

Q&A Interview: Members of the *Securities Litigation Report* Editorial Board Discuss Waiting for *Stoneridge*, the Impact of *Tellabs* & the Coming Wave of Subprime Class Actions

With 2007 coming to an end, and the New Year promising some surprises—as new years always do—we at Securities Litigation Report thought it might be interesting to speak to some legal experts and see what they thought about the past year and are thinking about the year ahead. And we could think of no better place to find said experts than among the members of SLR’s own Editorial Advisory Board.

News of the Past Year...

Securities Litigation Report: —While some surveys show a drop in the number of securities class action lawsuits being filed, at least through midyear, more recent data suggest that the rate of new case filings is on the upswing again. What do you think are the major driving forces behind the decline, and now the perceived “uptick”? What do you expect in the coming year?

Jonathan C. Dickey (Gibson Dunn & Crutcher): Recent reports on the demise of securities class action litigation as we know it have been greatly exaggerated, to borrow an old phrase. In the last few months, we have seen a significant increase in new class action case filings, fueled in part by the recent subprime turmoil in the financial services sector. As well, and as has been reported by several of the organizations who survey in this area, the lower rate of class ac-

tion filings in 2006 and the first half of 2007 masked the fact that there has been a large number of *derivative suits* filed in the last year, and no one should lightly ignore those statistics in evaluating the overall threat to public companies from the plaintiffs’ bar.

My personal belief is that the rate of new filings had a great deal to do with the fact that the securities markets have been relatively strong in the last two years, until very recently. I discount the suggestion by some that the Sarbanes-Oxley Act is directly responsible for the decreased rate of filings, although it certainly has had an

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overall positive impact on how public companies approach risk management in the current era. All things considered, I expect to see a significant increase in case filings for 2007 as a whole, compared to 2006, and that trend is likely to continue in 2008.

Sherrie R. Savett (Berger & Montague): The recent uptick is most likely caused by the subprime and credit crisis. Many institutions failed to disclose the risks embedded in their portfolios, and I think this will generate many more cases going into the next year.

Andrew B. Weissman (Wilmer Cutler Pickering Hale & Dorr): Trying to explain the reasons for the measured decline in securities class action complaints, or their recent apparent resurgence, is like trying to explain why the stock market moves from day to day. The explanations you hear are developed only in hindsight and usually can't be tested.

The driving force behind securities class action lawsuits is the likelihood of asserting claims that will yield positive results, for example, result in a judgment or settlement that provides a net benefit to those asserting the claims. There are a number of factors that affect that likelihood. To yield positive results, the circumstances must support the elements of a claim sufficiently to provide a reasonable chance that the complaint will survive. That means there must be disclosures that can effectively be portrayed as materially misleading, a potential basis for asserting these disclosures were intentionally or recklessly wrong, and a basis for claiming investors suffered losses as a result. Some of those factors are founded in the facts and circumstances that form the basis of possible claims, others depend on the state of the law or how the law is applied. Developments that change the prevalence of any of these elements will likely alter the flow of class action complaints.

Recent developments in both the law and the facts could have impacted the decision whether to commence an action. The decline in actions could be explained by a combination of factors: reduced receptivity to securities class action claims in many courts, fostered by the heightened PSLRA pleading standards; more stringent standards being applied in a number of courts to the class certifica-

tion process; the *Dura* effect: an increased focus on the need for an ascertainable nexus between stock price declines and the allegedly misleading conduct; and the plain fact that in a generally bull market, there are fewer times when there is a significant loss attached to company disclosures. The more recent trend towards a highly volatile market pushes in the opposite direction: all other things being equal, significant losses are more likely to flow from what are perceived as negative events. My belief is that this last factor is among the most powerful determinants of the flow of securities class actions. Continued volatility in the markets, or a general market decline, will probably be accompanied by a higher rate of claims; a relatively steady rise in the market will likely stem the flow of claims.

