1-1-2018

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GUARDIANS OF THE GALAXY: HOW SHAREHOLDER LAWYERS WON BIG FOR THEIR CLIENTS AND VINDICATED THE INTEGRITY OF OUR ECONOMY

Daniel J. Morrissey∗

Securities class actions are the most economically significant form of litigation. Highly skilled lawyers expend huge sums and relentless efforts in these matters but because of the costs involved and the potential for enormous liability very few of them ever make it to trial. This Article is the story of one that did, a mammoth fraud where a jury returned a $1.5 billion verdict that, with interest, increased to almost $2.5 billion by the time the case reached the appellate court.

There the Court upheld the shareholders' theory that their damages could be measured by the excessive amounts they had to pay for their shares whose value was artificially inflated by the defendants' false financial statements. In doing that the appellate panel significantly strengthened the potential claims of shareholders in these actions by accepting a new approach to reckoning their losses called the "leakage model." It allows damages to be determined by fixing the decline in the price the stockholders paid for their shares from the time news of the fraud first becomes available, rather than when the defendants ultimately acknowledge their wrongdoing.

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The author would like to thank his son, Graham J. Morrissey, for inspiring the title of this Article. Along those lines, he would like to declare on behalf of his family and friends, "We are Groot."

The author would also like to acknowledge academic colleagues Mark Lowenstein, Tamar Frankel, Eric Chiappanelli, Jay Silver, and Marc Steinberg for their support and encouragement. He would also like to thank friends from the bench and bar as well who were kind enough to read and comment on this piece: Hon. Joan Gottschall, Hon. Neil Wake, Don Curran, Darren Robbins, Michael Dowd, Spencer Burkholz, and Luke Brooks. The author would also like to thank Head Public Service Librarian Ashley Sundin and assistants Vicky Daniels and Kim Sellars for their help in preparation of this Article.

This piece is dedicated to Victoria J. Dodd, Professor Emerita at Suffolk University Law School, a renowned legal educator and a dear friend to the author and many others. It is quite fitting that this Article, dedicated to Professor Dodd, is appearing in the *Loyola of Los Angeles Law Review* because our friendship began there when we were both young professors.

> *Thanks to the unyielding work of their lawyers, the case was a grand success for the shareholders, returning them a significant percentage of the money they lost. Yet it took 14 years to litigate and initially cost the plaintiffs' attorneys, who bore all their clients' expenses, over $30 million. If we are truly committed to achieving justice in these shareholder frauds the law must find a more expeditious way to deter such wrongful conduct and compensate investors like these who are cheated.*

TABLE OF CONTENTS

I. INTRODUCTION: SECURITIES CLASS ACTIONS

A large portion of the wealth of our nation lies in the treasuries of its publicly held corporations.[1] Those resources belong to their shareholders[2] and are supposed to be managed faithfully for them by their officers and directors.[3] State corporate laws require that they discharge those responsibilities as fiduciaries[4] and the federal securities laws reinforce that notion by compelling accurate disclosure of all significant aspects of their businesses.[5]

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1. A report in 2011 stated that there were then approximately 6,700 large public corporations whose shares were actively traded. It also noted that even though they comprise a small fraction of the 5.8 million U.S. businesses operating in the corporate form, those firms generate the lion's share of our country's economic activity. HOWARD M. FRIEDMAN, PUBLICLY HELD CORPORATIONS: A LAWYER'S GUIDE 1 (2011).

Recent findings, however, indicate that number is shrinking. One stated that although there were over 7,000 companies listed on exchanges in the late 1990s, that number is now down to 3,671. *Why the Decline in the Number of Listed American Firms Matters*, ECONOMIST: SCHUMPETER BLOG (Apr. 22, 2017), https://www.economist.com/business/2017/04/22/why-the-decline-in-the-number-of-listed-american-firms-matters. That author also noted that there are now roughly one hundred unicorns, "private firms worth over $1 billion." *Id.*; *cf.* Andy Kessler, *Unicorns Need IPOs*, WALL ST. J. OPINION. (Jan. 7, 2018, 4:37 PM), https://www.wsj.com/articles/unicorns-need-ipos-1515361043 (asserting that unicorns must make public offerings of their shares to achieve the liquidity that will actualize their full potential)*; see also* Jason M. Thomas, *Where Have All the Public Companies Gone?*, WALL ST. J**.** OPINION (Nov. 16, 2017, 7:10 PM), https://www.wsj.com/articles/where-have-all-the-public-companies-gone-1510869125 (stating that the number of initial public offerings has fallen from 845 in 1996 to just 128 in 2016). Consistent with that, the Wall Street Journal reported that public investors do not now own a large number of the "growth stocks." *Id.* Instead, shares of those companies have "migrated" to private portfolios. *Id.* As the previously cited author noted critically about that phenomenon, "[o]rdinary Americans without connections are meanwhile unable directly to own shares in new companies that are active in the fastest-growing parts of the economy. ECONOMIST: SCHUMPETER BLOG, *supra*.

2. As one court famously put it: "A business corporation is organized and carried on primarily for the profit of the stockholders." Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). As to how that wealth is ultimately distributed to shareholders, see MODEL BUS. CORP. ACT § 6.40 (AM. BAR ASS'N 2016).

3. MODEL BUS. CORP. ACT § 8.30(a) (AM. BAR ASS'N 2016).

4. *Id.* As one noted commentator stated: "Like both trustees and agents, directors and officers act for the benefit of another, in this case the corporation. As such, just as trustees have a fiduciary duty to their beneficiaries, and agents have a fiduciary duty to their principals, directors and officers have a fiduciary duty to their corporations." FRANKLIN A. GEVURTZ, CORPORATION LAW 278 (2d ed. 2010).

5. There are two foundational pieces of legislation there. The first, the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2006) (Securities Act), requires, subject to certain exemptions, that securities be registered with a government agency, the Securities and Exchange Commission (SEC or Commission), before they can be offered or sold. The second, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2012) (Exchange Act), contains a host of provisions regulating the

While most corporate officials operate their firms honestly and in accord with the law,[6] some mislead their stockholders and the public by distorting the truth about their operations.[7] Usually that takes the form of falsified disclosures and financial statements designed to make their companies appear to be more successful than they really are.[8] In these situations, those who trade shares are deceived—with purchasers paying artificially inflated prices for their stock.[9]

When the truth comes out about those misrepresentations by public companies, share prices of their stock often drop and investors suffer the resulting losses.[10] Many times, there are hundreds, thousands, or even tens of thousands of shareholders injured by these deceptions[11] and their damages can run into the millions and in some

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trading of securities, including a requirement that public companies make periodic and current reports about their operations.

6. MARK S. BEASLEY et AL., COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM'N, FRAUDULENT FINANCIAL REPORTING 1998–2007: AN ANALYSIS OF U.S. PUBLIC COMPANIES 2 (2010), https://www.coso.org/Documents/COSO-Fraud-Study-2010-001.pdf.

7. The same study, however, cataloged 347 false and misleading reporting cases brought by the SEC during the years 1997–2008. *Id.* Since that time, corporate fraud has been on the rise. A recent study published by the consulting firm Kroll surveyed a large number of American and global firms. Seventy-five percent of them reported that they had been victims of fraud during the recent year. KROLL, GLOBAL FRAUD REPORT: VULNERABILITIES ON THE RISE 7 (2015–2016 ed.). Forty percent of those companies felt highly or moderately vulnerable to corruption and bribery. *Id.* at 8.

8. BEASLEY et AL., *supra* note 6.

9. *See infra* p. 108.

10. James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 502 (1997).

11. The ability of these defrauded investors with relatively small claims to band together in a class action allows them to seek redress when their individual actions would not merit the expense of litigation. James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 497 (1997). Another leading commentator made much the same point: "Securities class actions have an appealing attraction to those seeking to deter fraud. If a party commits fraud that affects hundreds, if not thousands of dispersed shareholders, allowing a plaintiffs' attorney to aggregate the claims into a single class action makes the pursuit of such claims both more manageable and economical." Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1522 (2004). The Supreme Court recognized this beneficial aspect of securities class actions with these comments in one such case: "Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985). A notable critic of class actions, however, is the retired U.S. Court of Appeals Judge, Richard Posner. At a gathering of lawyers who practice in that area, he referred to class actions as "an invitation to shenanigans" because "the client—the class—is basically helpless." Perry Cooper, *Posner: Class Action Rules, Constitution Overrated*, BLOOMBERG BNA NEWS (Oct. 28, 2016), https://www.bna.com/posner-class-action-n57982081985/. He went on to talk about how lawyers for the class make the decisions, but they "seem to be primarily interested in attorneys' fees . . . . And the defendants are just interested in getting off as lightly as they can." *Id.*

situations even billions of dollars.[12]

Such actions are violations of federal[13] and state securities laws[14] and may involve other wrongdoings as well, such as mail and wire fraud.[15] Those responsible may therefore be criminally prosecuted or otherwise sanctioned by government agencies, such as the Department of Justice and the U.S. Securities and Exchange Commission ("SEC" or the "Commission"), whose mandate is to administer and enforce the federal securities laws.[16] Unfortunately, they have been less aggressive of late in seeking sanctions for such wrongdoing.[17] The SEC, in particular, lacks the resources to investigate and prosecute most of the securities violations that occur.[18]

In any event, the SEC does not directly represent individual shareholders who have bought stock in companies and been cheated

12. In recent decades, tens of billions of dollars have been recovered in settlement of these shareholders' suits. Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 152 (2009).

13. Securities fraud is prohibited by § 17(a) and § 10(b) (along with Rule 10b-5 promulgated under it) of the Securities Act, and § 15(c) of the Exchange Act. Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a) (2012); Securities Exchange Act of 1934 §§ 10(b), 15(c), 15 U.S.C. §§ 78j(b), 78o(c) (2012); 17 C.F.R. § 240.10b-5 (2018). Section 24 of the Securities Act and § 32(a) of the Exchange Act impose criminal sanctions on anyone who willfully violates the provisions proscribing fraud. Securities Act of 1933 § 24; Securities Exchange Act of 1934 § 32(a).

