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The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Action Cases Aided by the Supreme Court

I. INTRODUCTION

THE U.S. SUPREME COURT'S DECISION IN *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*¹ illustrates a recent reformulation of the private attorney general model for enforcing federal laws.² In the case, decided January 15, 2008, the Court rejected another attempt to expand scheme liability in private securities actions to create a new class of defendants.³ In doing so, the Court's opinion, written by Justice Anthony Kennedy, recognized possible harms from unfettered private enforcement⁴ and described alternative methods of deterring bad behavior—namely state law and government enforcement.⁵ This follows a recent perceived pattern in securities and antitrust cases to scale back (and decline to expand) the

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1. 128 S. Ct. 761 (2008).

2. *See id.*

3. *Id.* at 766 (“We conclude the implied right of action does not reach the customer/supplier companies because the investors did not rely upon their statements or representations.”). The Court previously rejected aiding and abetting liability in Rule 10b-5 cases in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (“Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).”). The Court held, however, that secondary actors could be liable under that section, “assuming all of the requirements for primary liability under Rule 10b-5 are met.” *Id.* The *Stoneridge* plaintiff, of course, employed that opening to bring its lawsuit. *Stoneridge*, 128 S. Ct. at 769 (“The conduct of a secondary actor must satisfy each of the elements or preconditions for liability[.]”).

4. *Stoneridge*, 128 S. Ct. at 772. The Court cited the decision in *Blue Chip* for the proposition that “extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies.” *Id.* at 772 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740–41 (1975)).

5. *Id.* at 773–74 (describing alternatives to the implied private right of action under the Securities and Exchange Act in the form of government enforcement).

powers of private attorneys general to enforce federal law through class action lawsuits.⁶ *Stoneridge* and other recent cases do not represent the beginning of the end for these class actions, but instead suggest that the Supreme Court is taking a more nuanced (and perhaps cautious) approach to the private attorney general model by limiting its expansion in areas where harm could exceed benefits, and providing courts with greater ability to weed out unmeritorious cases earlier in the litigation.⁷

This article will begin in Part II.A. by describing the private attorney general model—both what it is and how it developed in the securities and antitrust class action arena.⁸ Part II.B. examines the private attorney general model in the context of the federal securities laws.⁹ Next, Part II.C. details the subject case, *Stoneridge*, and scheme liability under the securities laws.¹⁰ Finally, in Part II.D., we describe the Supreme Court's refinement of the private attorney general model in securities and antitrust cases in particular.¹¹

II. DISCUSSION

A. *The Private Attorney General Model*

One form of the private attorney general is a class action attorney who sues a defendant on behalf of a group of private citizens.¹² This attorney “sues to vindicate the public interest by representing” a group of individuals who either cannot afford the costs of litigation or whose stake is so small that litigation would not be cost-effective.¹³ Instead of receiving direct payment from the clients, the attorney—if successful—receives a portion of the award.¹⁴ Many of these cases are settled prior to trial with approval of the court and the parties will negotiate the attorneys' fees

6. See generally Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J. 181, 183–85 (2008) (critiquing U.S. securities litigation and describing how the recent Supreme Court decisions in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 124 S. Ct. 2499, 2504–05 (2007) and *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) “strictly interpreted” congressional reforms to heighten pleading standards and encourage dismissal of meritless claims).

7. See *id.* at 183–85 (noting that “Congress . . . placed quite severe procedural restrictions upon securities class actions” but that “filings in securities class actions continue at a robust rate and settlements have hit all time highs”).

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See *infra* Part II.C.

11. See *infra* Part II.D.

12. William B. Rubenstein, *On What a “Private Attorney General” is—And Why it Matters*, 57 VAND. L. REV. 2129, 2148 (2004) (describing the various types of private attorneys general). Rubenstein, in his excellent article, describes three forms of private attorneys general, but this paper will focus on the private attorney general as supplemental law enforcer—class action attorneys. *Id.* at 2142–55.

13. 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, 216 (1983) (“[A]s every law student knows, our society places extensive reliance upon such private attorneys general to enforce the federal antitrust and securities laws, to challenge corporate self-dealing in derivative actions, and to protect a host of other statutory policies.”).

14. See Rubenstein, *supra* note 12, at 2148–49 (citing BLACK’S LAW DICTIONARY 129 (6th ed. 1990)) (explaining that “a successful private [attorney general] is entitled to recover . . . attorneys fees] if he has advanced the policy inherent in public interest legislation” for a class of plaintiffs).

as part of the settlement.¹⁵ Indeed, because of the high costs of litigating and the risks of a very large adverse award, along with the delays in civil judicial proceedings, both plaintiff attorneys¹⁶ and defendants¹⁷ have strong incentives to settle.¹⁸ The prospect of these often large fees creates an incentive for plaintiff attorneys to file lawsuits on behalf of proposed class members.¹⁹ In fact, these incentives have created a cottage industry for lawyers and plaintiffs who compete to fulfill this “private attorney general” function.²⁰

These lawsuits can both compensate deserving plaintiffs and deter illegal conduct.²¹ Conventionally, compensation is considered a private goal, and deterrence a public goal,²² but in reality, actions by both private and public attorneys can lead to both compensation and deterrence.²³ For example, the *Stoneridge* Court noted that “[s]ince September 30, 2002, SEC enforcement actions have collected over \$10 billion in disgorgement and penalties, much of it for distribution to injured investors.”²⁴ And in another recent securities litigation decision, the Supreme Court reiterated that “meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC).”²⁵

15. Coffee, *supra* note 13, at 230.

16. *Id.* at 226, 230. In fact, one of Coffee’s critiques of the private attorney general model is that plaintiffs’ attorneys are more risk adverse than their clients and thus more likely to settle than would be in their clients’ interests. *Id.* at 230.

