) observed, "[s]tudies show that naming an accountant in a lawsuit adds 30 percent to its settlement value." *Sweeping Reform*, *supra* note 17, at 171. (Sen. Domenici was one of the original co-sponsors of PSLRA.)
20. *Sweeping Reform*, *supra* note 17, at 105 (quoting testimony of Hon. Richard Breeden, former SEC Chairman).
21. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302-03, 180 L. Ed. 2d 166, Fed. Sec. L. Rep. (CCH) P 96327 (2011) (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 167, 128 S. Ct. 761, 169 L. Ed. 2d 627, Fed. Sec. L. Rep. (CCH) P 94556 (2008)).
22. *Sweeping Reform*, *supra* note 17, at 106 (quoting testimony of Breeden).
23. *Sweeping Reform*, *supra* note 17, at 106.
24. PLSRA § 78u-4(f)(4).
25. *See supra* notes 9-10 and accompanying text.
26. *Enron* at 319.
27. Donald C. Langevoort, *The Reform of Joint and Several Liability Under the Private Securities Litigation Reform Act of 1995: Proportionate Liability, Contribution Rights and Settlement Effects*, 51 Bus. Law. 1157, 1168 (1996).
28. PLSRA § 78u-4(f)(3)(A)(ii) (emphasis added).
29. *Enron* at 320.
30. John C. Coffee, Jr., *Developments Under the Private Securities Litigation Reform Act of 1995: The Impact After Two Years*, ALI-ABA Course of Study, Corporate Governance: Current and Emerging Issues, at 420-421 (1997); *see also Enron* at 320; Grant & McIntyre, *supra* note 11, at 99.
31. *Fault Allocation*, *supra* note 11, at 212.
32. PLSRA § 78u-4(f)(3)(A).
33. PLSRA § 78u-4(f)(3)(A)(ii) (emphasis added).
34. *See* PLSRA § 78u-4(f)(3)(A)(iii).
35. *See Sweeping Reform*, *supra* note 17, at 436, 469 (emphasis added). This history is also discussed in Langevoort, *supra* note 27, at 1166-67.
36. *See Sweeping Reform*, *supra* note 17, at 469.
37. *See generally Janus*, 131 S. Ct. 2296.