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Merrill Lynch v. Dabit: Federal Preemption of Holders' Class Actions

By Mark J. Loewenstein*

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,*[1] the U.S. Supreme Court decided a seemingly narrow question of statutory interpretation, yet made a significant statement about federal-state jurisdiction in securities litigation. At issue was whether the Securities Litigation Uniform Standards Act of 1998[2] (SLUSA) prohibits the maintenance of a class action under state law alleging that the defendant fraudulently induced the plaintiff class to hold – as opposed to purchase or sell – certain securities. The Court held that it did, thus ending the litigation. While the Court had sound reasons for reaching this conclusion, there were also strong arguments leaning in the other direction. In the end, the Court chose an outcome that furthered a trend in its securities law jurisprudence limiting the role of state law. This article analyzes the *Dabit* decision, both on its on terms and in the context of the Court's recent decisions in the securities law area.

I. The Litigation

Dabit arose out of the scandal surrounding analysts' reports issued by the country's leading investment banks. This case, and others, alleged that those reports fraudulently induced investors to hold the subject securities; if the truth had been told, the investors allegedly would have sold. The complaints also alleged that investment banks encouraged such fraudulent reports to enhance their ability to attract investment banking business from the reported-on companies.[3] On these facts, the investors could not maintain actions under Rule 10b-5, because they did not *purchase or sell* securities on the basis of fraudulent statements, as required by the 1975 Supreme Court decision in *Blue Chip Stamps v. Manor Drug Stores*.[4] So, foreclosed from a federal cause of action, the investors in *Dabit* filed state law claims alleging breach of fiduciary duty and breach of the covenant of good faith and fair dealing.[5]

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A class action alleging state law claims in the securities law area, however, implicates SLUSA. Passed by Congress in 1998, this Act was designed to close a loophole that had developed under the Private Securities Litigation Reform Act of 1995[6] (the Reform Act). The Reform Act was intended to limit securities class actions by imposing various substantive and procedural requirements on such actions.[7] As a result of the Reform Act, securities class action litigation began to migrate to state courts, or allege state claims in federal diversity actions.[8] By filing state law actions, plaintiffs were able to avoid the onerous requirements of the Reform Act. In response, Congress passed SLUSA, providing that no "covered class actions" may be maintained under state law.[9] In short, and subject to certain exceptions, covered class actions are those that allege fraud in connection with the purchase or sale of a publicly traded security.[10]

In *Dabit*, the defendants sought to dismiss the complaint on the basis that it was preempted by SLUSA and therefore could not be maintained under state law, even as a diversity action in federal court.[11] The district court agreed,[12] but the Court of Appeals for the Second Circuit reversed,[13] holding that because the complaint did not allege that plaintiffs were fraudulently induced to purchase or sell securities, the cause of action was not preempted by SLUSA. Put differently, in the view of the appellate court, a "holders" class action may be maintained notwithstanding the broad preemptive reach of SLUSA.

Thus, the narrow issue before the Supreme Court was how to read the provision in SLUSA that preempted class actions alleging fraud "in connection with the purchase or sale of a covered security."[14] Literally, plaintiffs were not claiming that they were defrauded in buying or selling any security, but rather that they were defrauded by being induced *not to sell*.[15] Moreover, because *Blue Chip Stamps* held that Rule 10b-5 does not provide a remedy to those who are dissuaded from purchasing or selling a security, plaintiffs argued that if they could not maintain a class action under state law, they could not maintain a class action at all.[16]

Although these arguments persuaded the appellate court, the Supreme Court was unmoved.[17] Instead, the Court opted for a broad, non-literal reading of the "purchase and sale" requirement of SLUSA, thereby expanding the reach of that legislation.[18] In so doing, the Court clarified the meaning of *Blue Chip Stamps*, describing it as a case that merely limited standing to maintain a private cause of action under Rule 10b-5.[19] Of equal importance, the Court said that *Blue Chip Stamps* was based on policy considerations, not an interpretation of statutory language.[20] By so cabining *Blue Chip Stamps*, the Court answered the argument that the phrase "purchase or sale" must mean the same thing in Rule 10b-5 as it does in SLUSA. The Court essentially said that the phrase does mean the same thing in both provisions; because *Blue Chip Stamps* only deals with standing for private damage actions and not statutory interpretation, that precedent is not to the contrary.