14. The Uniform Securities Act, the basis of securities regulation in many states, criminalizes the willful violation of various provisions of that Act, including its registration and anti-fraud provisions. UNIF. SEC. ACT § 508 (2002) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2005); UNIF. SEC. ACT of 1985 § 604 (1985) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 1988); UNIF. SEC. ACT of 1956 § 409, 7C U.L.A. 873 (2006).

15. 18 U.S.C. §§ 1341, 1343, 1346 (2012).

16. For a full description of the SEC and its mission, see *Office of the Investor Advocate*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/page/investor-advocate-landing-page (last visited Oct. 9, 2018).

17. *See* JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016); Patrick Radden Keefe, *Limited Liability*: *Why Don't Corporate Wrongdoers Get Charged?*, NEW YORKER, July 31, 2017, at 28. Keefe particularly faults the Justice Department for its practice of deferring prosecution of corporate wrongdoers.

18. When the author was a junior staff attorney in the SEC's Enforcement Division in the late 1970s, a senior SEC lawyer told him that the Commission had the resources to prosecute no more than 2% of the then occurring securities law violations. Over thirty years later, at a conference on securities law held in Portland, Oregon, he heard a similar statement by an SEC official from one of its regional offices. This time, the Commission attorney said that his agency only had the ability to prosecute 1% of the current securities law violations. MARC I. STEINBERG et AL., SECURITIES LITIGATION 685 (2016). A well-respected financial columnist for The New York Times perhaps described this situation best with these remarks: "It is no secret that the Securities and Exchange Commission is terrifically understaffed and widely underfunded compared with the populous and wealthy Wall Street world it is supposed to police." Gretchen Morgenson, *Quick, Call Tech Support for the S.E.C.*, N.Y. TIMES, Dec. 16, 2007, at 31.

by paying more than they should have.[19] However, given the human temptation to such misconduct that is ever-present to those who control "other people's money,"[20] it is hard to see how the trust needed in private capital formation could exist if investors did not have the means to recover their losses caused by such wrongful activity.

Fortunately, our legal system affords defrauded investors an avenue to seek such redress by bringing their own civil claims in these matters.[21] The prospect of liability thus compels those seeking capital to make accurate disclosure of all relevant information that investors might need.[22] It also provides that they may be held financially responsible when they fail to do so.[23]

Securities frauds that involve large numbers of shareholders are mass torts.[24] To remedy them, the legal system allows stockholder victims to bring suit together as a class against the corporations and their officials who perpetrate such wrongs.[25] Those actions not only allow defrauded shareholders to recoup their damages, but they also deter others who might consider engaging in such illegal activity.[26]

A Congressional Committee aptly described the dual function that these suits have to both compensate victims and discourage such transgressions in the future.

> Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely on government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate

19. The SEC, however, does advise aggrieved investors on its website about various legal remedies they might pursue to seek redress for securities fraud. *See How Can Investors Get Money Back in a Fraud Case Involving a Violation of the Federal Securities Laws?*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/page/investor-section-landing (last modified Dec. 29, 2016).

20. The classic work here is LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).

21. Securities Exchange Act of 1934 § 21D(a)(3), 15 U.S.C. § 78u-4(a)(1) (2012).

22. STEINBERG et AL., *supra* note 18, at 7.

23. *See id.* ("Securities litigation also compensates investors who are injured by incomplete or inaccurate disclosures, and the availability of that encourages investors to enter the market.").

24. Securities Exchange Act of 1934 § 21D(a)(3).

25. *See* STEINBERG et AL., *supra* note 18, at 9–10.

26. *See* Marc I. Steinberg, *Curtailing Investor Protection Under the Securities Laws: Good for the Economy?*, 55 SMU L. REV. 347, 353–54 (2002). Given that settlements in the typical shareholder class action suit may not provide much compensation to individual shareholders, deterrence may be their principle benefit. Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 102 (2017). In the case discussed in this Article, however, the shareholders did recover a significant percentage of their losses. *See infra* notes 35–36 and accompanying text.

> officers, auditors, directors, lawyers and others properly perform their jobs.[27]

The Supreme Court has also noted the need for shareholder suits to police corrupt corporate activity. As it said in *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., "This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)."[28] In addition, as noted by one commentator, shareholder plaintiffs and their attorneys "may be more willing to invest in complex cases and expand the boundaries of the law than their public counterparts."[29]

These suits, known as securities class actions, are complex legal proceedings. The lawyers who bring them must not only be knowledgeable in the intricate laws and policies governing financial instruments, but they also have to be highly skilled in pretrial and trial practice.[30] In addition, these cases entail great risks for plaintiffs' attorneys who take them on.[31] This litigation is hugely expensive for those law firms and they typically undertake them on a contingent fee basis, receiving no compensation unless their clients secure a

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27. H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.).

28. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007). The Supreme Court made similar statements several times in earlier cases. *See, e.g.*, Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964). In another case, the Court also had this to say about the general importance of private anti-fraud actions: "[A] dynamic, free economy presupposes a high degree of integrity in all of its parts, an integrity that must be underwritten by rules enforceable in fair, independent, accessible courts." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 161 (2008).

29. Lipton, *supra* note 26, at 100.

30. For an elaborate discussion of all the litigation skills that these suits require, see STEINBERG et AL., *supra* note 18, at 573, 623. Shareholder class actions suits, however, are not without their critics. In a case involving claims that a company did not make appropriate disclosures to stockholders regarding a merger, Judge Richard Posner used a well-worn pejorative term, "strike suit", to describe such actions brought "for the sole purpose of obtaining fees for the plaintiffs' counsel." Hays v. Walgreen Co. (*In re* Walgreen Co. Stockholder Litig.), 832 F.3d 718, 721 (7th Cir. 2016)*; see also* Debra Cassens Weiss, *Posner Opinion Blasts Class Actions that Are 'No Better than a Racket'*, A.B.A. J. (Aug. 12, 2016, 8:15 AM), http://www.abajournal.com/news/article /posner_opinion_blasts_class_actions_that_are_no_better_than_a_racket; Cooper, *supra* note 11 (Judge Posner (now retired) has made what one observer called "tongue-in-cheek" comments about class actions by calling them "an invitation to shenanigans.").

31. Professor Cox described the intrepid attitude of the lawyers who bring these often mammoth suits: "[T] he sheer size of the aggregated claim attracts not only the entrepreneurial skills of the class lawyer but also commands the full attention of the defendants." Cox, *supra* note 10, at 497.

recovery.[32]

II. THE *HOUSEHOLD* SUIT

This Article describes such a case brought against a major financial institution, Household International, Inc. (Household). It is one of the most significant securities class actions of recent times because it not only achieved a standout result for shareholders, but it was also one of very few such suits that actually went to trial.[33] While it may be a bit much to call lawyers who bring these actions "Guardians of the Galaxy,"[34] this litigation demonstrates how difficult it is for shareholders to prevail in these matters, yet how essential the work of their lawyers is to maintaining the honesty of our economy and the integrity of our financial markets.

In *Glickenhaus & Co. v. Household Int'l, Inc.*,[35] over thirty thousand shareholders[36] sued together claiming that they suffered losses because of the public representations made by the company and some of its senior officials.[37] It took fourteen years to litigate the matter.[38] That entailed seven years of pretrial practice,[39] a twenty-six

32. As one commentator put it succinctly, lead counsel in these cases is the "litigation's financier." Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1115 (2011). As the author stated earlier in that article, "Good lead counsel is hard to find," going on to discuss various approaches to make sure that such lawyers adequately represent the interests of their clients, the defrauded shareholders. *Id*. at 1110. Others have also expressed concerns that plaintiffs' attorneys, facing mounting financial challenges, would agree to an inadequate settlement out of self-interest. *See, e.g.*, John C. Coffee, Jr. *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 281 (1983). Professor Burch's article discusses these issues in the context of the requirement that the Court appoint a lead plaintiff counsel in securities class actions. Burch, *supra*. Securities Exchange Act of 1934 § 21D(a)(3), 15 U.S.C. § 78u-4(a)(3)(b)(v) (2012).

33. *See* Matthew L. Mustokoff & Margaret E. Mazzeo, *Loss Causation on Trial in Rule 10b-5 Litigation a Decade After* Dura, 70 RUTGERS U. L. REV. 175, 217 (2017) ("Moreover, there is no reason to believe that the rate of securities class actions advancing to trial—21 out of roughly 5,000 cases filed . . . , or 0.4%—will increase any time soon.").

34. *See Guardians of the Galaxy* (film), WIKIPEDIA, https://en.wikipedia.org/wiki/Guardians_of_the_Galaxy (last edited Jan. 12, 2019, Oct. 15, 2018, 7:00 PM) ("Guardians of the Galaxy . . . is a 2014 American superhero film based on the Marvel Comics superhero team . . . .").

35. 787 F.3d 408 (7th Cir. 2015).

36. This and much of the procedural history of the case are taken from an elaborate report to the court by plaintiffs' counsel. *See* Declaration of Spencer A. Burkholz in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Approval of Attorneys' Fees and Expenses and Award of Expenses to Lead Plaintiffs at 3, Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 2016 WL 10571774 (N.D. Ill. Nov. 10, 2016) (No. 02-C-5893) [hereinafter Burkholz Report].

37. *Id*. at 5.

38. *Id*. at 4.

39. *Id*. at 5–90.

day jury trial[40] that resulted in a whopping $1.5 billion verdict (which the award of prejudgment interest increased to nearly $2.5 billion),[41] and an elaborate post-trial claims process.[42] After that came a reversal on appeal[43] and lengthy preparations for a retrial that culminated in a final settlement of $1.575 billion in the early morning hours before the second trial was to begin.[44]

All in all the plaintiffs and their lawyers achieved a stunning outcome, returning investors a large percentage of their losses.[45] The trial judge stated at a pretrial hearing that there were a hundred ways that the plaintiffs could lose the case, but only one way that they could win it.[46] But win it they did, with the lawyers for the class vindicating the integrity of our financial system.