17. Thomas F. Gillespie III, *Dura Pharmaceuticals, Inc. v. Broudo: A Missed Opportunity to Right the Wrongs in the PSLRA and Rebalance the Private Rule 10b-5 Litigation Playing Field*, 3 J. Bus. & Tech. L. 161, 175–76 (2008) (“Plaintiffs counsel . . . know that if they can survive a pre-trial dismissal, the public company defendant will almost assuredly, as a business decision, settle for a significant sum regardless of the strength of the plaintiffs’ underlying claims.”) (citing S. REP. NO. 104-98, at 6 (1995) (Conf. Rep.), reprinted in 1995 U.S.C.C.A.N. 679, 685 (“[U]nder the current system, the initiative for filing 10b-5 suits comes almost entirely from the lawyers, not from genuine investors.”) (alteration in original)).

18. See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, LAW & CONTEMP. PROBS., Autumn 1997, at 167, 168 (describing how the “disparity between the stake of plaintiffs’ counsel in the litigation and the stakes of the class members gives rise to a variety of agency problems” including the motivation to settle).

19. See *id.* (noting that “class action litigation [may] produce handsome compensation for class counsel” and fee awards, often based on judicial determinations rather than market forces, frequently exceed the damages recovered by members of the plaintiff class).

20. Coffee, *supra* note 13, at 223 (“Typically, the sequence begins with an SEC injunctive action or an antitrust indictment, which within a brief period elicits a horde of plaintiffs’ attorney—sometimes numbering well over 100—all seeking to participate in a private class action, the allegations of which largely parallel and sometimes literally parrot those set forth in the agency’s complaint.”); Gillespie, *supra* note 17, at 174.

21. Rubenstein, *supra* note 12, at 2140.

22. *Id.* (“[P]rivate attorneys pursue compensation for individual clients arising out of past injuries (torts, breaches of contracts, discriminatory harms, financial losses) while public attorneys aim to deter future bad behavior.”).

23. *Id.*

24. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008).

25. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007).

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As the Supreme Court noted, private class action lawsuits can supplement government enforcement of federal law, particularly the antitrust and securities laws.²⁶ This “private attorney general” concept is based upon the idea that governmental authorities have neither the time nor the resources to bring enforcement actions against all wrongdoers.²⁷

The phrase “private attorney general” was first coined by Second Circuit Judge Jerome Frank in 1943.²⁸ Justice William Douglas cited Judge Frank in using the term in a Supreme Court dissent several months later.²⁹ The term remained somewhat dormant, however, until the 1970s, when its use started to skyrocket.³⁰ Now the term is part of legal lexicon and regularly employed by judges and scholars throughout the country.³¹ Although the phrase can denote a wide range of private attorneys that serve the public interest, these unfortunately sometimes include profit-seeking private attorneys who bring baseless class action lawsuits to enforce federal laws.³² Professor Coffee described these attorneys as “bounty hunters” in his 1983 article on the subject.³³ The theory is that these bounty hunters are private attorneys general in that they are induced by profit motive to seek out cases that government enforcers either miss or do not have the resources (or desire) to prosecute.³⁴

B. *Private Attorneys General and the Federal Securities Laws*

Private attorneys general have been particularly active in the securities law arena since the U.S. Supreme Court created an implied private cause of action from section 10(b) of the Securities Exchange Act of 1934.³⁵ This private cause of action

26. *Id.*; see also Coffee, *supra* note 13, at 216.

27. Barbara Black, *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.: Reliance on Deceptive Conduct and the Future of Securities Fraud Class Actions*, 36 SEC. REG. L.J. 330, 338 (2008) (“[E]mpirical studies make clear that the SEC cannot investigate and bring enforcement actions against all corporate wrongdoers; the concept of the private plaintiffs acting as a ‘private attorney general’ as a necessary supplement to the SEC’s enforcement powers maintains its vitality.”) (citations omitted).

28. *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (“Such persons, so authorized, are, so to speak, private Attorney Generals.”), *vacated*, 320 U.S. 707 (1943); Coffee, *supra* note 13, at 215; Rubenstein, *supra* note 12, at 2133.

29. *FCC v. Nat’l Broad. Co.*, 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting); Rubenstein, *supra* note 12, at 2130 n.2.

30. Rubenstein, *supra* note 12, at 2130.

31. *Id.* at 2130, 2134.

32. *Id.* at 2142–55. Another example of private attorneys general includes experienced private attorneys who are directly hired by a government entity to litigate, as occurred in both the tobacco cases and Microsoft antitrust litigation. *Id.* at 2143.

33. Coffee, *supra* note 13, at 218.

34. *Id.* at 220. The Third Circuit in *Garr* upheld Rule 11 sanctions against typical “bounty hunters” for failing to make a reasonable inquiry before signing their securities complaint. *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1281 (3d Cir. 1994). This decision provides an excellent description of how this “bounty hunter” theory works in practice, and can be criticized by the courts. *Id.* at 1275–78.

35. See Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2006); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 766 (2008); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971); 17 C.F.R. § 240.10b-5 (2008). Interestingly, the *Stoneridge* Court notes that under current

allows a plaintiff to sue any person who violates SEC Rule 10b-5, which makes it unlawful:

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.³⁶

To prevail under this implied private action, “a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”³⁷ The “bounty hunters” or “private attorneys general” usually sue officers, controlling shareholders, and directors of a corporation, but it is the corporation, and sometimes its insurer, that pays the settlement.³⁸ Indeed, plaintiffs often sue these corporate insiders specifically to gain access to their insurance.³⁹

Class action filings under Rule 10b-5 accelerated after 1988 when the Supreme Court in *Basic Inc. v. Levinson* created a presumption of reliance (element four, above) for securities lawsuits traded in secondary public markets.⁴⁰ This is known as the “fraud-on-the-market” theory,⁴¹ which “is based on the hypothesis that, in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and its business.”⁴² As a result, this theory presumes that misleading statements will “defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.”⁴³ Thus, in these circumstances, a court may presume that individual plaintiffs relied upon the misstatement, even if they did not do so directly.⁴⁴ This presumption is extremely

law, the Court would not find an implied cause of action unless “the underlying statute can be interpreted to disclose the intent to create one,” which is not the case with respect to section 10(b). *Stoneridge*, 128 S. Ct. at 768.

36. 17 C.F.R. § 240.10b-5.

37. *Stoneridge*, 128 S. Ct. at 768 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005)).

38. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1550–51 (2006).

39. *Id.* at 1551.