One problem faced by the *Dabit* Court was whether the phrase "purchase and sale," as employed in SLUSA, has such a plain meaning that the Court could reach a different result through interpretation. Interestingly, the Court did not even consider the potential "plain meaning" of the term, despite ample precedents that suggest that plain meaning is the first inquiry in statutory interpretation.[21] Of even greater interest is the fact that Justices Scalia and Thomas, who have frequently chided the Court for ignoring the plain meaning of statutes or the Constitution, did not write separately in this case to address this lurking plain meaning problem.[22]

Eschewing, at least implicitly, the plain meaning rule, the Court instead relied on its decisions that gave a broad meaning to Rule 10b-5.[23] The Court cited *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*,[24] *SEC v. Zandford*,[25] and *United States v. O'Hagan*[26] as cases that demonstrate that "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else."[27] Only the first of these, however, was a private damage action. In the latter two cases, which are discussed in section III below, the Court was not faced with the interpretation question faced here. The Court decided that where there is a sufficient link between a securities transaction – a purchase or sale – and the fraud, an action may be maintained under Rule 10b-5. *Superintendent of Insurance*, a truly inscrutable decision, stands for the same proposition. But all of this begs the question, which is whether the fraud alleged in *Dabit* would constitute a violation of Rule 10b-5. In other words, if those who were defrauded consisted solely of holders, would the SEC have jurisdiction to maintain an enforcement action under Rule 10b-5 (or the Department of Justice a criminal prosecution under the Rule)? No precedent has so held, although *Dabit* now stands for just that proposition.

The Court thus concludes that because its precedents construed Rule 10b-5 broadly, and *Blue Chip Stamps* only decided who has standing to maintain a private damage action, Congress must have intended that the phrase "purchase and sell" have the same meaning in SLUSA as in the

Supreme Court's Rule 10b-5 cases (other than *Blue Chip Stamps*).[28] While there is some force to this approach, it has two problems. First, none of these cases turned on the meaning of "purchase and sale," and second, *Blue Chip Stamps* was not as policy-based as the Court suggested. The latter point is addressed in the next section.

II. *Blue Chip Stamps* Revisited

Justice Stevens, writing for a unanimous court in *Dabit*,[29] characterized *Blue Chip Stamps* as a case "[r]elying principally on 'policy considerations.'"[30] One might take issue with this characterization. While Justice Rehnquist, who wrote the majority opinion for a divided court,[31] did discuss why denying standing to the plaintiff class in *Blue Chip Stamps* was sound policy, the opinion may not rest "primarily" on policy considerations.[32] For starters, Rehnquist's opinion cites an earlier, widely adopted opinion by the Second Circuit, *Birnbaum v. Newport Steel Corp.*,[33] which did not consider policy at all in concluding that Rule 10b-5 provided a remedy only to purchasers and sellers of securities. Indeed the *Birnbaum* court correctly saw Rule 10b-5 as filling a gap in the anti-fraud coverage of the federal securities laws, because section 17(a) of the Securities Act of 1933 prohibited fraud in connection with the sale of securities, but no provision expressly prohibited fraud in connection with the purchase of securities. To cover this gap, the Securities and Exchange Commission adopted Rule 10b-5 pursuant to its rulemaking authority under section 10(b) of the 1934 Act.