The Court of Appeals began its opinion, which ultimately sent the case back for retrial, by noting the complexity and lengthy procedural history of the *Household* case.[47] Instead of recounting all of that however, the panel said it would "start with the view from 10,000 feet and add details relevant to particular issues as needed."[48] The case did indeed raise a host of legal questions and as the Court of Appeals said, "a tome" could be written about all of them.[49]

This Article however will adopt a middle ground, describing this record-setting lawsuit[50] more extensively than did the Court of Appeals. It will present that in the context of the rules and policies that make up this highly specialized but extremely important area of law. Ultimately, all that will form a backdrop to a discussion of the issue

40. *Id.* at 1.

41. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 412 (7th Cir. 2015).

42. Burkholz Report, *supra* note 36, at 2.

43. *Glickenhaus & Co.*, 787 F.3d at 433.

44. Burkholz Report, *supra* note 36, at 1.

45. Depending on the damage model used, class members recovered amounts that were between 75% to 252% of their losses. That far exceeds the percentage recovery of all the other securities settlements valued in excess of $500 million. Plaintiff's Reply Memorandum in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds at 1, Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 2016 WL 10571774 (N.D. Ill. Nov. 10, 2016) (N.D. Ill. Sept. 29, 2016) (No. 02-C-5893) [hereinafter Reply Memo].

46. As recounted to the author by Michael Dowd, attorney for the plaintiff.

47. *Glickenhaus & Co.*, 787 F.3d at 413–14.

48. *Id*. at 413.

49. *Id.*

50. As the court of appeals noted, the "enormous" $2.46 billion judgment for the plaintiffs appeared to be one of the largest to date. *Id.* at 412 (citing Reuters, *HSBC Faces $2.46 Billion Judgment in Securities Fraud Case*, N.Y. TIMES (Oct. 17, 2013), https://www.nytimes.com/2013/10/18/business/hsbc-is-fined-2-46-billion-in-securities-fraud-case.html).

that the Court of Appeals found so crucial—how to calculate shareholder damages in such a huge fraud.

A. The Fraud

Household was a Chicago-based holding company with subsidiaries that provided loans to subprime customers—individuals who for the most part had less than stellar credit histories.[51] By the 1990s, through growth and acquisitions, Household had become one of the nation's largest mortgage lenders.[52] It also made home-equity loans and engaged in auto financing and credit card lending.[53] Household funded much of its operations by reselling its loans as asset-backed securities and continuing to service them for a fee.[54] For the five years from October 1997 to October 2002, it used that process to raise $75 billion.[55]

The company supported those sales of its loans as well as the price of its stock by assuring the market that its loan pools were stable and consistently profitable.[56] It claimed to have achieved that by using sophisticated centralized technology that gave it a competitive advantage in monitoring its customers' accounts to guard against delinquencies.[57]

In reality, however, Household's purported success resulted from predatory lending practices that confused its borrowers about interest rates and other aspects of their obligations.[58] It was also attributable to what might euphemistically be called "re-aging" and "restructuring" of its non-performing loans.[59] That involved distortion of metrics used to record the percentage of its loans that were delinquent so that they

51. Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws at 4, Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 756 F. Supp. 2d 928 (N.D. Ill. 2010) (No. 02-C-5893) [hereinafter Complaint].

52. *Id.* at 4.

53. *Glickenhaus & Co.*, 787 F.3d at 413.

54. Complaint, *supra* note 51, at 5.

55. *Id.*

56. *See id.* at 4.

57. *Id.*

58. *See Glickenhaus & Co.*, 787 F.3d at 413. Throughout its early history, however, Household did not encourage such improvident practices by its customers. As one of its early radio commercials put it: "Never borrow money needlessly, just when you must. Borrow where the loans are a specialty from folks you trust. Borrow confidently from H-F-C." *HFC - Household Finance Corporation: Radio Commercials*, YOUTUBE (Feb. 28, 2014), https://www.youtube.com/watch?v=vg5gtjKhRDc.

59. *Glickenhaus & Co.*, 787 F.3d at 413.

would not have to be written down as uncollectable.[60] In addition, Household used other impermissible accounting techniques to make its operations appear stronger and more lucrative than they were.[61]

These practices, which began in 1997, were authorized by the company's top officials and were ingrained in Household's corporate culture.[62] Most significantly, they made it possible for Household falsely to report record financial results that bolstered the price of its shares. Between the summers of 1999 and 2001, the company's stock price thus rose more than 50% from around $40 per share to the mid $60s, hitting a high of $69 in July 2001.[63]

The truth about the company however began to emerge later that year due to investigations and legal actions by various State Attorneys General that focused on Household's illegal lending practices.[64] Those began with a suit by California on November 15, 2001.[65] Household ultimately settled them on October 11, 2002 by paying $484 million to all fifty states.[66] That resulted in the company taking a $525 million charge to its financial statements.[67] Household was also forced to restate its financials due to improper accounting of its expenses.[68] That lowered its earnings by $386 million.[69]

Between the initiation of the California action and the multistate settlement, the price of the company's shares decreased 54% from $60.90 to $28.20—far worse than drops in the comparative S&P 500 and S&P financial indexes that were respectively 25% and 21%.[70] Perhaps believing it would then be getting a bargain, HSBC Holdings from the United Kingdom, at that time the world's second largest bank, acquired Household in November 2002 for just over $16 billion.[71] It was a decision that HSBC would later regret because it eventually made that financial giant liable in this litigation as

60. *Id.*
61. *Id.*
62. Complaint, *supra* note 51, at 19–23.
63. *Glickenhaus & Co.*, 787 F.3d at 413.
64. *Id.*
65. *Id.*
66. *Id.*
67. Burkholz Report, *supra* note 36, at 5.
68. *Id.*
69. *Id.*
70. *Glickenhaus & Co.*, 787 F.3d at 413.
71. Erik Portanger et al., *HSBC Sets $16 Billion Deal for Household International*, WALL ST. J. (Nov. 15, 2002, 12:01 AM), https://www.wsj.com/articles/SB1037262079434607068.

Household's successor.[72]

Household's problems with government authorities however were not over. Its final day of reckoning with them came in March 2003 when it entered into a consent decree with the SEC agreeing to cease and desist from engaging in improper re-aging of its delinquent accounts.[73]

B. Pre-Trial Litigation

The first shareholder fraud complaints were filed in August 2002 in the U.S. District Court in Chicago.[74] On October 18, 2002, when the number of similar suits filed had risen to seven, a group of investors led by Glickenhaus Institutional Group and represented by the law firm later renamed Robbins Geller Rudman & Dowd (Robbins Geller)[75] moved to have the actions consolidated and be designated lead plaintiff and counsel. After several other plaintiffs and their attorneys withdrew similar motions, the court granted Glickenhaus and Robbins Geller's motion on December 18, 2002.[76]

Several months later, the Robbins Geller firm filed a 154 page consolidated complaint.[77] In addition to Household, it named as defendants 16 officers and directors of the company as well as its auditor, Arthur Anderson, and two investment banks that had

72. Household was merged into Household International, Inc. and its name changed to HSBC Finance Corporation. As the company's press release stated, "The name change to HSBC Finance Corporation furthers the rebranding of Household to HSBC." The release also announced that HSBC would assume all the obligations of Household. *HSBC Merges Household Finance Corporation into Household International, Inc.; Renames Entity "HSBC Finance Corporation"*, BUS. WIRE (Dec. 15, 2004, 4:01 PM), https://www.businesswire.com/news/home/20041215005787/en/HSBC-Merges-Household-Finance-Corporation-Household-International.

By March 2009, HSBC was shutting down much of the consumer finance business it had gotten by purchasing Household and writing off its value. HSBC's Chairman Stephen Green then said, "With the benefit of hindsight, this is an acquisition we wish we had not undertaken." Steve Slater, *HSBC Retreats from U.S., Regrets Household Deal*, REUTERS (Mar. 2, 2009, 4:22 AM), https://www.reuters.com/article/us-hsbc-us-sb-idUSTRE52127520090302.

73. *Household International Agrees to Cease-and-Desist Order for False and Misleading Statements About Restructuring Policies Concerning Delinquent Loans*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/news/press/2003-35.htm (last modified Mar. 19, 2003).

74. Burkholz Report, *supra* note 36, at 5.

75. The Robbins Geller firm is among the most prominent group of lawyers who represent shareholders. It has obtained some of the largest securities class action recoveries in American legal history, including most famously a $7 billion settlement in litigation on behalf of the shareholders of Enron. In recent years, it has continued to rank first in the total amount recovered for investors. *See The Right Choice*, ROBBINS GELLER RUDMAN & DOWD LLP, https://www.rgrdlaw.com/firm.html (last visited Oct. 11, 2018).

76. Burkholz Report, *supra* note 36, at 6–7.

77. Complaint, *supra* note 51.

underwritten a public offering by Household.[78] The complaint went on to state various fraud claims on behalf of all those who had purchased or otherwise acquired Household securities between October 23, 1997 and October 11, 2002.[79]

It also alleged in great detail how during that period the defendants made a number of false representations and material omissions about various aspects of Household's operations.[80] Those included its lending practices, delinquency rates, and earnings from credit-card agreements.[81] Those also involved the company's failure to disclose its predatory lending, the concealment of its loan delinquencies by "re-aging" or restructuring them, and a number of other practices that Household engaged in to make it appear more profitable than it really was.[82]

The complaint also alleged that Arthur Anderson had participated in Household's fraudulent scheme.[83] It charged that the investment banks were therefore liable in their roles as underwriters and experts in an SEC-registered offering of securities issued by Household in 1998.[84] The company used those to acquire another subprime lender, Beneficial Finance Company.[85]

Amendments added to the federal securities laws by the Private Securities Litigation Reform Act of 1995 (PSLRA) include a provision staying discovery until claims in securities fraud class actions survive a motion to dismiss.[86] That fact-finding process was thus not available to the plaintiffs until they could overcome extensive challenges by the defendants to the legal sufficiency of their causes of action.