Warren R. Stern (Wachtell, Lipton, Rosen & Katz): The decline in 2006 probably reflected a rising stock market with relatively little volatility, and stronger audit and internal controls post-Enron. The "uptick" is driven by the strong market correction fueled by increased borrowing costs, credit-related write-offs, related regulatory investigations, and the housing market crash. If macroeconomic forces stabilize in 2008, I expect that securities class action filings will revert to 2006 levels.

Paul H. Dawes (Latham & Watkins): The decline was due to SOX and better corporate governance, a rising stock market, and recent case decisions that are more defendant oriented. There is too much uncertainty in newest numbers for me to tell what is driving the uptick, but I do think that there will be more cases as the market softens.

SLR: *In a general way, do you think that the threat of private securities class actions meaningfully contributes to deterring corporate fraud?*

Dawes: As far as whether the threat of securities class actions deters corporate fraud—I would say only at the margin. Fraudsters (the real ones) have a way of rationalizing their risky behavior.

Dickey: You could write a book about whether private securities class actions serve an overall deterrent effect. My short answer is "no," for several reasons: a) the numbers of companies that get sued for securities fraud historically have been an

extremely small fraction of the total population of public companies, even before the “fraud on the market” theory was adopted, and launched a whole new generation of class actions; in general, the vast, vast majority of public companies are run by talented, law-abiding citizens, and do not need the private plaintiffs’ bar to keep them honest; b) given the role of D&O insurance in the settlements of these cases, the true cost of these lawsuits in the average case are not borne by the companies themselves, so the deterrent value of such settlements is doubtful; and c) a number of academic studies show that the damage theories advanced by plaintiffs’ counsel in securities class actions bear little or no relationship to deterrence, or to the real world impacts of the alleged corporate wrongdoing in these cases on well diversified institutional investors, who comprise the vast majority of the shareholding interests in these private cases.

Michael R. Young (Willkie Farr & Gallagher): In my view, the significance of private securities class actions as a vehicle to deter corporate fraud is greatly overrated. Based on the investigations I have undertaken, most executives slip into fraudulent financial reporting almost unwittingly without realizing that they have actually stepped over the line. The risk of litigation does not even occur to them. If it did, they would probably place it fairly low down on their list of concerns given the other risks they are running.

Stern: Private securities class actions may incrementally contribute to deterring corporate fraud but are almost certainly less of a deterrent than public enforcement. Corporate officers do not like to be sued even if indemnified or insured against personal loss. The suits damage reputations and disrupt business and professional lives. There are numerous abuses of the class action device, but the one that can and should be curtailed by the courts is discovery costs: lodestar-minded plaintiffs’ lawyers have every incentive to multiply document requests and depositions, and the costs of defense can become staggering.

Weissman: Whether securities class actions deter corporate fraud is largely dependent on two factors. First, to what extent are private actions leading indicators of bad conduct, as opposed to

consequences of other events that independently reveal potential bad conduct, like harmful publicity or the commencement of law enforcement inquiries? Second, to what extent do private class actions actually impact the persons responsible for corporate decision-making? Since I believe it is rare that class actions actually identify corporate misconduct in the first instance, and I also believe that the resolution of class actions rarely has a material effect on corporate decision-makers—management and directors—I do not believe private securities class actions play a significant role in deterring corporate fraud.

Savett: I do think the threat of securities class actions will continue to and has deferred fraud. Fraud still occurs because executives believe they can get away with it or that conditions will improve and bail them out.

SLR: *Conversely, do you perceive any particular abuse in the present system that you think should (or will) be curtailed?*

Dickey: In my view, real reform is needed. At a minimum, reforms are needed to better align damage theory in private class actions with actual investor loss. A number of proposals recently have been advanced, and important questions have been posed, on this subject. I was particularly impressed by the thoughtful comments and questions from a group of distinguished law professors, sent to the SEC in August 2007, and I look forward to the SEC’s planned “roundtable” on this subject in 2008.