Second, Justice Rehnquist relied on Congressional determinations in 1957 and 1959 to decline the invitation of the SEC to broaden section 10(b) to cover "any attempt to purchase or sell … any security."[34] Such reliance is similar to relying on legislative history, but quite dissimilar from a policy-based analysis. Finally, the Justice carefully analyzed the "Congressional scheme"[35] of the federal securities laws to support the holding. This scheme clearly indicated Congress's intent that "purchase and sale" be read literally: "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action."[36] Only after all of the foregoing analysis did Justice Rehnquist turn to policy considerations.

Indeed, rather than characterize policy considerations as of primary concern, one might view *Blue Chip Stamps* as a case in which policy considerations merely added weight to a holding supported on other bases. Justice

Stevens, however, faced a dilemma by viewing *Blue Chip Stamps* in this light. If *Blue Chip Stamps* rested on a narrow interpretation of section 10(b), and since Congress used the same language in SLUSA, the latter statute must have the same meaning. To avoid this dilemma, Justice Stevens had to characterize *Blue Chip Stamps* as resting on policy considerations.

Blue Chip Stamps was not, however, the only obstacle which the Court faced in *Dabit*. Giving an expansive reading to SLUSA meant narrowing the freedom of the states to provide a class action remedy. The Court recognized this: "In concluding that SLUSA pre-empts state-law holder class-action claims of the kind alleged in Dabit's complaint, we do not lose sight of the general 'presum[ption] that Congress does not cavalierly pre-empt state-law causes of action.'"[37]

While the Court responded to this argument, noting that SLUSA "does not actually pre-empt any state cause of action ... [because] [i]t simply denies plaintiffs the right to use the class action device to vindicate certain claims,"[38] there is another aspect of preemption, or at least federalism, that should have been considered. That aspect is discussed in the next section.

III. The Federalism Concern

Dabit is now the fifth case decided under the federal securities laws since 1997 that has had the effect of displacing state law.[39] In the first of these, *United States v. O'Hagan*,[40] the Court endorsed the misappropriation theory under Rule 10b-5. As a result, it is a crime under the federal securities laws for a person to purchase securities on the basis of information entrusted to him about the issuer of those securities unless the provider of the information consents to such use.[41] Such misuse, or misappropriation, of confidential information is a fraud in connection with the purchase of securities because the purchaser "defrauded" the provider of the information, and did so in connection with a securities transaction.[42] Thus, what might otherwise be characterized, and treated, as a state law breach of fiduciary duty has become, under *O'Hagan*, a federal crime. While the states could conceivably regulate such conduct, the incentive to do so, and the normal range of options that a state might consider, are mooted by the *O'Hagan* decision.

Following *O'Hagan*, the Court decided *Wharf (Holdings) Ltd. v. United International Holdings, Inc.*,[43] which, like *O'Hagan*, was a decision that federalized an area of common law. *Wharf* involved the question of whether a contracting party's failure to disclose its intent not to honor an oral commitment to sell stock to the plaintiff under certain agreed-upon circumstances constituted fraud under Rule 10b-5.[44] The Court thus had to decide whether an oral option (as it characterized the parties' agreement) was a security and whether the defendant's "secret reservation" amounted to an actionable misrepresentation.[45] The Court decided both issues in favor of the plaintiff.[46] Thus, a transaction that, on its face, appears to be a simple common law breach of contract, was transformed by the Court into a federal cause of action. Whether this area of law, traditionally relegated to the states, should as a matter of policy fall under the federal securities laws did not merit any comment from the Court.

A year after *Wharf*, the Court followed the same tack in *SEC v. Zandford*,[47] a case involving a theft by a broker from his customers' brokerage account. On its face, the defendant's conduct is a classic example of breach of fiduciary duty and common law theft. The SEC, however, sought a remedy under Rule 10b-5, arguing that the defendant's theft was "in connection with the purchase and sale" of a security and, therefore, in violation of the Rule.[48] The Supreme Court, reversing the Fourth Circuit, agreed.[49] Citing *O'Hagan*, the Court took an expansive view of the "in connection with" language and concluded that the scheme to misappropriate the proceeds of the sale of securities was enough to satisfy the requirements of the Rule.[50] As in *Wharf*, the Court took an aggressive view of the reach of the federal securities laws, and enlarged the jurisdiction of the SEC. The transaction in *Zandford*, like that in *Wharf*, had no effect on integrity of the securities markets and thus there was little reason to bring it within federal securities laws.[51]