40. 485 U.S. 224, 249–50 (1988); A.C. Pritchard, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.: The Political Economy of Securities Class Action Reform 1* (John M. Olin Ctr. for Law & Econ., Working Paper No. 08-010, 2008), available at <http://ssrn.com/abstract=1159983>.

41. Pritchard, *supra* note 40, at 1.

42. *Basic*, 485 U.S. at 241 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160–61 (3d Cir. 1986)).

43. *Id.* at 241–42.

44. *Id.* at 242.

important for the proliferation of private attorneys general because the reliance element would otherwise be a major barrier to class certification.⁴⁵ This is because the fraud-on-the-market theory transforms reliance from an individual issue (proving direct reliance) into a common issue (presuming reliance for a class of stock purchasers).⁴⁶ Without this presumption, individual issues may predominate over common issues, leading courts to reject motions for class certification.⁴⁷ At the same time, this presumption greatly expands the size of the class and potential amount of damages, and makes the lawsuit more valuable to the plaintiffs' attorney.⁴⁸ Indeed, because of the enormous trading volume in secondary markets, the recoverable damages could reach hundreds of millions, or even billions of dollars.⁴⁹

Congress reacted to the flood of securities litigation in 1995 by passing the Private Securities Litigation Reform Act (PSLRA).⁵⁰ In addition to other procedural provisions, the PSLRA "created heightened pleading requirements for the misrepresentation and scienter elements of a Rule 10b-5 claim."⁵¹ These restrictions led plaintiffs deciding to bring a lawsuit to "focus on objective evidence, such as re-statements, insider trading, and SEC enforcement actions"⁵² As recent cases demonstrate, however, this statute was not sufficient to eliminate concerns about abusive class actions.⁵³ Ironically, Congress and the SEC have faced recent criticism from the current economic crisis and Wall Street bailout for insufficient oversight over so-called abusive business practices.⁵⁴

C. Stoneridge and Scheme Liability

In *Stoneridge*, the U.S. Supreme Court held that the Rule 10b-5 implied right of action "does not reach the customer/supplier companies because the investors did

45. See, e.g., Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 REV. LITIG. 405, 409–10, 412 (2003) (explaining the "paradigm case" for class certification and that "[p]laintiffs who cannot rely on the fraud-on-the-market theory face an uphill battle in seeking certification").

46. See FED. R. CIV. P. 23(b)(3) ("[Q]uestions of law or fact common to class members [must] predominate over any questions affecting only individual members"); see also Paul G. Mahony, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623, 625 (1992) (arguing that the fraud-on-the-market theory should be replaced with a requirement of individualized proof of reliance in 10b-5 suits in order to maximize deterrence under fraud liability).

47. See FED. R. CIV. P. 23(b)(3) ("[Q]uestions of law or fact common to class members [must] predominate over any questions affecting only individual members"); see also Pritchard, *supra* note 40, at 31 ("Requiring plaintiffs to plead actual reliance largely eliminates class actions, leaving fraud deterrence exclusively in the hands of the SEC and the Justice Department.").

48. Pritchard, *supra* note 40, at 5.

49. *Id.* at 9.

50. 15 U.S.C. § 78u-4(b)(1) (2006); see also Gillespie, *supra* note 17, at 167.

51. Gillespie, *supra* note 17, at 167–68.

52. Pritchard, *supra* note 40, at 31.

53. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007) ("Private securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.").

54. See Jim Popkin, *Critics Say Bailout is Stuffed with Billions in Pork*, MSNBC.COM, Oct. 3, 2008, available at <http://deepbackground.msnbc.msn.com/archive/2008/10/03/1489413.aspx>.

not rely upon their statements or representations.⁵⁵ In other words, the Court rejected the plaintiff's attempt to stretch federal securities liability to certain secondary actors.⁵⁶

Stoneridge involved a motion to dismiss a Rule 10b-5 class action that was originally filed against Charter Communications and other defendants, including two of Charter's suppliers and customers.⁵⁷ The Court's decision concerned liability for these two secondary actors.⁵⁸ Plaintiffs alleged that "Charter, a cable operator, engaged in a variety of fraudulent practices so its quarterly reports would meet Wall Street expectations for cable subscriber growth and operating cash flow."⁵⁹ According to the complaint, the "fraud included misclassification of its customer base; delayed reporting of terminated customers; improper capitalization of costs that should have been shown as expenses; and manipulation of the company's billing cutoff dates to inflate reported revenues."⁶⁰ The secondary actors "supplied Charter with the digital cable converter (set top) boxes that Charter furnished to its customers."⁶¹ Plaintiffs alleged that the secondary actors contributed to the fraud by agreeing to accept \$20 more from Charter for each set top box, in exchange for purchasing advertising from Charter.⁶² The transactions were a wash and had no "economic substance," but Charter allegedly recorded the advertising "as revenue and capitalized its purchase of the set top boxes, in violation of generally accepted accounting principles"⁶³ This, plaintiffs alleged, allowed "Charter to fool its auditor into approving a financial statement showing it met projected revenue and operating cash flow numbers."⁶⁴ The secondary actors "had no role in preparing or disseminating Charter's financial statements. And their own financial statements booked the transactions as a wash, under generally accepted accounting principles."⁶⁵

The Supreme Court concluded that "respondents' deceptive acts, which were not disclosed to the investing public, were too remote to satisfy the requirement of reliance."⁶⁶ The fraud-on-the-market theory that presumed reliance did not apply here because defendants were secondary actors, and "[n]o member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts

55. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 766 (2008).

56. *See id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 767.

65. *Id.*

66. *Id.* at 770.