Dawes: The courts and the SEC could do better and faster. Why did it take 30 years to get a decision on scienter and why is it mush? Loss causation is not much better. Class scopes should be managed earlier and with greater discipline.

SLR: *There has been significant debate among industry participants about possible reforms of the Sarbanes-Oxley Act. Do you think SOX is in need of reform, and if so, in what ways?*

John F. Savarese (Wachtell, Lipton, Rosen & Katz): Many of the Sarbanes-Oxley innovations have worked well and have heightened the attention of boards of directors and senior management on enhancing internal controls and expanding ethics and compliance programs. Some SOX changes, however, have proved to be enormously

burdensome, including the assessment of internal controls over financial reporting mandated by SOX Section 404. Corporations would benefit from greater clarity and more sensible, balanced guidance about what is required to conduct such assessments and how to evaluate whether control deficiencies really are material.

Dawes: The small business cost burden has been substantially addressed which is realistic and helpful.

Weissman: Any person who has seen the high costs imposed on public companies by Sarbanes Oxley would have to conclude SOX is in need of reform. Companies are now governed by procedure manuals hundreds of pages long, making every public company look more and more like regulated securities dealers. The costs imposed by that regime are far greater than the out-of-pocket dollar costs for designing and implementing the programs—themselves typically millions of dollars. I leave it to the SOX experts to figure out how to rationalize this process, but something clearly must be done.

Dickey: The headlines in the last two years principally have focused on the debate over SOX Section 407 and internal controls, particularly for small issuers. I think that issue is dying down, and hopefully will not be a persistent issue going forward. Also, despite the many concerns expressed that Sarbanes-Oxley was going to lead to new and dangerous exposures for directors and officers of public companies, I don't believe the statistics would demonstrate a significant increase in cases of personal liability of directors and officers traceable to violations of SOX *per se*. SOX was enacted in the wake of some real scandals, and, rightly or wrongly, it served a necessary political and psychological purpose at the time it was enacted. A "crisis of confidence" was the driving force behind the legislation, and I doubt that thoughtful members of congress would have crafted the law in quite so draconian a form, but for that crisis situation.

SLR: *Earlier in the year, the McNulty Memo was issued as an effort by the Department of Justice to redefine how the Department of Justice would approach prosecutions of companies, particularly in relation to privilege waivers. Many*

have questioned whether the McNulty Memo went far enough, and there have been several bills introduced in Congress to address the perceived shortcomings. What has been the practical impact of this over the past year, and what is the prognosis?

Dawes: This is a philosophical answer. Government should be forced to prove cases by means other than waivers of privilege except for extreme situations. The social cost of "cooperation" is a society that is less free. Practically, waivers are cheaper ways to explain and get rid of enormous gridlock and cost.

Weissman: The McNulty Memo addressed the highly sensitive privilege issue, and helped to stem the trend of prosecutors and SEC enforcement lawyers to pressure for waivers of privilege. But it is still common to waive the privilege as a means of currying favor with law enforcement officials. The McNulty Memo does not, however, address a broader range of questionable prosecutorial conduct, all designed to leverage some possible defendants to make it more difficult for other targets to defend themselves. For example, it remains a common practice in securities law enforcement investigations to seek to deprive targets of sources of exculpatory evidence by maintaining the threat that persons cooperating with targets could still themselves be charged, even after indictment decisions have been made. Further reforms are needed.

Savarese: The McNulty memo seems, at least in my experience, to have made prosecutors much more circumspect about privilege waivers. Before the congressional hearings, judicial decisions and other developments in 2006 of which the McNulty Memo was a part, it was generally assumed by prosecutors that corporations would automatically waive privilege. That seems to be changing. But the key question now is whether that change will prove to be only temporary. The Attorney-Client Privilege Protection Act passed recently by the House but still pending in the Senate is really the only way that these changes in the "culture of waiver" can be made permanent.