Those entailed arguments that the complaint failed to meet other requirements of the PSLRA—specifically that the plaintiffs plead the fraud with particularity[87] and that the facts in the complaint give rise

78. *Id.* at 14–18.
79. *Id.* at 1.
80. *Id.*
81. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 413 (7th Cir. 2015).
82. *Id.* at 423.
83. Burkholz Report, *supra* note 36, at 10.
84. *Id.*
85. *Id.*
86. Securities Exchange Act of 1934 § 21D(b)(3)(B), 15 U.S.C. § 78u-4(b)(3)(B) (2012).
87. Securities Exchange Act of 1934 § 21D(b)(1), 15 U.S.C. § 78u-4(b)(1).

to a strong inference that the defendants acted with scienter.[88]

Household's motion to dismiss along those lines included a potpourri of other contentions as well. Among them were charges that the complaint fell short of establishing certain elements of the causes of action that it alleged.[89]

Plaintiffs answered with a fifty-five page memorandum in opposition to Household's motion to dismiss and with extensive briefs responding to contentions made by the other defendants.[90] In all, they cited over one hundred cases in an attempt to refute each of the arguments made by the defendants that the litigation should not go forward. Approximately nine months later in May 2004 the Court ruled, upholding some of the plaintiffs' claims and dismissing others.[91]

The upshot was that Household and its officials remained in the case.[92] Arthur Anderson did as well, but since it was in the process of dissolution because of its involvement in the Enron scandal, it settled with the plaintiffs for $1.5 million.[93] The investment bankers however were released because the statute of limitations had run on the claims covering their role in the fraud.[94]

The defendants nevertheless made two subsequent motions to dismiss in 2005 based on cases recently decided by the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit.[95] The ruling from the High Court in *Dura Pharmaceuticals v. Broudo,*[96] which dealt with loss causation, would remain significant throughout the case and its eventual appeal.[97] The trial court however denied both motions at that time.[98] It also turned aside an attempt by the defendants to have its ruling on the *Dura* issue certified as an interlocutory

88. Securities Exchange Act of 1934 § 21D(b)(2); *see* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007) (holding that the inference of scienter "must be more than merely 'reasonable' or 'permissible'—it must be cogent and compelling, thus strong in the light of other explanations").

89. Burkholz Report, *supra* note 36, at 11–12.

90. *Id.*

91. *Id.* at 14.

92. *Id.*

93. *Id.* at 14, 73.

94. *Id.* at 14.

95. *Id.*

96. 544 U.S. 336 (2005).

97. Burkholz Report, *supra* note 36, at 16.

98. Even though the Court denied those motions, its ruling did result in the shortening of the class period in the *Household* action. *Id.* at 16–17.

appeal.[99]

With the Court's denial of the defendants' motions to dismiss, the stay on discovery was lifted.[100] The parties then vigorously engaged in that for over three years.[101] As a result, the plaintiffs obtained over four million pages of documents from defendants and third parties, including extensive government reports about the defendants' predatory lending practices.[102] Those of course required a massive amount of attorney time to examine and analyze.[103]

In addition, plaintiffs' counsel took the depositions of more than fifty former and current Household employees and issued subpoenas for documents and depositions to dozens of third parties, almost all of whom objected to those requests.[104] The defendants in turn served wide-ranging interrogatories, made elaborate requests for documents, and issued numerous subpoenas for depositions of their own.[105]

Due to the complexities of those demands and the disputes that arose from them, the parties made over forty motions related to discovery.[106] Many involved issues like privilege and work product and most of them required full briefing before a U.S. Magistrate assigned to the case could decide them.[107] In addition, both parties retained experts.[108] Not surprisingly, discovery controversies about them had to be resolved as well.[109]

To manage all of this the parties attended over a dozen status conferences with either the magistrate or the trial judge and submitted numerous reports to them in anticipation of those meetings.[110] At the close of discovery, the defendants made extensive motions for summary judgment, which the plaintiffs answered and the Court held in abeyance until the trial.[111]

Although the parties had engaged in settlement discussions throughout this process, the defendants made no offers acceptable to

99. *Id*. at 18.
100. *Id*. at 20.
101. *Id*. at 20–26.
102. *Id.* at 72.
103. *Id.* at 27.
104. *Id.* at 21–26.
105. *Id.* at 26–27.
106. *Id.* at 28.
107. *Id.* at 27–64.
108. *Id.* at 65–68, 70.
109. *Id.* at 69–71.
110. *Id*. at 71–72.
111. *Id*. at 73–75.

plaintiffs.[112] The case was then set for trial on March 30, 2009.[113] By that time, the parties had stipulated to class certification[114] and the defendants were winnowed down to four: Household itself and three of its former top officers, William Aldinger, the CEO, David Schoenholz, the CFO, and Gary Gilmer, Household's Vice-Chairman and President of Consumer Lending.[115] By agreement, the parties had likewise narrowed the grounds upon which the law would hold those defendants legally culpable.[116]

C. The Rule 10b-5 Cause of Action

As a result, by the time of trial the potential liability of the defendants rested in large part[117] on one significant provision of the Securities Exchange Act of 1934, Section 10(b),[118] and Exchange Act Rule 10b-5[119] that the Commission had made under it. Section 10(b) is an enabling statute that grants the SEC power to make rules prohibiting fraud in connection with the purchase or sale of a security.[120] Under that authority, the Commission promulgated Rule 10b-5—a broad, "catch-all"[121] regulation. Subpart two of that provision declares it a crime to make a materially false or misleading statement in connection with the purchase or sale of a security.[122]

In the post-World War II era, federal courts expanded the scope of that rule from just a criminal provision to one that implies a civil cause of action as well.[123] Victims of securities fraud thus began using Rule 10b-5 to bring private actions in federal court. By the mid-1970s,

112. *Id.* at 145–46.

113. *Id.* at 75.

114. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 413 (7th Cir. 2015).

115. *Id.* at 426.

116. Burkholz Report, *supra* note 36, at 105.

117. *Id.* at 14. Plaintiffs also alleged that the individual defendants were liable under § 20(a) of the Exchange Act, which provides liability for persons who control those who are liable under the Act. *Id.* at 8.

118. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012); 17 C.F.R. § 240.10b-5 (2018).

119. 17 C.F.R. 240.10b-5 (2018).

120. *Id.*

121. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 (1976).

122. 17 C.F.R. 240.10b-5 (2018).

123. The leading case there is Kardon v. Nat'l Gypsum Co., 73 F. Supp. 798, 802–03 (E.D. Pa. 1947), modified on other grounds, 83 F. Supp. 613 (E.D. Pa. 1947). Because Rule 10b-5 civil actions are not predicated on an express provision like other causes of action in the federal securities laws, ". . . there is ample room for litigants to assert creative and unique arguments, which makes the study and practice of securities fraud litigation both dynamic and interesting." STEINBERG et AL., *supra* note 18, at 168.

such suits had become a major vehicle for business litigation.

In critical remarks responding to that, Justice Rehnquist then called them "a judicial oak which has grown from little more than a legislative acorn"[124] and also stated: "There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general . . . ."[125]

Because of Justice Rehnquist's comments in the *Blue Chip Stamps* case[126] and two other Supreme Court opinions that followed it, which also restricted 10b-5 claims,[127] it seemed the then conservative Supreme Court might even rescind such a judicially created extension of federal power. In a 1983 decision however the High Court ended that speculation stating that the existence of the 10b-5 civil remedy, which courts had consistently recognized for thirty-five years, was "beyond peradventure."[128]

The 10b-5 cause of action thus survived and in its contemporary jurisprudence the Supreme Court has listed six elements that a plaintiff must prove to recover under it.[129] First, there must be a material misrepresentation (or omission).[130] Second, the plaintiff must prove the defendants' scienter, i.e. a wrongful state of mind.[131] Third, the material misstatement or omission must be in connection with the purchase or sale of a security.[132] Fourth, there must be a showing of reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation."[133] Fifth, there must be proof that the investor has suffered economic loss and, sixth,

124. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

125. *Id.* at 739.

126. *Id.* at 731–32 (explaining how lower federal district courts have held that only purchasers and sellers of securities could bring claims under 10b-5).

127. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 205–07 (1976) (holding that to be liable under 10b-5, a defendant had to have acted with scienter); STEINBERG et AL., *supra* note 18, at 228–36; Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 471 (1977) (holding that 10b-5 could only apply in situations where the defendants had been guilty of making material misrepresentations or not disclosing material facts); *Blue Chip Stamps*, 421 U.S. at 760 (Powell, J., concurring) (noting that Justice Harry Blackmun was a persistent dissenter throughout these opinions, at one point accusing the majority of having a "preternatural solicitousness" for the corporate establishment).

128. Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983).

129. Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398, 2407 (2014); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).

130. *Halliburton II*, 134 S. Ct. at 2407.

131. *Id.*

132. *Id.*

133. *Id.*

the plaintiff must show a causal connection between the material misrepresentation and the decline in the value of the security.[134]

D. Loss Causation

It was that last element, loss causation, which proved the major hurdle to recovery in *Household*, and under Rule 10b-5 the plaintiffs had the burden to prove it.[135] The federal securities laws however contain two express civil causes of action for securities fraud and either one would have made it easier for the plaintiffs in *Household* to prevail on that issue because they both reverse the burden of proof there.[136]

Section 11 of the Securities Act[137] gives an express cause of action to those who purchase securities traceable to an offering made in an effective SEC registration statement that contains a material misstatement. It allows them to bring the action not only versus the issuer but also directly against a number of individuals who participated in the offering.[138] That avenue for recovery however was inapplicable here because the *Household* plaintiffs who remained after the dismissal of the investment bankers purchased their shares in the secondary market.[139]

Another cause of action, § 12(a)(2) of the Securities Act,[140] appears to go beyond § 11 however and affords a broader remedy for all those who suffer losses because of materially false or misleading statements made in a "prospectus."[141] In a 1995 opinion,[142] however, the Supreme Court limited the meaning of that to solely a selling document used in a public offering, which was not the case in the *Household* action.