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during the relevant times.⁶⁷ The Court's decision was infused with policy.⁶⁸ For example, it expressed concern that plaintiffs sought to apply securities liability "beyond the securities markets—the realm of financing business—to purchase and supply contracts—the realm of ordinary business operations."⁶⁹

Almost fifteen years earlier, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,⁷⁰ the Supreme Court substantially narrowed potential securities liability for secondary actors when it rejected aiding and abetting liability for Rule 10b-5 actions.⁷¹ Since the 10b-5 action is a judicially-created implied cause of action, the Court had "to infer how the 1934 Congress would have addressed the issue[s] had the 10b-5 action been included as an express provision in the 1934 Act."⁷² In doing so, the Court pointed out that a "private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b)."⁷³ And section 10(b) does not mention aiding and abetting.⁷⁴ The Court disposed of arguments that aiding and abetting liability was implied based upon general principles of tort law, and declined to expand the cause of action beyond acts prohibited by section 10(b)'s text.⁷⁵ While the Court based its decision on the statute's text, it did point out that "[s]econdary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets."⁷⁶

The *Central Bank* Court did, however, leave an opening for secondary actor liability:

*Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met.*⁷⁷

67. *Id.* at 769.

68. Black, *supra* note 27, at 335.

69. *Stoneridge*, 128 S. Ct. at 770.

70. 511 U.S. 164 (1994).

71. *Id.* at 191 ("Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)."). Interestingly, after *Central Bank* was decided, Congress amended section 20 of the Exchange Act to allow the SEC to enforce aiding and abetting liability against control persons. 15 U.S.C. § 78t (2006); Eric Berry, Note, *Stoneridge and the Short-Lived Experiment of Scheme Liability*, 4 N.Y.U. J. L. & Bus. 355, 362–63 (2007). It is notable that Congress did not permit private attorneys general to enforce aiding and abetting liability. *Id.* at 363.

72. *Central Bank*, 511 U.S. at 173 (quoting *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 294 (1993)) (alteration in original).

73. *Id.*

74. *Id.* at 175.

75. *Id.* at 181–85.

76. *Id.* at 188.

77. *Id.* at 191 (emphasis in original).

Indeed, this is the opening that plaintiffs in *Stoneridge* sought to exploit.⁷⁸ And the Court, following *Central Bank*, required plaintiffs to fulfill “each of the elements or preconditions for liability” to prevail against the secondary actors.⁷⁹ The Court held, of course, that plaintiffs did not satisfy the reliance element because the alleged “deceptive acts, which were not disclosed to the investing public, [we]re too remote” to constitute reliance.⁸⁰

D. Refining the Private Attorney General Model

The *Stoneridge* Court’s refusal to expand the universe of Rule 10b-5 defendants is illustrative of the Court’s recent approach that is reformulating the private attorney general model for both securities and antitrust cases.⁸¹ This approach does not disapprove of the class action as a way to enforce federal law, but instead embraces a less ambitious and more nuanced view about the ability of class action plaintiff attorneys to become effective private attorneys general.⁸² The Court seems to be increasingly responding to the potential for abuse in these actions, and the costs to companies and the economy.⁸³ Rather than allowing these actions to proliferate as the Court did in the past,⁸⁴ the Court has instead limited class actions either outright⁸⁵ or by providing lower courts with tools to dismiss the actions that are not likely meritorious.⁸⁶ At the same time, the Court has placed greater emphasis on government enforcement, i.e., the public attorney general (or SEC, state authorities, etc.).⁸⁷ While this is not the end of class actions—they will continue to be a

78. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008).

79. *Id.*

80. *Id.* at 770.

81. Pritchard, *supra* note 40, at 1.

82. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007). Indeed, Justice Ginsburg, writing for the majority in 2007, began her opinion by stating that the Supreme Court “has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC).” *Id.* Her next sentence, of course, pointed out that “[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.” *Id.*

83. *Stoneridge*, 128 S. Ct. at 772 (“Overseas firms with no other exposure to our securities laws could be deterred from doing business here. . . . This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.”).

84. See Pritchard, *supra* note 40, at 1. See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 223, 250 (1988) (stating that it is appropriate to adopt “a presumption of reliance supported by the fraud-on-the-market theory” and thus allowing certification of the class).

85. See *Stoneridge*, 128 S. Ct. at 761 (indicating that the Court did not permit expansion of private rights of action because of extensive discovery); Pritchard, *supra* note 40, at 1.

86. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1971 (2007) (dismissing a claim alleging conspiracy for failing to plead facts demonstrating plausibility); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346–48 (2005) (dismissing a complaint for securities fraud for failing to state an economic loss and a causal connection).

87. *Stoneridge*, 128 S. Ct. at 773 (“Secondary actors are subject to criminal penalties . . . and civil enforcement by the SEC The enforcement power is not toothless.”); *Credit Suisse Sec. (USA) LLC, v. Billing*, 127 S. Ct. 2383, 2396 (2007) (“[A]ny enforcement-related need for an antitrust lawsuit is unusually small. . . . [T]he SEC actively enforces the rules and regulations that forbid the conduct in question.”).

significant force—the private attorney general concept may have already passed its peak.⁸⁸ It will, of course, be interesting to see if recent economic turmoil and criticism of abusive business practices lead to calls for greater private attorney general power, especially in light of concerns that regulators were not sufficiently vigilant.

1. Blue Chip Stamps v. Manor Drug Stores

The Supreme Court did not just recently “discover” that private class actions could lead to abuse. Indeed, in *Blue Chip Stamps v. Manor Drug Stores*,⁸⁹ the Court in 1975 expressed deep concern about frivolous class action lawsuits.⁹⁰ The Court recognized that

*even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.*⁹¹

The *Stoneridge* Court pointed to this same concern—weak-claimed plaintiffs extorting settlements from non-guilty companies—when it declined to expand securities liability to secondary actors.⁹²

Besides extortionate settlements, the *Blue Chip* Court recognized that the “very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.”⁹³ For example, a defendant with an upcoming securities offering may be forced to delay or abandon it during the lawsuit. Moreover, corporate officers, instead of focusing on creating shareholder value, are meeting with lawyers and taking depositions.

Interestingly, whereas in *Stoneridge* the Court limited the potential defendants to Rule 10b-5 cases,⁹⁴ the *Blue Chip* Court limited the number of potential plaintiffs by holding that initiators of a stock offering cannot sue under that implied cause of action “where they have neither purchased nor sold any of the offered shares.”⁹⁵

88. See Rubenstein, *supra* note 12, at 2135 & n.32 (noting that use of the “private attorney general” term began skyrocketing in the 1970’s and increased steadily each decade to the present).