Dickey: My sense is that it has been "business as usual" despite the McNulty Memo—prosecutors leaning on public companies to cooperate in

their investigations, on pain of severe corporate penalties. The “culture of waiver” has been hard to eradicate, and only time will tell. Any legislative reform obviously must await the outcome of next year’s election cycle, and I am skeptical that much reform is possible between now and next November.

SLR: *The swirling storm caused by companies’ alleged “backdating” of executive stock options has begun to dissipate, and the SEC is starting to wind down investigations of many public companies. The first settlements of the civil cases, including derivative suits, are now being announced. What is the likely trend in SEC and private litigation in this area for the next year?*

Stern: The “backdating” scandals reflect compensation practices no longer tolerated. Companies with significant option compensation have investigated, reported, and corrected abuses. Class actions have not resulted in large recoveries because disclosure does not usually trigger a large stock drop, but corporations, acting through independent directors, may be able to recover significant givebacks from executives involved in backdating or similar improper practices.

Dawes: The stock options drama has played itself out now that the government has explained its priorities. I do not see a great deal of litigation except to flush out very egregious practices such as intentional record alterations or lying in public disclosures.

Dickey: I predict that we will see a few more “headline” cases being brought by the SEC and DOJ, especially in light of the recent criminal convictions of top officers at Brocade Communications Systems, Inc. However, the SEC appears to be “closing the file” on most of the open investigations, so the biggest issue facing companies going forward will be how to settle the many class and derivative suits that have survived pleading challenges. One major obstacle is the over-the-top demands of plaintiffs’ lawyers, both in terms of “disgorgement” being demanded, and also the “corporate therapeutics” they expect companies to agree to as the price of peace. On the money front, the recent settlements in United Health Group, Inc. and Mercury Interactive Corp., which involved relatively large settlement amounts, may

embolden plaintiffs’ counsel to demand larger and larger sums, and many companies and directors and officers are likely to balk at that. Compromise is going to be needed from all the involved constituencies in order to bring the backdating cases to closure.

SLR: *Besides options backdating, what are the likely drivers for private litigations in the next year?*

Young: In addition to options backdating, the major areas of litigation are likely to be insider trading, subprime mortgages, municipal finance, and violations of the Foreign Corrupt Practices Act.

Savett: I think a major area of litigation will relate to the credit and subprime practices already mentioned. I think it will cover mortgage lenders and large financial institutions that packaged mortgages and other credit into securities like CMOs and CDOs.

Measuring the Impact...

SLR: *Has the Tellabs decision’s impact been meaningful?*

Savett: Yes, it affects a conservative judge and allows him to draw inferences, weight them and throw out more cases on pleadings.

Stern: The *Tellabs* opinion had something for everyone: on the one hand, it spelled an end to the notion that the court may consider only inferences favorable to the plaintiff; on the other hand, it may be read to say that, if all inferences are equal, the complaint should be sustained. Much will depend on the Seventh Circuit remand. The plaintiffs’ bar will be much encouraged if the Seventh Circuit sustains the complaint under the Supreme Court’s standard.

Dickey: The long-term impact of *Tellabs* is difficult to measure at this time, but based on early results the case has not been a “home run” for defendants. Indeed, in some courtrooms, trial court decisions seem to have interpreted *Tellabs* to have actually *liberalized* pleading standards in PSLRA cases, especially in the 9th Circuit. As several plaintiffs’ lawyers have colorfully put it, under their reading of *Tellabs*, “tie goes to the plaintiffs.” I rather doubt this is what Congress

intended when it imposed the new “strong inference” pleading standard back in 1995.

Young: It is proving to be one element which, among others, is turning the tide against class action plaintiffs.