In addition § 12(a)(2) contains a privity requirement giving a remedy only against sellers of securities.[143] The High Court again gave

134. *Id.*
135. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 415 (7th Cir. 2015).
136. *See* Securities Act of 1933 § 11, 15 U.S.C. § 77k (2012); *id.* § 12(a)(2).
137. 15 U.S.C. § 77k (2012).
138. *Id.*
139. Burkholz Report, *supra* note 36, at 14.
140. 15 U.S.C. § 77l(a)(2).
141. *Id.*
142. Gustafson v. Alloyd Co., 513 U.S. 561, 584 (1995). For the author's criticism of that case, see Daniel J. Morrissey, *Shareholder Litigation After the Meltdown*, 114 W. VA. L. REV. 531, 565–67 (2012).
143. 15 U.S.C. § 77l(a)(2).

a narrow meaning to that word, defining a "seller" as just one who passes title to a security or receives a financial benefit for recommending its purchase.[144] The plaintiffs in *Household* could thus not use § 12(a)(2) on those grounds either because they bought their shares in the open market, not directly from the company.

That was unfortunate because both § 11 and § 12(a)(2) offer defrauded shareholders much better vehicles for recovery on the issue of causation.[145] To avoid liability under both, the defendants must show that the plaintiffs' losses resulted from factors other than its false statements.[146] By contrast, the burden is on 10b-5 plaintiffs to prove causation in two ways.

First, they must show that they relied on the defendants' misrepresentation or omission in purchasing the securities.[147] That satisfies one aspect of those requirements usually called "transaction causation."[148] In other words, "but for" the misrepresentations or omissions, the plaintiffs would not have bought the stock or paid such a high price for it.[149]

In the context of a class action such as the *Household* case, there may be tens of thousands of shareholders. It would obviously be prohibitively expensive for the plaintiffs' lawyers to adduce testimony from each purchasing stockholder that the defendants' falsehoods misled her into paying a higher price for her shares than was justified.

To overcome that difficulty courts have adopted a presumption

144. Pinter v. Dahl, 486 U.S. 622, 649 (1988).

145. In addition to the causation issue, defendants seeking to avoid liability under both § 11 and § 12(a)(2) have the burden of proving that they were not negligent in providing untruthful information to the purchasers of their shares. Securities Act of 1933 § 11(b)(3), 15 U.S.C. § 77k(b)(3) (2012); 15 U.S.C. § 77l (a)(2).

By contrast, Rule 10b-5 puts the burden to prove that crucial state-of-mind element on the plaintiffs. *See* STEINBERG et AL., *supra* note 18, at 228. Even though Rule 10b-5 contains no provision requiring a showing of the defendants' intentions for liability, the Court in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) found that the language used in its enabling statute, § 10(b), requires more than mere negligence for civil liability. *See* STEINBERG et AL., *supra* note 18, at 236. In addition, under the PSLRA, defrauded shareholders must first plead facts, without the benefit of discovery, that create a strong inference that the defendants acted with scienter; then, at trial, the shareholders must prove scienter by a preponderance of the evidence. *Id.* at 171, 227.

146. Securities Act of 1933 § 11(e), 15 U.S.C. § 77k(e) (2012); *id.* § 12(b); Akerman v. Oryx Commc'ns, Inc., 810 F.2d 336, 341 (2d Cir. 1987).

147. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008).

148. *See* Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 563 U.S. 804, 812 (2011); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).

149. In cases involving material omissions, courts will presume that a reasonable investor might have considered those facts significant, thus satisfying the reliance element. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153–54 (1972).

called fraud-on-the-market that may establish that each class member relied on the stock's price as an accurate indicator of its value.[150] That theory is a corollary to an economic principal called the efficient market hypothesis. It holds that the price of a share in a closely followed and heavily traded stock reflects the market's best estimate of its worth at any point in time.[151]

False information however skews that assessment, distorting the stock's true value and usually causing share purchasers to pay more than they should. The Supreme Court accepted that assumption in 1988 in a case, *Basic, Inc. v. Levinson.*[152] More than a quarter century later, in 2014, the High Court revisited it in the *Halliburton II* case which contested its continuing viability.[153] The Court there turned away that challenge and reaffirmed the usefulness of the fraud-on-the-market theory.[154] It did rule, however, that defendants could introduce evidence at the class certification stage that the presumption was unwarranted in a particular case.[155]

Because of a Supreme Court case decided in 2005, however, a second aspect of the plaintiff's proof of causation—that the plaintiff's losses actually resulted from the falsehoods—became more difficult. The PSLRA already required that plaintiffs prove "loss causation"[156] as well as the "transaction causation" just discussed.[157] The decision, *Dura Pharmaceuticals, Inc. v. Broudo,*[158] however, reversed the holding from the U.S. Court of Appeals for the 9th Circuit that allowed the plaintiff to satisfy that requirement by simply alleging that a misrepresentation inflated the price of a security at the time it was

150. Basic, Inc. v. Levinson, 485 U.S. 224, 241–42 (1988).

151. Eugene Fama, an economics professor at the University of Chicago, is known as the "father of the efficient market theory." *Eugene Fama, King of Predictable Markets*, N.Y. TIMES (Oct. 26, 2013), https://www.nytimes.com/2013/10/27/business /eugene-fama-king-of-predictable-markets.html. In 2013, he was awarded the Nobel Prize in Economics. *Id.*

With these remarks, one commentator summed up how this presumption eliminates the need to show that each investor has relied on the fraudulent statements. "The doctrine [of fraud-on-the-market] affords plaintiffs in a section 10(b) action the benefit of two presumptions: first, that any material information—including false information—introduced into an 'open and developed market' influences stock prices, and second, that investors who transact in such a market 'rely' on stock prices when they purchase at the market price." Lipton, *supra* note 26, at 101.

152. 485 U.S. 224, 247 (1988).

153. Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II)*, 134 S. Ct. 2398 (2014).

154. *Id.* at 2410.

155. *Id.* at 2414–15.

156. Securities Exchange Act of 1934 § 21D(b)(4), 15 U.S.C. § 78u-4(b)(4) (2012).

157. *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153–54 (1972).

158. 544 U.S. 336 (2005).

made.[159]

The defendant company in *Dura* was charged with making false statements about its medical product.[160] When the truth came out, its stock price dropped precipitously but it recovered all that value a week later. While conceding that an inflated purchase price may "touch upon"[161] a later economic loss, the Court held that alone was not sufficient to show that the falsehood was the proximate cause of the shareholder's economic loss.[162]

More facts therefore would have to be plead and proven to establish that element. Accordingly, the plaintiffs in *Household* engaged a witness who was an expert in law and economic theory to show that the decline in the worth of their shares resulted from the defendants' falsehoods.[163] While the Court of Appeals found his testimony generally probative, it reversed the initial verdict in the plaintiffs' favor because it said the expert's opinion lacked specificity in certain areas.[164]

Another aspect of 10b-5 jurisprudence served as a barrier to the plaintiffs' success as well. It arose from a 2011 Supreme Court decision, *Janus Capital Grp., Inc. v. First Derivative Traders*,[165] where the High Court gave a narrow, literal ruling in interpreting liability under Rule 10b-5(2). It requires that to be liable, a defendant must "make" a false statement.[166] In *Janus*, the investment adviser of a mutual fund controlled the company and drafted the allegedly false and misleading prospectus that the fund used to sell its shares.[167]

The Court nevertheless found that the adviser was not the author of the prospectus because it was a statement of the fund.[168] The adviser therefore could not have "made" any falsehoods that it contained. In the same manner, Household officials who merely furnished false information for a statement ultimately attributed to either the corporation or another officer could therefore not be liable for

159. *Id.* at 338.
160. *Id.* at 339.
161. *Id.* at 343.
162. *Id.*
163. Burkholz Report, *supra* note 36, at 65.
164. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 423 (7th Cir. 2015).
165. 564 U.S. 135, 144 (2011).
166. *Id.* at 149.
167. *Id.* at 135.
168. *Id.* at 146–47.

wrongdoing under 10b-5.[169]

E. Trial Preparation

At a status hearing on June 30, 2008, the case was set for trial nine months later, on March 30, 2009.[170] Given the tens of thousands of documents that had surfaced during discovery and the more than fifty potential witnesses deposed, preparation for trial was arduous and required extensive effort. The strategy included culling documents and witnesses for presentation at trial, issuing subpoenas, and preparing various motions in limine.[171] In addition, the lawyers had to prepare for voir dire and draft verdict forms and jury instructions.[172]

By the end of February 2009, a twenty-person team of lawyers, forensic accountants, and support personnel relocated to Chicago to prepare for trial.[173] Defense firms made preparations that involved even larger numbers of attorneys and their assistants.[174] Lawyers for the parties then entered into wide-ranging negotiations to draft a pre-trial order.[175] Earlier they had been able to stipulate to class certification and they ultimately agreed on a host of other evidentiary and procedural matters as well. Those included a description of the case that they would present to the jury.[176]

There was however lengthy pretrial sparring between the parties which included unsuccessful motions for evidentiary sanctions that the plaintiffs brought against the defendants for allegedly failing to preserve relevant documents. The parties also battled over the qualifications of expert witnesses, the relevance of certain material that might prove prejudicial to either party, and various matters which the defendants claimed were privileged.[177] All this culminated in a pretrial conference that lasted over the course of eight days where the parties settled some of those disputes, the Court decided others, and still more were designated for rulings at trial.[178]

169. *Glickenhaus & Co.*, 787 F.3d at 426.
170. Burkholz Report, *supra* note 36, at 76.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 128.
176. *Id.* at 76–77.
177. *Id.* at 80.
178. *Id.* at 76–90.