89. 421 U.S. 723 (1975).

90. *Id.* at 740. The Court was particularly concerned about Rule 10b-5 suits, stating that “[t]here 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.” *Id.* at 739.

91. *Id.* at 740.

92. *Stoneridge*, 128 S. Ct. at 772 (“In *Blue Chip*, the Court noted that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies.”).

93. *Blue Chip*, 421 U.S. at 740.

94. *Stoneridge*, 128 S. Ct. at 773.

95. *Blue Chip*, 421 U.S. at 725, 754–55.

The concerns the Supreme Court expressed in 1975 in *Blue Chip* previewed the action the Supreme Court is taking now in both antitrust and securities cases.⁹⁶

2. Congress

The Supreme Court often “takes its cues from Congress” and the public.⁹⁷ The PLSRA’s passage was a giant signal to “rein in” abusive class action litigation.⁹⁸ Indeed, in *Tellabs*, Justice Ruth Bader Ginsburg noted in 2007 that, “[a]s a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995.”⁹⁹ One method that Congress employed to try to check the abusive litigation is by requiring “[e]xacting pleading requirements” for Rule 10b-5 cases.¹⁰⁰ “The Act requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, i.e., the defendant’s intention ‘to deceive, manipulate, or defraud.’”¹⁰¹ Creating a heightened pleading standard should have two effects. The first is that class action attorneys will decline to file some cases that they would have filed before the PLSRA because those cases are likely to be dismissed, and are therefore not as profitable.¹⁰² Second, the higher standard provides courts with a tool to more easily clear their docket of cases that lack merit.¹⁰³ According to some commentators, however, “the reforms set out by the Act did not create much change.”¹⁰⁴

Congress could have—but did not—eliminate the fraud-on-the-market presumption for reliance.¹⁰⁵ That would have mostly killed securities class actions because without that presumption it would have been very difficult for private attorneys general to obtain class certification.¹⁰⁶ This suggests that Congress did not want to eliminate securities class actions, but instead wanted to filter out the less

96. This is not to say that the Supreme Court did nothing between *Blue Chip* and recent cases to limit the surge of private attorney general class actions. See, e.g., *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). Rather, the Court has recently taken increased steps to “regulate” these suits. Pritchard, *supra* note 40, at 1.

97. See *Gonzales v. Raich*, 545 U.S. 1, 45 (2005).

98. Pritchard, *supra* note 40, at 1–2.

99. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007).

100. *Id.*; see also *Credit Suisse Sec. (USA) LLC, v. Billing*, 127 S. Ct. 2383, 2396 (2007) (“We also note that Congress, in an effort to weed out unmeritorious securities lawsuits, has recently tightened the procedural requirements that plaintiffs must satisfy when they file those suits.”).

101. *Tellabs*, 127 S. Ct. at 2504 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 & n.12 (1976)).

102. Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act 2* (John M. Olin Ctr. for Law & Econ., Working Paper No. 07-008, 2007), available at <http://ssrn.com/abstract=975301> (“[P]rocedural barriers of the PLSRA likely raised the cost to plaintiffs’ attorneys to pursue a class action and reduced the expected outcome from litigation.”).

103. See *Credit Suisse*, 127 S. Ct. at 2396 (noting heightened pleading standards permit courts to dismiss unmeritorious claims).

104. Gillespie, *supra* note 17, at 175. But see Pritchard, *supra* note 40, at 31 (“This means that securities class actions are now brought when the evidence of fraud is relatively obvious.”).

105. Pritchard, *supra* note 40, at 31.

106. *Id.*

meritorious ones.¹⁰⁷ The Supreme Court in recent decisions has taken the same approach of reaching decisions that support the continued existence of the private attorney general, but at the same time paring back its scope.¹⁰⁸

Congress again signaled its concern about abusive and costly class actions when it passed the Class Action Fairness Act in 2005.¹⁰⁹ Among other reforms, this Act expanded federal jurisdiction over class actions, even when those actions involved state law claims.¹¹⁰ This Act reacted to concern that class actions—although a legitimate method to obtain relief—have been disproportionately abused at the state level.¹¹¹ These abuses “undermined the national judicial system, the flow of interstate commerce, and the concept of diversity jurisdiction.”¹¹² Moreover, plaintiff attorneys were filing national cases in state courts, and as a result states often imposed their own law on residents of other states.¹¹³ Shuttling these cases to federal court was one method that Congress determined would help pare down abusive and unmeritorious class actions.¹¹⁴

Perhaps responding to one or both of these acts, and other concerns expressed about class actions,¹¹⁵ the Supreme Court has recently issued several antitrust and securities litigation opinions that do not eliminate, but instead significantly limit the role of the private attorney general in favor of government enforcement.¹¹⁶

107. *Id.* (explaining that instead of changing the fraud-on-the-market presumption, Congress created procedural barriers to make class actions more difficult to pursue).

108. See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773–74 (2008) (noting all secondary actors are not immune from private suit, but rather a claim is limited as against secondary actors committing primary violations); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007) (“recogniz[ing] that meritorious private actions . . . are an essential supplement to . . . actions brought . . . by the Department of Justice and the Securities and Exchange Commission (SEC),” but private actions must be adequately contained to avoid abuse).

109. Pub. L. No. 109–2, 119 Stat. 4, 4–5 (2005).

110. *Class Action Fairness Act of 2005* § 4, 28 U.S.C. § 1332(d) (2000); Warren W. Harris & Erin Glenn Busby, *Highlights of the Class Action Fairness Act of 2005*, 72 DEF. COUNS. J. 228, 228 (2005).

111. Harris & Busby, *supra* note 110, at 228–29. The PSLRA “prompted at least some members of the plaintiffs’ bar to avoid the federal forum altogether” and file analogous state claims in state court. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 82 (2006). As a result, Congress passed the Securities Litigation Uniform Standards Act (SLUSA), which denied plaintiffs the right to the class action device to vindicate many of these claims. *Id.* at 82–83 (citing 15 U.S.C. § 78bb(f)(1) (2000)).