Weissman: It is too early to measure the impact *Tellabs* might have. We can’t be sure, for example, how influential the recent *Higginbotham* decision in the Seventh Circuit might be on the issue of so-called “confidential informants.” We also can’t be sure yet whether the *Tellabs* requirement of a “co-gent” and “compelling” inference of scienter will tip the balances toward defendants more than the statute’s “strong” inference language, or whether the Court’s refusal to adopt a “more plausible” or “high likelihood” inference will counterbalance that language. Apart from the decision in *Higginbotham*, I don’t think the appellate decisions to date read materially differently because of *Tellabs* than they would have based on earlier precedent.

Dawes: No—it hasn’t been meaningful and that was very disappointing. *Tellabs* tried to bring something for everyone and resulted in another severe split on the bench.

SLR: *What has been the impact of “opt out” litigation brought by institutional investors in major cases, such as Qwest and AOL Time-Warner? Do you see that trend continuing or increasing?*

Dickey: “Opt out” litigation has become a pernicious aspect of private securities litigation in the U.S., and I see no signs that this situation is going to abate any time soon. In *Qwest*, the number of “opt-outs” following the announcement of the class settlement seemed to dwarf the class action case itself, even though to many of us, a class settlement of \$450 million still sounds like a pretty good day for investors. Part of the unintended consequences of the PSLRA is that it creates a “winner-takes-all” lead plaintiff situation, and that eliminated some of the old ways that plaintiffs’ counsel cooperated in the context of a single class action case. Now, plaintiffs’ firms that are foreclosed from serving as lead counsel in a PSLRA case seek out institutional investors (particularly pension funds) to bring opt-out cases in state court. This creates havoc for defendants trying to settle claims, as multiple plaintiff firms insist that their individual opt-out case is entitled

to a greater recovery on a per-share basis than the recovery class members receive. It’s a totally regressive system that needs reform.

Dawes: This is a real phenomenon. These cases will be pursued, tried and settled separately. I think the recoveries have been greater than the companioning class cases.

Stern: Opt-out litigation can significantly affect the defense and settlement of major actions. I would predict that in any large case involving strong evidence of fraud, an institution with major losses would find it more attractive to litigate separately and will be able to find competent counsel prepared to take the risk.

Savett: Opt-out cases only work in big massive fraud cases. There will be fewer of them, but there will still be one or two a year.

SLR: *You saw several court decisions this year that impacted class certification in securities fraud actions (IPO Litigation, Oscar, etc.) Is this a sign of a trend, and how does it relate to trends in the decisional law relating to loss causation?*

Dickey: The issues embedded in the *IPO* and *Oscar* decisions are ones that may ultimately require review by the U.S. Supreme Court. In particular, the issue of how far trial courts must go in considering “merits” issues in connection with class certification is hotly contested, and the Ninth Circuit in the *Wal-Mart* litigation (an employment class action) has created a split among the circuits on this point. If the Supreme Court were to take up the issue and side with the Second and Fifth Circuits, then I can envision many more cases like *IPO* and *Oscar* in which securities class action cases are effectively terminated at the class certification stage. And I absolutely see loss causation issues as being front-and-center if “merits” issues are appropriately considered in the class certification context.

Dawes: This is where the action is—and we need greater jurisprudence here. The 5th Circuit is the place that has really joined the debate, but much more work in many courts is needed.

Stern: Class certification has become a battleground for issues that, until recently, were left for adjudication at the “merits” stage. Any issue that can plausibly be linked to a finding necessary under Rule 23 can now be tested at class certi-

fication. The issue of “reliance” is the most obvious example—a finding of class-wide reliance depends on a presumption flowing from a theory of market efficiency (and, perhaps, loss causation) that may be vulnerable to expert challenge in particular cases. We should also expect to see more defendants relying on econometric data to support motions to dismiss or for summary judgment on grounds of loss causation.

Savett: With a large cap company and a fraud which survives the motion to dismiss, most of the strong classes will still be certified.