The fourth case decided by the Court, *SEC v. Edwards*,[52] fits neatly into this pattern as well. *Edwards* involved the definition of a security, in this case a sale of payphones to investors with ancillary agreements that essentially assigned to the promoters the responsibility of managing the phones and promised the investors a fixed return.[53] The Court ruled that transaction amounted to security under the definition announced in *SEC v. W.J. Howey*[54] for an investment contract: "an investment of money in a common enterprise with profits to come solely from the efforts of others."[55] The Court's opinion does not, however, consider whether, in fact, there was a common enterprise. The facts in *Edwards* may not satisfy the prevailing concepts of common enterprise – that there must be horizontal commonality where the investors' money is pooled.[56] Judge Lay, of the Fourth Circuit, who concurred in the appellate court's decision in *Ed-*

wards, observed that there was no pooling of funds.[57] Removing horizontal commonality from the definition of an investment contract would expand the definition of a security and, thus, the reach of the federal securities laws. As in *O'Hagan* and *Zandford*, what would otherwise be garden variety state law claims are now federal securities law violations.

The final and most recent case decided by the Court before *Dabit*, *Dura Pharmaceuticals v. Broudo*,[58] seemingly does not fit this pattern. On close examination, however, it may. *Dura* decided what constitutes "loss causation" in a Rule 10b-5 action.[59] The plaintiff had alleged that misrepresentations made by the corporate defendant had artificially inflated the purchase price for the company's stock and that plaintiff thus suffered a loss at the time of purchase.[60] The Court, reversing the Ninth Circuit, held that loss causation requires more than just purchasing stock at an inflated price. Rather, the Court suggested that the complaint should "claim that Dura's share price fell significantly after the truth became known . . . ."[61] Interestingly, the Court grounded this conclusion on its view of the common law,[62] thus preserving the link between Rule 10b-5 actions and common law fraud.[63]

The common law basis for *Dura's* conclusion is not beyond question. As an initial matter, common law cases do support the plaintiff's argument that paying an inflated price constitutes a loss[64] and no less an authority than the Supreme Court itself so determined. In *Sigafus v. Porter*[65] the Court accepted the common law proposition that loss causation is determined by calculating the difference between the purchase price of the security and the "true" value of the security at the time of purchase.[66] The Court supported its holding in *Sigafus* with an English common law precedent. [67] Other precedents,[68] and common sense, support the notion that a person suffers a loss at the time of purchase. The stock may never decline in value, even after the truth of the misrepresentation is disclosed, because other factors caused the stock to increase. Yet plaintiff can still claim a loss because, had the truth been known when he purchased the stock, the total increase in value that the plaintiff realized would have been greater.

There are, to be sure, precedents that support the Court's view of loss causation.[69] But to a large extent these cases and, indeed, *Dura* itself, represent an adaptation of the elements of common law to a Rule 10b-5 action involving publicly-traded securities. As a matter of policy, not necessarily common law, proof of loss causation may require that plaintiff allege more than purchase-time loss. On the other hand, it seems unjust, and unprecedented, to hold a purchaser of stock in a nonpublic company to the same standard.[70] In that instance, subsequent disclosure will not provide the critical evidence of plaintiff's loss; that disclosure will only constitute some sort of notice to plaintiff that it has a claim for a loss incurred at the time of purchase. One perverse effect of *Dura* may be to alter the common law view of loss causation in fraudulent misrepresentation cases.[71] At best, however, Rule 10b-5 is further unmoored from the state law concepts of fraud from which it emanated.