112. Harris & Busby, *supra* note 110, at 229.

113. *Id.*

114. See *id.*

115. See, e.g., Brief of the Washington Legal Foundation as Amici Curiae in Support of Respondents at 4, 6–11, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc. & Motorola, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43) (discussing abusive securities litigation).

116. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (noting the PSLRA permits private securities actions but requires heightened pleading specificity).

3. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP

Justice Antonin Scalia, writing for the majority in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,¹¹⁷ confronted the need for private antitrust attorneys general in the face of a detailed regulatory structure in the telecommunications industry.¹¹⁸ *Verizon Communications* arose out of the Telecommunications Act of 1996 and certain duties that the act imposed upon incumbent local telephone companies to facilitate market entry by competitors.¹¹⁹ The Court considered “whether a complaint alleging breach of the incumbent’s duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act”¹²⁰ In examining whether traditional antitrust principles justify adding this “case to the few existing exceptions from the proposition that there is no duty to aid competitors,” the Court analyzed whether private enforcement was necessary in these circumstances.¹²¹ In doing so, the Court recognized that where there already is a regulatory structure designed to deter and remedy anticompetitive harm, “the additional benefit to competition provided by antitrust enforcement will tend to be small.”¹²² Indeed, “[t]he cost of false positives counsels against an undue expansion of § 2 liability.”¹²³ In contrast, absent such a regulatory structure, “the benefits of antitrust are worth its sometimes considerable disadvantages.”¹²⁴

The Court’s analysis is significant because it recognizes that the private attorney general—in the vehicle of private antitrust actions—should be held in check (or at least slowed down) if there already is a government enforcement mechanism in place.¹²⁵ The Court recognizes that there are both benefits and costs to these lawsuits,¹²⁶ and it defers not to the private attorney general, but to the regulatory agency.¹²⁷

117. 540 U.S. 398 (2004).

118. *Id.* at 412.

119. *Id.* at 401.

120. *Id.* The Court dismissed the possibility of antitrust immunity because the 1996 Act had an antitrust-specific savings clause. *Id.* at 406.

121. *Id.* at 411.

122. *Id.* at 412.

123. *Id.* at 414.

124. *Id.* at 412.

125. *Id.* (noting “the existence of a regulatory structure designed to deter and remedy anticompetitive harm” limits the necessity of private action).

126. *Id.* at 412, 414.

127. *Id.* at 415. In a rather significant pronouncement, Justice Scalia stated that “[a]n antitrust court is unlikely to be an effective day-to-day enforcer,” but rather regulatory agencies are more appropriate enforcers. *Id.*

4. *Dura Pharmaceuticals, Inc. v. Broudo*

The next term, in 2005, the Court decided a securities case entitled *Dura Pharmaceuticals, Inc. v. Broudo*.¹²⁸ Here, the Court considered what plaintiffs must plead to satisfy the “loss causation” element for 10b-5.¹²⁹ The Ninth Circuit took a very lenient view, and only required plaintiffs to allege that “‘the price’ of the security ‘on the date of purchase was inflated because of the misrepresentation.’”¹³⁰ The Court rejected that standard, and held that plaintiffs must instead plead that they suffered an actual economic loss as a result of the challenged actions.¹³¹ Echoing its 1975 *Blue Chip* decision, the Court noted that the lower Ninth Circuit standard would permit plaintiffs with largely groundless claims to file suit and obtain extortionate settlements.¹³² This, the Court stated, “would tend to transform a private securities action into a partial downside insurance policy.”¹³³ This case is another recent example of the Supreme Court limiting the private attorney general concept in such a way as to diminish the number of frivolous and unmeritorious lawsuits filed.¹³⁴

5. *Credit Suisse Securities (USA) LLC v. Billing*

Credit Suisse Securities (USA) LLC v. Billing,¹³⁵ like *Verizon Communications*¹³⁶ decided a few years earlier, required the Supreme Court to reconcile a detailed regulatory regime with private attorney general antitrust lawsuits.¹³⁷ Unlike *Verizon Communications*, however, implied antitrust immunity was at issue in *Credit Suisse*.¹³⁸ More specifically, the Supreme Court declared that particular IPO stock underwriting practices were off-limits to the antitrust laws because these laws were impliedly preempted by the securities laws.¹³⁹ Private attorney general plaintiffs’ counsel brought an antitrust class action on behalf of securities purchasers against several underwriters alleging that their “tying” and “laddering” arrangements grossly inflated the prices of the affected securities and violated the federal antitrust laws.¹⁴⁰

128. 544 U.S. 336 (2005). See generally Gillespie, *supra* note 17 (giving an excellent analysis of this decision).

129. *Dura Pharm.*, 544 U.S. at 338.

130. *Id.* (quoting *Broudo v. Dura Pharm., Inc.*, 339 F.3d 933, 938 (9th Cir. 2003) (emphasis in original), *rev'd*, 544 U.S. 336 (2005)).

131. *Id.* at 347.

132. *Id.* (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)).

133. *Id.* at 347–48.

134. See *id.*

135. 127 S. Ct. 2383 (2007).

136. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

137. *Credit Suisse*, 127 S. Ct. at 2387.

138. Compare *id.* (providing examples of statutes that preclude application of antitrust laws), with *Verizon Commc'ns*, 540 U.S. at 406 (stating the principle that congressional creation of sharing duties under section 251(c) does not automatically allow those duties to be enforced via an antitrust claim).

139. *Credit Suisse*, 127 S. Ct. at 2387.