Weissman: Developments this past year in the treatment of class certification motions are likely to have a significant impact in the future. For years, the class certification process did not get significant attention at the district court level, with district courts reluctant to address what they feared were “merits” issues on certification. But the tide is clearly turning on that front, and the standard argument that an issue that could divide the class should not be considered on certification because it involves “the merits” is less likely to succeed. The *Oscar* decision shows how far some appellate courts are now willing to go to address merits issues in the context of deciding a class certification motion. I expect the trend of heavily disputed class certification motions to continue and grow. As a result, it behooves defense lawyers to bring economic experts into the litigation process at this early stage to assist in developing class certification issues.

SLR: *This past summer, everyone was talking about the pending Stoneridge case and how the Supreme Court could decide it. What do you think will be the outcome of Stoneridge and has it already affected the way you handle your cases?*

Dawes: I think the result will be a reversal.

Savett: A finding for the defense will severely limit suing third-party non-speakers, and I think that will make plaintiffs more hesitant to name them.

Weissman: I expect the Supreme Court to decline to expand coverage of section 10(b) private actions to alleged third-party “participants.” For many years, the Court has declined to expand the scope of section 10(b) private actions, each time questioning the propriety of doing so for

a judicially-created private right of action. The Court will, among other things, recognize that it is essentially impossible to draw the line between “participants” and “aiders and abettors,” noting that allowing third-party participant claims will create great uncertainty in the law, and would create significant settlement leverage even for cases that ultimately may fail.

Stern: The Supreme Court will likely reject the “scheme” theory, leaving aiders and abettors to the SEC and criminal authorities. The theory is most relevant in cases where a major issuer has gone bankrupt and there is strong evidence of fraudulent activity involving outsiders. Relatively few of these cases have been brought in recent years, and the “scheme” issue has not been particularly important in my current practice.

Dickey: I think *Stoneridge* is likely to be of greatest import to audit firms, financial advisors, and law firms. There are two key issues that the Court will have to decide—first, can Section 10(b) liability be imposed on “non-speakers” with no duty to disclose? Second, if the answer to that is “yes,” the question then is whether *private* plaintiffs can sue under Section 10(b) if they cannot adequately plead *reliance*. I think the second issue is the real “sleeper” issue in the case. If the court sides with defendants (and the Solicitor General) on that issue, the scope of *private* litigation against secondary actors is likely to be vastly curtailed.

Looking Ahead...

SLR: *The subprime mess and the credit crunch have certainly weighed on the markets and especially on the stocks of some financial companies. Do you envision that the recent spate of 10b-5 and derivative cases relating to subprime losses will lead to meaningful recoveries?*

Dickey: Our firm is representing a number of clients in the sub-prime litigation. Most of these cases appear to have been filed “on spec,” with little or no facts other than the disclosure of large write-downs. The class action cases against financial services firms will be subject to many strong defenses on scienter, reliance, and loss causation, among other issues. We are at the early stages, of course, but right now I have difficulty seeing

that investors will “ring the bell” in these cases in terms of recoveries against the financial services firms.

Dawes: Yes, I think there will be some heavy action here—loan practices, disclosures, appraisals, advising, etc. will all be topics of litigation. Go back and look at the Savings & Loan litigation in the 1980s, this will be a model of what is to follow, though not as visibly.

Stern: It is early, but my hunch is that there may be some significant settlements in securities class actions where there is evidence suggesting that issuers delayed acknowledging problems or marking positions to markets. I doubt that derivative settlements will be substantial: most derivative cases will not survive the demand requirement and, in any event, the issues involve questions of business judgment.

SLR: *There have been two securities class actions that have gone to trial this year and, at this time, one—JDS Uniphase—resulted in a defense verdict. Do you think more cases will go to trial? Do you think the defense victory in JDS Uniphase will affect settlement negotiations generally?*

Dickey: Our firm is in trial right now in the *Apollo* litigation, so it has been an “up” year for jury trials of securities cases, to be sure. I applaud the verdict in *JDS Uniphase*, but I do not think it will dramatically alter the settlement landscape, any more than the defense verdict a few years back in another case in the Northern District of California did. Most companies do not want to incur the cost and uncertainty of a jury trial, and unless the plaintiffs’ bar becomes entirely unreasonable in their settlement demands (that is, more unreasonable than they normally are), or insurance carriers become unreasonable in their willingness to contribute to settlements, more likely than not most cases are going to settle.