F. The Trial

The trial began at the end of March 2009 and lasted over five weeks.[179] Twenty-two witnesses testified, including each of the three individual Defendants still in the case.[180] On cross-examination William Aldinger—Household's former CEO—made the bombshell admission that disclosures in the Company's 2001 annual report were materially false and misleading.[181]

Plaintiffs also presented forceful evidence of Household's predatory lending, which included showing the jury training videos made for the Company's employees that instructed them how to engage in those unscrupulous practices.[182] They also laid out how the Defendants manipulated the quality of their loan portfolios by disguising customer delinquencies.[183] In addition, even though the Court had earlier excluded introduction of Household's settlements with state authorities, the Plaintiffs were nonetheless able to get those into evidence after the Defendants opened the door to their admission.[184]

After closing argument, the Court instructed the jurors that they were to determine which, if any, of the forty statements in issue made by the Defendants were materially false.[185] If any were, they were then asked to identify which of the four Defendants were responsible for them and to find if those entities or persons made them knowingly or recklessly.[186]

The jurors returned a verdict that seventeen of the statements were indeed materially false, all of which were made between March 23, 2001 and October 11, 2002.[187] As perhaps a compromise, however, they found that the other twenty-three statements made earlier in the class period were not.[188] Since it established liability, the jury then had to address the question of causation and determine how Household's stock was overpriced due to those falsehoods.[189] The

179. *Id.* at 90.
180. *Id.*
181. *Id.* at 91.
182. *Id.* at 136.
183. *Id.* at 87.
184. *Id.* at 91.
185. *Id.* at 147.
186. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 413–14 (7th Cir. 2015).
187. *Id.*
188. *Id.*
189. *Id.* at 414.

plaintiffs' expert had presented two alternatives for that at trial.[190]

The first was called the "specific-disclosure" model and reckoned damages based on fourteen separate disclosure events.[191] The net total effect of those on Household's shares, as established by the plaintiffs' expert, was a decline of $7.97—indicating that the misrepresentations inflated the company's stock by that amount.[192] The jurors were thus given a table to complete if they accepted that model which would list the amount Household's stock was overpriced on a given day during the period of the falsehoods—with the maximum amount being $7.97.[193]

The jury however had an alternative way to calculate damages that the plaintiffs' expert also presented to it called the "leakage" model.[194] It was premised on the belief that the truth about a company's inflated stock price may become known not just from significantly specific corrective disclosures but also from other information that may leak out to some market participants before its general release.[195]

In the *Household* case, that may have begun as early as the announcements of actions by the State Attorneys General and continued with other news about the company's true situation from various sources.[196] The cumulative effect of all those disclosures—the net sum of the resulting price declines—would compound the drop in Household's stock price beyond what the specific disclosure model allowed.[197]

The jury adopted the leakage model and based on the calculations presented there by the Plaintiffs' expert it determined that the falsehoods overpriced Household's stock by $23.94.[198] It entered that on its table, added the amounts for each day during the relevant period, and came back with what the Court of Appeals called "an enormous judgment for the Plaintiffs"—a $1.48 billion verdict that measured the inflation in the price that the plaintiffs had to pay for their shares.[199]

190. *Id.*
191. *Id.* at 415–16.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 417 n.4.
197. *Id.* at 416.
198. *Id.* at 417–18.
199. *Id.* at 412, 431 n.14.

That amount increased to $2.46 billion when prejudgment interest was added.[200]

As the Appellate Court also noted, that judgment was "apparently one of the largest to date."[201] The jury also apportioned those damages among the three defendants—55% to the company and the remaining 45% among the three individuals (20% to Aldinger, 15% to Schoenholz, and 10% to Gilmer).[202]

G. Post-Trial and Phase Two

Despite the Plaintiffs' significant victory at trial, the case was hardly over. Household made repeated statements that it expected to prevail either in post-trial motions or on appeal.[203] The company's parent, HSBC, did the same.[204] Several months after trial, therefore, the Defendants filed a sixty page motion for judgment as a matter of law and alternatively a 116 page motion for a new trial.[205]

There they made twelve separate arguments including that the plaintiffs had failed to prove loss causation and materiality.[206] They also disputed the plaintiffs' claims about predatory lending, asserted that the jury's verdict was inconsistent, and claimed the Court's evidentiary rulings were unfair.[207] Plaintiffs of course vigorously contested all of those points and prevailed when the trial judge denied them as moot and premature.[208]

The Court then embarked on what it called Phase II of the trial to fix damages for each class member who had purchased their shares between March 23, 2001 and the date the damage period ended on October 11, 2002 or who had owned some stock before then and sold it during the damage period.[209] To establish them, the Court set up a three-fold approach.

(1) If the stockholders bought their shares when the Company was making false statements and did not sell, their damages would be the

200. *Id.* at 431 n.14.
201. *Id.* at 412.
202. *Id.* at 428. The jury found that Aldinger and Schoenholz were also liable as controlling persons of each other, Household, and Gilmer under § 20(a) of the Exchange Act.
203. Burkholz Report, *supra* note 36, at 94.
204. *Id.*
205. *Id.* at 93.
206. *Id.*
207. *Id.*
208. *Id.* at 93–94.
209. *Id.* at 92, 95.

amount of artificial inflation at the time of their purchase.[210] (2) If they purchased their stock before the class period and sold during the damage period at a gain or loss, their damages would be their out-of-pocket losses less any gain they obtained or loss they avoided because of the artificial inflation at the time of sale.[211] (3) For shares bought during the damage period, their damages would be the stock's artificial inflation at the time of purchase less the artificial inflation at the time of sale.[212]

The Court also set out a protocol for Phase II. It gave the defendants the ability to rebut the *Basic* presumption that their falsehoods had created a "fraud on the market" thus causing the plaintiffs to purchase their shares at an inflated price.[213] The first two ways that the defendants could do that under *Basic* were by showing that the market knew the truth all along or that news of the fraud had entered the market and dissipated the impact of the falsehoods.[214] The Court ruled, however, that the jury's findings had precluded them.[215] The defendants therefore could now only rebut the "fraud-on-the-market" presumption if they could "show that individual plaintiffs bought or sold Household stock without relying on the integrity of the market."[216]

To determine that, the Court approved a "Notice and Claim Questionnaire" to be sent to the class members.[217] It asked them if they would have bought Household's stock even if they had known its price was falsely inflated.[218] If they answered "no," they would be entitled to recovery.[219] If they answered "yes," their recovery would be subject to further proceedings.[220]

The Court allowed the defendants to take additional discovery from some plaintiffs along those lines to see if they had not relied on Household's stock price to purchase their shares.[221] Following up on

210. Burkholz Report, *supra* note 36, at 95.
211. *Id*.
212. *Id*.
213. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 430 (7th Cir. 2015); Basic, Inc. v. Levinson, 485 U.S. 224, 241 (1988).
214. *Glickenhaus & Co.*, 787 F.3d at 429.
215. *Id*. at 430.
216. *Id.*
217. Burkholz Report, *supra* note 36, at 95.
218. *Glickenhaus & Co.*, 787 F.3d at 430.
219. *Id*.
220. *Id*.
221. *Id*. at 431.

that, the defendants then served ninety-eight class members with interrogatories, requests for documents, and notices for depositions.[222] When plaintiffs' attorneys objected to such broad demands, the court limited the number of depositions to just fifteen of the large institutional investors.[223] It did however permit as much written discovery from class members as the defendants wanted to do.[224]

After extensive arguments on how to deal with information garnered from that process, the Court ruled that it would award damages to all class members if they satisfied two factors indicating that they relied on the integrity of Household's market price in purchasing their shares.[225] Those were: (1) they stated on the questionnaire that they would not have bought the stock if they had known its price was falsely inflated and (2) no information turned up in discovery to contest that.[226]

"When the time for answering the court's preliminary questions had expired, a large number of the class members still had not responded."[227] The Court then divided that group into two classes depending on whether their claims were more or less than $250,000.[228] Class members above that amount would be required to answer the questionnaire.[229]

If those class members answered "no" they would be entitled to recovery, assuming there were no other objections to their claims.[230] But if they indicated they might have bought Household's stock anyway even if they had known of the company's misrepresentations, the extent of their reliance on the integrity of the market price would have to be resolved in a Phase II trial.[231] For those class members who failed to answer the questionnaire, the defendants would be entitled to judgment on their claims.[232]

The Court also selected a Special Master to determine whether

222. *Id.*
223. *Id.*
224. Burkholz Report, *supra* note 36, at 96–97.
225. *Glickenhaus & Co.*, 787 F.3d at 431; Burkholz Report, *supra* note 36, at 99–100.
226. *Glickenhaus & Co.*, 787 F.3d at 431.
227. *Id.*
228. *Id.*
229. *Id.* Ultimately, the trial court required all class members, regardless of their claim amount, to answer the questionnaire. Order at 1, Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., No. 02-C-5893 (N.D. Ill. Dec. 6, 2012).
230. Burkholz Report, *supra* note 36, at 100.
231. *Id.*
232. *Id.*

the claims of particular class members were valid or would have to be tried under the criteria the Court had established for awards.[233] To accomplish that, elaborate processes were set up to communicate with class members and financial intermediaries who held their shares.[234] All that took thousands of hours.[235]

At the end of the second response period, 10,902 claimants answered "no" to the Court's questions and they had no other ministerial objections to their claims outstanding.[236] The Court therefore entered a partial judgment in their favor.[237] With the addition of prejudgment interest, that amount totaled $2.46 billion.[238] Other claimants had answered "yes" to the court's questionnaire and still others had failed to answer it.[239] At the time of the appeal, however, there were objections outstanding to over 20,000 other claims.[240] Most of those belonged either to those who had failed to answer the questionnaire or whose claims were valued at less than $250,000.[241]

H. The Appeal

The oral argument there was held on May 29, 2014 and featured two jurists whom presidential candidate Donald Trump had listed as potential Supreme Court nominees.[242] One was Paul Clement, a former solicitor general of the United States under President George W. Bush who argued for the defendants,[243] and the other was a judge with an equally illustrious conservative pedigree: Diane Sykes.[244] The two other members of the panel were William Bauer, a Republican

233. *Id*. The defendants objected to the validity of approximately 30,000 claims; the Special Master was tasked with resolving those objections. *Id*. at 107.

234. *Id.* at 104.

235. *Id*.

236. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 431 (7th Cir. 2015).

237. *Id*.

238. *Id*.

239. *Id*.

240. *Id*.

241. *Id*. at 431–32. *See also infra* note 324 and accompanying text for a discussion of how those claims were ultimately involved in the settlement of the case.

242. Jeremy Diamond, *Trump Unveils His Potential Supreme Court Nominees*, CNN POLITICS, https://www.cnn.com/2016/05/18/politics/donald-trump-supreme-court-nominees/index.html (last updated May 18, 2016, 10:38 PM).

243. Professional Profile of *Paul D. Clement – Partner*, KIRKLAND & ELLIS LLP, https://www.kirkland.com/sitecontent.cfm?contentID=220&itemID=12018 (last visited Oct. 8, 2018).