140. *Id.*

The issue was whether there is a conflict between private antitrust lawsuits and the securities regulatory regime that “rises to the level of incompatibility.”¹⁴¹ Here, Justice Stephen Breyer came up with another limiting factor for the private attorney general model: it is inferior to “expert” agency enforcement for complex subject matter that requires the drawing of a “fine, complex, detailed line” separating legal from illegal activity.¹⁴² Justice Breyer points out that “to distinguish what is forbidden from what is allowed requires an understanding of just when, in relation to services provided, a commission is ‘excessive,’ indeed, so ‘excessive’ that it will remain *permanently* forbidden.”¹⁴³ “And who,” asks Justice Breyer, “but the SEC itself could do so with confidence?”¹⁴⁴ At the same time, the Court was concerned that private attorney general actions will just cause problems when it stated, “antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries.”¹⁴⁵ Justice Breyer continued by stating that “[i]n light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results.”¹⁴⁶

Continuing the analysis, the Court, as in *Verizon Communications*,¹⁴⁷ balanced the benefits and harm of supplemental private attorney general enforcement.¹⁴⁸ The Court noted that in light of the complex regulatory structure, “any enforcement-related need for an antitrust lawsuit is unusually small.”¹⁴⁹ This is because “the SEC actively enforces the rules and regulations that forbid the conduct in question,” and that “the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations.”¹⁵⁰ As a result, “it [is] somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior.”¹⁵¹ Once again, it appears that the Court decided that it trusted government enforcement a lot more than the private attorney general model. Indeed, the Court was concerned that private attorney general enforcement would disrupt the government regulation.¹⁵² Of course, government regulation has

141. *Id.* at 2393.

142. *Id.* at 2394.

143. *Id.* at 2395 (emphasis in original).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004).

148. *Credit Suisse*, 127 S. Ct. at 2395–96.

149. *Id.* at 2396.

150. *Id.*

151. *Id.* The Court also referenced the PSLRA, and expressed concern that permitting antitrust lawsuits “risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing.” *Id.*

152. *Id.* at 2395.

recently come under fire for its perceived failure to stop certain business practices that many believe led to collapsing credit markets and economic turmoil.¹⁵³

6. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*

The Supreme Court's 2007 antitrust decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹⁵⁴ did not involve a class action, but it did result in a change in substantive law that narrows opportunities for antitrust class actions.¹⁵⁵ In overruling almost one-hundred years of precedent,¹⁵⁶ the Court declared that vertical agreements between manufacturers and retailers to set minimum prices for the manufacturers' goods would be subject to the rule-of-reason, instead of the per se rule.¹⁵⁷ This is significant for prospective antitrust cases because the "rule-of-reason claim is much more difficult and expensive to prove, and plaintiffs are thus less likely to challenge these agreements."¹⁵⁸ In reaching this decision, the Court noted that per se rules "may increase litigation costs by promoting frivolous suits against legitimate practices."¹⁵⁹ Not surprisingly, the Court was very conscious of the costs and abuses possible in antitrust litigation.

7. *Bell Atlantic Corp. v. Twombly*

The Supreme Court issued another antitrust opinion in 2007—the court issued four in total¹⁶⁰—that provided courts in antitrust cases (and other complex federal actions) with a tool to filter out unmeritorious cases.¹⁶¹ In *Bell Atlantic Corp. v. Twombly*, the Court held that private attorneys general who assert an antitrust conspiracy cannot survive a motion to dismiss unless they allege more than a bare allegation of conspiracy and that defendants engaged in consciously parallel behavior.¹⁶² The Court did not elevate pleading standards (as Congress did for the

153. See Yaron Brook, Commentary, *The Government Did It*, FORBES, July 18, 2008, available at http://www.forbes.com/2008/07/18/fannie-freddie-regulation-oped-cx_yb_0718brook.html.

154. 127 S. Ct. 2705 (2007).

155. *Id.* at 2710 ("The Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors.")

156. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), overruled by *Leegin Creative*, 127 S. Ct. at 2710.

157. *Leegin Creative*, 127 S. Ct. at 2721.

158. Carl W. Hittinger & Jarod M. Bona, *Supreme Court Decisions Weaken Antitrust Laws*, EXECUTIVE COUNS., March/April 2008, at 40, 40.

159. *Leegin Creative*, 127 S. Ct. at 2718.

160. See Carl W. Hittinger & Jarod M. Bona, *Recent High Court Rulings Don't Deserve 'Pro-Business' Label*, THE LEGAL INTELLIGENCER, Apr. 8, 2008, <http://www.law.com/jsp/PubArticle.jsp?id=900005508066> (analyzing the four antitrust cases decided by the U.S. Supreme Court during its 2006–07 term).

161. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1982 (2007) (Stevens, J., dissenting).

162. *Id.* at 1966 (majority opinion). Justice Stevens wrote a vigorous dissent and stated that the Court should have instructed the antitrust defense bar "among whom 'lament' as to inadequate judicial supervision of discovery is most 'common' . . . that their remedy was to seek to amend the Federal rules—not our interpretation of them." *Id.* at 1988 (Stevens, J., dissenting).

PSLRA), but it did add some content to the standard pleading requirements.¹⁶³ Namely, the Court required that complaints state enough facts “to state a claim to relief that is plausible on its face.”¹⁶⁴ The Court also empathized with antitrust defendants, pointing out that “it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive.”¹⁶⁵ It will take lower courts many years to sort out exactly what this “plausible” requirement means, but in any event, it represents further erosion of the private attorney general model. Thus far, the lower courts have issued varying interpretations of *Twombly*.¹⁶⁶

8. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*

The Supreme Court’s securities decision that same term in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*¹⁶⁷ provided a very direct articulation of the Court’s present thinking about the private attorney general.¹⁶⁸ Justice Ginsburg started her majority opinion by praising the private attorney general: “This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC).”¹⁶⁹ Her next sentence, however, added a bit of caution by stating that “[p]rivate securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.”¹⁷⁰ These two statements illustrate the Court’s approach to the private attorney general: supportive, but with a more elaborate structure to minimize costs and abuses.¹⁷¹ This approach is consistent with what the Court interpreted to be the PSLRA’s twin goals, that is “to curb frivolous, lawyer-driven litigation, while preserving investors’ ability to recover on meritorious claims.”¹⁷²

163. *Id.* at 1974 (majority opinion) (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

164. *Id.*

165. *Id.* at 1966–67.

166. *Compare Phillips v. County of Allegheny*, 515 F.3d 224, 234–35 (3d Cir. 2008) (upholding dismissal of wrongful death claim because plaintiff failed to plead commission of affirmative acts exposing decedent to danger as required under state-created danger doctrine), with *In re Elevator Antitrust Litig.*, 502 F.3d 47, 48–49 (2d Cir. 2007) (upholding dismissal of price fixing claim against elevator companies on grounds that purchasers failed to meet pleading requirements), and *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1045 (9th Cir. 2008) (upholding dismissal of Sherman Act allegation of setting credit card transaction fees because plaintiffs failed to specifically state Sherman Act restraint of trade claim against banks).