Savett: No, I don’t think *JDS Uniphase* will impact settlements. Good cases will still get settled almost all the time.

Stern: *JDS Uniphase* may prove very significant in how all players, especially insurers, measure risk in securities litigation. My personal view is that the defense victory will depress settlement values in other cases, and may lead to defendants and carriers refusing to settle until late stages in

the proceedings. It may also embolden defense counsel to take, or threaten to take, more cases to trial.

SLR: *Looking ahead to 2008, what do you think will be the biggest newsmaker or trend in the securities litigation industry—Government-led regulatory or tort reform? Corporate crime and fraud? Major court decisions like *Stoneridge*? Other?*

Savett: *Stoneridge* will be big and will set a limitation on third-party actors’ liability, like investment banks, except when there is a Section 11 claim.

Dickey: I think the biggest event in 2008 that will affect the fortunes of defendants in private securities litigation for years to come will be the 2008 elections. At the end of the day, the outcomes of most cases come down to how specific trial judges interpret the law, and how they exercise discretion. If the Democrats “sweep” the 2008 elections, that may re-shape the judiciary over the next four years. As well, a Democratic Congress could potentially pass new legislation—for example, clarifying the scope of primary liability under Section 10(b)—and dramatically alter the securities litigation landscape.

Stern: I believe that the SEC may well address the problem of “circularity” of securities fraud damages, and the courts may scrutinize class settlements more carefully, particularly if the corporation is bearing the entire cost of a settlement attributable to fraudulent conduct of particular individuals.

Dawes: The Paulson debate will trigger some reform due to an over reliance on private actions.

The “Devil’s Advocate” Question

SLR: —*Suppose *Stoneridge* is decided in favor of the defense and third-party liability becomes a dead issue. If you take that, plus *Tellabs*, plus the class certification and loss causation decisions of the past year, a case can be made that the securities litigation pendulum has swung in favor of defendants in 2007. Is that a fair conclusion?*

Stern: Yes. On balance, the case law in 2007 has provided defendants with additional weapons to defeat meritless class actions at the threshold.

Taken together with the jury verdict in *JDS Uniphase*, the defense bar has moved the ball considerably downfield.

Savett: Yes, that's a fair conclusion—but strong securities cases will survive each attack and still produce big settlements.

Dawes: The pendulum has swung—clearly that is the mindset of advocates on both sides. But frauds will be frauds and there will be a need for compensation. The real challenge is to engineer the junk out of the system more efficiently; on that front, jurisprudence on fee awards could help.

Dickey: When the PSLRA was enacted, many people said that it would be the death knell of securities litigation as we know it. Well, that didn't happen. I give credit to the plaintiffs' bar for being very resilient. In all likelihood, *Tellabs* will not be the panacea that many members of the defense bar have suggested. And if the Supreme Court affirms in *Stoneridge*, the result may simply be that the current status quo will be maintained—that is, hundreds of cases a year still will be filed against

public companies and their directors and officers, who will receive no direct benefit from the Supreme Court's decision, since they do not fall into the secondary actor category to begin with. The "steady state" of cases will continue to pose risks to issuers, and the outcomes of these cases will continue to be judge driven. Given that, it's hard for me to predict that the pendulum really will swing all that noticeably.

Weissman: Even assuming all of the pro-defense recent developments grow and prosper, I think they will affect the "securities class action business" only marginally. There may need to be a somewhat larger potential payoff to support commencing an action (for example, a larger apparent stock price impact), but negative company disclosures accompanied by significant stock price declines will continue to spawn actions. As long as the "fraud on the market" theory of constructive reliance is permitted to survive, even in the face of growing economic evidence that it is not justified, the securities class action business will remain healthy.