244. *Glickenhaus & Co.*, 787 F.3d at 412; Diamond, *supra* note 242.

appointee and former prosecutor,[245] then a senior judge in his late 80s, and Michael Kanne, another conservative,[246] in his mid-70s. Michael Dowd, a name partner in the plaintiffs' firm, argued for the shareholders.[247]

The defendants sought to overturn the lower court's verdict on three grounds. First, they challenged the Court's instruction to the jury on what it means to "make" a false statement.[248] Second, they claimed that the trial judge deprived them of a meaningful opportunity to rebut the presumption of reliance.[249] And third, they argued that the plaintiffs had not proven that their damages were a result of the false statements attributed to the defendants.[250] This last issue of loss causation proved most significant and ultimately led to a partial reversal.[251]

The controlling precedent there, as has been stated, was the High Court's decision in *Dura Pharmaceuticals*.[252] It held that for a recovery under Rule 10b-5 plaintiffs must show not only that the falsehoods caused them to buy the stock at an inflated price ("transaction" or "but-for" causation) but also that they suffered financial damages because of their purchase ("loss causation").[253] That meant that the shareholders had to demonstrate that the misrepresentations artificially increased the price of the stock they bought and then the revelation of those falsehoods made it drop.

Judge Sykes, writing for the *Household* Court, gave a lucid description of how the plaintiffs could prove that. Because many factors can influence a stock's movement, she said, it is hard to measure how much a particular misrepresentation or omission falsely increases its price.[254] The better way to determine that is to see what happens to the stock's worth when the truth comes out.[255] As she

245. *Glickenhaus & Co.*, 787 F.3d at 412; Profile of *Bauer, William Joseph*, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/bauer-william-joseph (last visited Oct. , 2018).

246. *Glickenhaus & Co.*, 787 F.3d at 412; Profile of *Kanne, Michael Stephen*, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/kanne-michael-stephen (last visited Oct. 12, 2018).

247. *Glickenhaus & Co.*, 787 F.3d at 412.

248. *Id.*

249. *Id.* at 429.

250. *Id.* at 412.

251. *Id.*

252. 544 U.S. 336 (2005).

253. *Id.* at 345–46.

254. *See supra* note 96 and accompanying text.

255. *Id.*

succinctly put it, "What goes up [falsely], must come down."[256] In other words, the decline in a share's price, which follows the disclosure of falsehoods, is probably the best indicator of how much it was overvalued.

The Court then acknowledged that the plaintiffs had engaged a renowned expert, Professor Daniel Fischel, to establish that.[257] As has been discussed,[258] he presented two different approaches to the jury—the "specific disclosure" model and the "leakage" model. The latter theory, which the jury accepted and used as the basis for its verdict, was first articulated in a 1990 article.[259]

There, two law and economic scholars asserted that specific relevant information about an event can underestimate the economic importance of it on the price of a firm's stock.[260] A better way to account fully for its impact on the share price would be to "extend the observation window surrounding the disclosure date."[261] That should, wrote the authors, begin when one can be "reasonably confident that no significant information leakage has occurred" and end when one "feels confident that most of the information is publicly available."[262]

Following Fischel's use of that reasoning, Judge Sykes approved of how the jurors had applied it in the *Household* case.[263] Fischel had presented them with the date of the California suit against the Company as the possible beginning of the leakage period so that they might reckon the drop in the stock's price from that time.[264] He told them they could then find that the disclosure period ended when Household settled the multi-state litigation.[265]

Following that, the panel reasoned that the decline of $23.94 per share which the jury found using the leakage model was a good measure of how Household's falsehoods affected the price of its stock.[266] As has been described,[267] that resulted in much larger

256. *Id.*
257. *Id.*
258. *See supra* note 194 and accompanying text.
259. Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 UCLA L. REV. 883, 888 (1990).
260. *Id.*
261. *Id.* at 906.
262. *Id.*
263. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 419 (7th Cir. 2015).
264. Burkholz Report, *supra* note 36, at 65.
265. *Id.*
266. *Glickenhaus & Co.*, 787 F.3d at 417.
267. *See supra* note 191 and accompanying text.

damages than the specific disclosure model. That only included declines from dates on which Household's stock price moved in a statistically significant manner different from the market generally and its industry peers.[268] It therefore excluded price declines on other days when news regarding Household continued to leak into the market.[269]

The Court then acknowledged there was little case law formally embracing the leakage model—most likely, as it said, "because these cases rarely make it to trial."[270] Yet Judge Sykes astutely found that the Supreme Court had implicitly accepted it in *Dura Pharmaceuticals* with its observation there that some shareholders may have no damages in fraud cases if they sell their shares before the truth about corporate falsehoods begins to "leak out."[271]

After thus whole-heartedly accepting the leakage model, the Court of Appeals then brushed off the defendants' principal objection to it—"that it made no attempt to prove how Household's stock price became inflated in the first instance."[272] The Court answered that by restating its basic insight on how shareholder-plaintiffs can prove loss causation.[273]

They can do that, the Court repeated, by showing how the stock dropped as the truth gradually came out.[274] Then in response to the defendants' argument the panel stated, "How the stock became inflated in the first place is irrelevant because each subsequent false statement prevented the price from falling to its true value and therefore caused the price to remain elevated."[275]

More convincing to the court however were the defendants' arguments that the leakage theory as presented to the jury did not account for "firm-specific, non-fraud factors that may have affected the decline in Household's stock price."[276] Fischel's models, said the Court, did control for "market and industry factors and general trends

268. *Glickenhaus & Co.*, 787 F.3d at 415–16.

269. *See id*. at 416.

270. *Id.* (reporting that less than ½ of the 1% of securities class actions filed make it to trial); *see also* Mustokoff, *supra* note 33.

271. *Glickenhaus & Co.*, 787 F.3d at 422 (citing Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342 (2005)).

272. *Id.* at 418.

273. *Id.* at 419.

274. *Id*.

275. *Id.* at 418; *see also* Mustokoff, *supra* note 33, at 194 (This has been called the "price maintenance" theory of loss causation, i.e. the plaintiff does not have to show how each new misrepresentation skewed the price of the stock).

276. *Glickenhaus & Co.*, 787 F.3d at 421.

in the economy" but not for other factors specific to Household.[277]

The Court noted that Fischel testified to those possibilities in a general sense and ruled them out.[278] The panel also acknowledged that the defendants did not cross-examine Fischel on that opinion.[279] In addition, the defendants did not themselves identify such information that might have affected Household's stock.[280]

Yet that was not enough, said the Court, to eliminate other firm specific, non-fraud related factors from being possible causes for the stock's decline.[281] To establish loss causation under the leakage model there had to be "non-conclusory" testimony to that effect.[282] The Court therefore reversed and ordered a retrial on that matter.[283]

Nevertheless, the Court's general approval of the leakage method for proving damages gave the plaintiffs a major victory and it broke new ground to advance these actions, making them potentially more remunerative for shareholders victimized by fraud. Yet by demanding additional proof to rule out other factors that might have caused the stock's drop, the panel stopped short of affirming the judgment of the district court and giving the plaintiffs an immediate win.

Perhaps the Court just wanted the plaintiffs' lawyers to work a little harder for their billion-dollar recovery! In any event, its requirement for more particularized proof that no firm-specific, non-fraudulent information affected the decline in Household's stock put a limit on the leakage model.[284]

The other two issues that defendants raised on appeal proved much less consequential. Since the trial, the Supreme Court had decided the *Janus* case. As has been stated, it held that only those who have the ultimate authority for false statements can "make" them.[285] Therefore, the trial court's pre-*Janus* instructions to the jury which made the defendants liable if they merely furnished language or

277. *Id.*; *see also* Mustokoff, *supra* note 33, at 215 ("The court found that Fischel's attempt to rule out the effects of non-fraud factors was inadequate, explaining that Fischel's leakage model 'needed to eliminate any firm-specific, non-fraud related factors that might have contributed to the stock's decline'").

278. *Glickenhaus & Co.*, 787 F.3d at 421.

279. *Id.* at 421–22.

280. *Id.* at 422.

281. *Id.* at 420.

282. *Id.* at 422.

283. *Id.* at 433.

284. Mustokoff, *supra* note 33, at 219.

285. Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142, 144 (2011).

information that ended up being disseminated to the public were not enough to satisfy that standard.

Certain of the individual defendants therefore could be entitled to a new trial on the issue of whether they had "made" certain false statements attributed to them. Before the re-trial, however, the parties ironed that issue out by agreeing which statements by the individual defendants made them potentially liable under the *Janus* test.[286]

In addition, the Appellate Court dismissed the defendants' arguments that it should invalidate Phase II of the trial because that process did not allow them to rebut *Basic*'s presumption about the plaintiffs' reliance on Household's market price.[287] To the contrary, the panel found that the questionnaire sent to each shareholder plaintiff, with the availability of follow-up discovery, was an accurate and practical way to determine that.[288]

The Court of Appeals instead faulted the defendants for merely lodging general objections to the pragmatic approach that the trial court had adopted to resolve that issue.[289] It turned aside their protests with this terse comment, "[the defendants] don't specify what the Court should have done differently."[290]

I. Preparations for Retrial and Settlement

The unfortunate result for the plaintiffs from all this however was that they had to retry the case. Despite the panel's acceptance of the leakage method and its approval of the claims process, the Court of Appeals did not affirm the judgement.[291] Instead, it remanded the matter for a new trial, compelling the shareholders to litigate the damage issues again.[292] This time their burden was greater. They would have to present more particularized evidence that the defendants' falsehoods—not other firm specific, non-fraudulent factors—caused the decline in the value of their shares.[293]

On remand, the case was re-assigned to another U.S. District Judge, Jorge Alonso, who had assumed his position just a year

286. Burkholz Report, *supra* note 36, at 125.
287. *Id*. at 94–95.
288. *Id.* at 95.
289. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 432 (7th Cir. 2015).
290. *Id*.
291. *Id*. at 433.
292. *Id*.
293. *Id*. at 415.

earlier.[294] His previous legal career had principally entailed criminal work, first as a public defender and then as a state court trial judge.[295] Judge Alonso's first rulings re-enforced the daunting task that the plaintiffs' lawyers again faced.