167. 127 S. Ct. 2499 (2007).

168. *Id.*

169. *Id.* at 2504.

170. *Id.*

171. *See id.*

172. *Id.* at 2509.

In *Tellabs*, the Supreme Court interpreted the PSLRA's scienter standard to require that a plaintiff alleging fraud in a section 10(b) action "must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference."¹⁷³ This is a more difficult standard to reach than the Seventh Circuit standard that was on review.¹⁷⁴ As in *Leegin*, this substantive interpretation will likely limit private attorney general actions.

9. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*

Finally, in *Stoneridge*, the Court continued its pattern of limiting private attorney general enforcement in favor of government enforcement.¹⁷⁵ As discussed above,¹⁷⁶ the Court declined to allow private attorneys general to sue secondary actors under Rule 10(b) when the alleged bad acts are in the "realm of ordinary business operations."¹⁷⁷ The plaintiff attempted to expand the fraud-on-the-market theory¹⁷⁸ to ordinary business practices by arguing that "in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect."¹⁷⁹ The Court, however, decided that the fraud-on-the-market theory had gone far enough and stated that "[w]ere this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule."¹⁸⁰

The Court was concerned that overactive private attorneys general would begin to hurt our economy. For example, the Court speculated that "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here."¹⁸¹ And this could "raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets."¹⁸² As in other recent cases, the Court once again decided to rely on government en-

173. *Id.* at 2513.

174. *Id.* at 2506.

175. See Pritchard, *supra* note 40, at 1–2. A.C. Pritchard argues that the Court chose to base its decision on the "reliance" element because that element does not apply to government enforcement actions. *Id.* at 18. Thus, the Court was able to cabin private litigation, while at the same time, not affecting government enforcement of the same conduct. *Id.* According to Pritchard, "[p]utting the limit on secondary party liability in the reliance element allowed the Court to have its cake—unfettered government enforcement—and eat it too—constrain the scope of private actions." *Id.*

176. See *supra* Part II.C.

177. *Stoneridge Inv. Partners, LLC, v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770 (2008).

178. See *Basic Inc. v. Levinson*, 485 U.S. 224, 250 (1988).

179. *Stoneridge*, 128 S. Ct. at 770; see also *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 223–24 (3d Cir. 2008) (rejecting similar efficient market theory for justifiable reliance requirement for Pennsylvania Consumer Protection Law).

180. *Stoneridge*, 128 S. Ct. at 770. In *Pugh v. Tribune Co.*, the Seventh Circuit interpreted *Stoneridge* to hold that "an indirect chain to the contents of false public statements is too remote to establish primary liability." 521 F.3d 686, 697 (7th Cir. 2008). Thus, the Court directly applied *Stoneridge* to uphold dismissal of a securities complaint. *Id.*

181. *Stoneridge*, 128 S. Ct. at 772.

182. *Id.*

forcement to stem any bad conduct.¹⁸³ Thus, at the end of its opinion, the Court reassures us that these secondary actors are subject to criminal penalties and SEC civil enforcement.¹⁸⁴ Finally, the Court noted, “some state securities laws permit state authorities to seek fines and restitution from aiders and abettors.”¹⁸⁵

Justice John Paul Stevens wrote the three-justice dissent and, interestingly, noted that “[t]he Court seems to assume that respondents’ alleged conduct could subject them to liability in an enforcement proceeding initiated by the Government . . . but nevertheless concludes that they are not subject to liability in a private action brought by injured investors”¹⁸⁶ That is exactly what the Court did: the Court chose government enforcement over private attorney general enforcement.

III. CONCLUSION

Stoneridge represents the continuation of the Court’s recent reformulation of the private attorney general model.¹⁸⁷ While the Court is still supporting the class action as a way to enforce the federal securities and antitrust laws, it is showing more restraint and caution in allowing these suits to proliferate.¹⁸⁸ The Court is instead placing more reliance on government enforcers.¹⁸⁹ Not surprisingly, some private plaintiffs’ class action counsel—as legal bounty hunters—have attorneys’ fees as their primary motivation.¹⁹⁰ While this mechanism is effective in encouraging private parties to enforce federal law, it has also lead to abuse, high costs, and lower economic efficiency.¹⁹¹ Moreover, as commentators have pointed out, these lawsuits often are just piggy-back lawsuits on government enforcement efforts, so they may not necessarily broaden the scope of law enforcement.¹⁹² They may instead just intensify the penalty.¹⁹³ It appears that the current Supreme Court is well aware of the costs and benefits of the private attorney general model and will continue to refine the private attorney general model by narrowing its scope and providing courts with tools to filter out unmeritorious cases early in the litigation.¹⁹⁴

Eventually, however, as is often the case, the pendulum may swing back in the other direction. This could result from one or more of many possible catalysts: a change in the composition of the Supreme Court, an Act of Congress (maybe from heavy lobbying by the trial bar), highly publicized business scandals, or even public

183. *Id.* at 773–74.

184. *Id.* at 773.

185. *Id.*

186. *Id.* at 774 (Stevens, J., dissenting).

187. *See supra* Part II.D.9.

188. *See supra* Part II.D.

189. *See supra* Part II.A.

190. *Id.*

191. *Id.*

192. Coffee, *supra* note 13, at 223–24.

193. *See id.* at 224.

194. *See supra* Part II.D.

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criticism of government enforcers for enforcement that is too harsh, too lenient, or too corrupt, or a new administration in the White House that has a differing view of the role of, in particular, the scope and purpose of the antitrust and securities laws.¹⁹⁵

195. See Carl W. Hittinger & Nicholas T. Solosky, *The Candidates and Antitrust Enforcement: Changes Are Coming*, THE LEGAL INTELLIGENCER, Oct. 6, 2008, available at http://www.dlapiper.com/files/upload/The_Legal_Intelligencer_Oct6_08.pdf.