He held that plaintiffs would once more have to show that the defendants' misstatements were "a substantial cause of the economic losses suffered by the Plaintiffs."[296] They would also have to reprove "the amount of per share damages, if any, to which plaintiffs were entitled."[297] The Court did however rule that the plaintiffs would not have to show the defendants' statements were fraudulent or that they made them with scienter.[298] The findings from the first trial that the defendants' made those falsehoods knowingly or recklessly would stand.[299]

Since the plaintiffs did not prevail on appeal, the defendants claimed they were entitled to the costs of that proceeding—most significantly, the $13,281,282.00 premium they had to expend for a bond guaranteeing payment of the judgment.[300] Despite arguments made by the plaintiffs' lawyers, which included that such a ruling would chill future class action suits, the Court ordered the plaintiffs to reimburse the defendants for the full amount, more than $13 million.[301]

An eight-figure payment like that would break the back of almost all other law firms who routinely take these cases on a contingent fee basis and agree to bear all their costs. Yet to show its full commitment to the case Robbins Geller immediately wired the full amount—more than $13 million—to the defendants.[302] Because of the magnitude of

294. Burkholz Report, *supra* note 36, at 117; Profile of *Alonso, Jorge Luis*, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/alonso-jorge-luis (last visited Oct. 9, 2018).

295. Profile of *Alonso, Jorge Luis*, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/alonso-jorge-luis (last visited Oct. 9, 2018).

296. Burkholz Report, *supra* note 36, at 117–18.

297. *Id.* at 118

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 118–19.

302. Plaintiffs' Motion & Memorandum of Law in Support of Motion for an Award of Attorneys' Fees & Expenses & Reasonable Costs & Expenses for Lead Plaintiffs at 3, Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 2016 WL 10571774 (N.D. Ill. Nov. 10, 2016) (No. 02-C-5893) ("Demonstrating their resolve and commitment, Lead Counsel refused to fold and instead paid the $13.28 million out-of-pocket and prepared the case for a second trial.").

that sum, the law firm's swift response astounded Judge Alonso.[303]

The parties again began making extensive preparations for trial, which the Court set to begin within a year on June 6, 2016.[304] Professor Fischel then started to refashion his opinion to meet the concerns of the appellate court. That entailed reviewing his original findings to see if there were any changes in Household's stock during the relevant period that might be due to firm-specific, non-fraudulent information.[305]

At trial, Fischel had testified that he assumed that any changes in Household's stock price, other than those explained by market and industry trends, were caused by fraud-related disclosures.[306] His revised report however was more specific. Now reviewing information in the market during the twenty-seven disclosure dates he had previously identified, he concluded that as to all but one there was no cause for the stock's decline other than leakage of the fraud.[307]

The defendants in turn retained three experts to dispute Fischel's new opinion.[308] One was the self-same Bradford Cornell, the lead author of the article that had first advanced the leakage method.[309] The defendants' experts roundly criticized Fischel, arguing that numerous other items of information could have produced the decline in Household's shares.[310] Professor Cornell also asserted that Fischel misapplied his methodology.[311]

The defendants then moved to exclude Fischel's opinion.[312] Judge Alonso however ruled that the plaintiffs had presented sufficient proof to meet the appellate court's requirements about the absence of firm-specific, non-fraudulent factors that could have contributed to the decline in the price of Household's shares.[313] The defendants would then have to refute that at the new trial.[314]

In May 2016 then, a team of fourteen Robbins Geller attorneys,

303. Judge Alonso shared that impression with the author of this Article.
304. Burkholz Report, *supra* note 36, at 118.
305. *Id.* at 119.
306. Mustokoff, *supra* note 33, at 215.
307. *Id.* at 217.
308. Burkholz Report, *supra* note 36, at 119.
309. *Id.* at 119–20.
310. *Id.*
311. *Id.* at 120.
312. *Id.*
313. *Id.* at 123–24.
314. *Id.* at 124.

other professionals, and support staff returned to Chicago and began engaging in lengthy preparations for the retrial.[315] In anticipation of that, the parties made a number of motions in limine.[316] Some of them involved questions about whether certain findings from the first trial could be considered proven or would have to be retried.[317] Others concerned evidentiary issues.[318]

Importantly, for the Lead Plaintiff to give the new jury a flavor of Household's fraud, the Court ruled that it would again allow the introduction of certain material that showed Household's predatory lending practices.[319] That included the training video used by the Company for its new employees that promoted such unscrupulous conduct.[320]

In the midst of all this pretrial sparring mediated settlement negotiations continued.[321] Even though the plaintiffs had prevailed at the original trial on the issue of loss causation, they faced substantial risks that the new jury would not again find for them on that crucial element.[322] Yet even if it did, the second jury might not fix damages by using the leakage model, as had the first jury, but instead might use the specific-disclosure method that would result in a much smaller verdict.[323]

In addition, even if plaintiffs were successful in achieving a substantial win as they did in the original trial, they would still be facing another appeal that would certainly delay the ultimate outcome of the case. Worse, a new appellate decision might even undo the plaintiffs' success as had happened in the first round of the litigation.

The plaintiffs however were not without some leverage of their own in the settlement talks. As the Appellate Court noted, thousands of claims remained unresolved—most involving situations where class members had failed to answer the Court's questions or where claims were valued at less than $250,000.[324] A finding that those were meritorious and entitled to pre-judgment interest could increase the

315. *Id.* at 127.
316. *Id.* at 128.
317. *Id.* at 131–38.
318. *Id.*
319. *Id.* at 131–32.
320. *Id.* at 136.
321. *Id.* at 145.
322. *Id.* at 149.
323. *Id.* at 149–50.
324. Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 431 (7th Cir. 2015).

plaintiffs' recovery well beyond the $2.46 billion judgment that resulted from the first round of litigation.

With all that at stake, Judge Alonso was happy when he came into his chambers the morning of trial and saw a sticky-note on his chair telling him the case had been resolved.[325] It had settled at four that morning for $1.575 billion—the largest securities fraud class action recovery ever following a trial.[326] Depending on the model used, the class members would recover an astonishing amount—between 75% of their damages (if the jury adopted the Specific Disclosure Model) and 252% (if the jury used the Leakage Model).[327]

J. Reflections

The result of this litigation was thus a grand success for the class members, thanks to the skill and persistence of their lead counsel, the Robbins Geller law firm. Yet because of procedural challenges by an army of lawyers for the defendants and the exercise of their appellate rights, it took the defrauded shareholders fourteen years from the commencement of their suit to achieve this outcome. If there is truth in the maxim "justice delayed is justice denied," this case may be a prime example of that unfairness!

Put simply, if we accept the jury's finding that the defendants cheated 30,000 of their shareholders by rigging Household's financial statements and causing them to pay more for their shares than they should have, why couldn't our legal system have provided those stockholders a speedier remedy? For sure, the wheels of justice grind slowly, but fourteen years?

To that end, the remarks by a renowned jurist, Judge Richard Posner now retired from the federal appellate bench are instructive. He would greatly pare down the rules of civil procedure and require that legal briefs be shorter, without exaggeration or emphasis on minor points.[328] Along those lines, he has stated that he decides cases in this manner: "The way I approach a case is by asking myself, 'What would be a common sense result, forgetting about the law? You have a problem: What's the best solution based on basic moral values,

325. From a conversation between Judge Alonso and the author.
326. Reply Memo, *supra* note 45, at 1.
327. *Id.* at 4.
328. Cooper, *supra* note 11.

economic insights, whatever makes sense."[329]

Much of the unwarranted delay in this case came from the extensive motions to dismiss made and briefed exhaustively by the defendants. Of course, those charged with wrongdoing should have the opportunity to test the legal sufficiency of the accusations against them and the legal rules governing securities litigation are certainly complex. Yet how much of the argumentation in a case like this legitimately serves that purpose? Often it is just a way for well-funded defendants (and their lawyers who are paid handsome hourly sums) to grind down plaintiffs or deter them all together from bringing these suits.

In addition, the discovery in this case went on for years. That process should also be streamlined.[330] Once again, however, such reforms must recognize that plaintiffs have a legitimate need to dig out significant facts relating to their cases. For instance, it was important for the shareholders here to compel disclosure of training videos instructing Household's salesforce to engage in predatory lending practices.[331]

III. CONCLUSION

The *Household* case demonstrates that it is possible for defrauded shareholders to gain ample redress for their losses even when defendants with great resources vigorously resist claims against them. Plaudits go to the Robbins Geller law firm for achieving this notable victory for their clients and affirming that the law can produce such a satisfying result even when opposed by well-funded and well-advised wrongdoers.

We hear a lot about how class action suits serve only to enrich plaintiffs' attorneys, while providing very little for the claimants themselves. The good and relentless work of the plaintiffs' lawyers

329. *Id.*; *see also* RICHARD A. POSNER, THE PROBLEM OF JURISPRUDENCE 466 (1990) (Posner describes his jurisprudence as characterized by "the continual testing and retesting of accepted 'truths,' the constant kicking over of sacred cows—in short, a commitment to robust and free-wheeling inquiry with no intellectual quarter asked or given.").

330. *See* MaryAnn Spoto, *Civil Case Taking Too Long? A Court Advisory Committee Hopes to Speed That Up*, NJ.COM (Apr. 20, 2014), https://www.nj.com/news/index.ssf/2014/04/civil_case_taking_too_long_a_court_advisory_committee_hopes_to_speed_that_up.html (explaining that an advisory committee to the State Supreme Court of New Jersey has offered guidelines for speeding up civil cases that contain limits on depositions and other aspects of discovery like the time given the parties to answer interrogatories).

331. *See* Burkholz Report, *supra* note 36, at 136.

here shows just how wrong those assertions can be. Yet their significant success took fourteen years and a herculean legal effort to accomplish. The Federal Rules of Civil Procedure state that the goal of our legal system is "to secure the just, speedy, and inexpensive determination of every action and proceeding."[332] If we are truly committed to that ideal, our legal system must find ways to achieve swifter justice for defrauded shareholders.

332. FED. R. CIV. P. 1.