IV. Conclusion

While one can quibble with the Court's reasoning and the parsing of its precedents, *Dabit* is by no means an unprecedented or unreasoned decision. The Court is surely correct that Congress sought to limit securities class action litigation based on state law and, we can safely speculate, would have approved of language incorporating the result in *Dabit*. Moreover, holders' actions are, by their very nature, troubling class actions. The Court was correct, as was the Court in *Blue Chip Stamps*, to note the large potential for abuse in these sorts of class actions. Plaintiffs with strong cases can, as the Court noted, maintain their action as individual actions (or joined with up to 49 others) under state law. What they are deprived of is the special leverage that a class action gives to the plaintiff class. From a public policy perspective, that's not such a bad thing.

What is troubling about *Dabit*, and the Court's other recent precedents in the area of the federal securities laws, is the short shrift that these cases give to state law. The Court's passing reference to the presumption against preemption rings hollow; one might reasonably ask whether state law procedural rules – in this case rules that allowed holders' class actions – should be "cavalierly" pre-empted. *Dabit* is just another instance of the declining importance of state law in the securities arena.

NOTES

1. 126 S. Ct. 1503 (2006).

2. Pub. L. No. 105-353, 112 Stat. 3227 (1998).

3. *Dabit*, 126 S. Ct. at 1507.

4. 421 U.S. 723 (1975).

5. *Dabit*, 126 S. Ct. at 1507. The lead plaintiff was a stock broker at Merrill Lynch and the class consisted of "all other former or current brokers who … purchased … certain stocks [during the class period]." *Id.* After a dismissal, plaintiff amended his complaint to make clear that the fraud consisted of actions by the defendant that induced the class to hold the stocks in question, damaging the class members by causing them "to hold onto overvalued securities," and to lose "commission fees when their clients, now aware that they had made poor investments, took their business

elsewhere." *Id.* The fact that the plaintiffs in *Dabit* were brokers, as opposed to ordinary investors, represents a bit of twist in the typical fact pattern in these cases, but one without significance in the outcome of the case.

6. Pub. L. No. 104-67, 109 Stat. 737 (1995).

7. The Court succinctly summarized some of the key elements of the Reform Act:

> Title I of the Reform Act, captioned "Reduction of Abusive Litigation," represents Congress' effort to curb these perceived abuses. Its provisions limit recoverable damages and attorney's fees, provide a "safe harbor" for forward-looking statements, impose new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, and authorize a stay of discovery pending resolution of any motion to dismiss. See 15 U.S.C.A. § 78u-4. Title I also imposes heightened pleading requirements in actions brought pursuant to § 10(b) and Rule 10b-5; it "insists that securities fraud complaints 'specify' each misleading statement; that they set forth the facts 'on which [a] belief' that a statement is misleading was 'formed'; and that they 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.' " *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 345, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (quoting 15 U.S.C.A. §§ 78u-4(b)(1), (2)).

Id. at 1511. *See generally* Marc I. Steinberg, *Symposium: Securities Law After the Private Securities Litigation Reform Act—Unfinished Business*, 50 SMU L. Rev. 9 (1996).

8. The *Dabit* case itself was a diversity action. *Dabit*, 126 S. Ct. at 1504.

9. 15 U.S.C.A. § 78bb(1) (2000).

10. As codified in the Securities Exchange Act of 1934, 15 U.S.C.A. § 78 (2000), SLUSA provides:

(1) Class Action Limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

. . .

(5) Definitions

. . .

(B) Covered class action

The term "covered class action" means—

(i) any single lawsuit in which-

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which-

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

§ 78bb(f). Another key provision of the statute makes all "covered class actions" filed in state court removable to federal court. § 78bb(f)(2). Once in federal court, the complaint will become subject to the limitations of the Reform Act.

11. *In re Merrill Lynch & Co., Inc.*, Nos. 02MDL1484(MP), 02CV4051(MP), 02CV8472(MP), 02CV4205(MP) & 02CV9487(MP), 2003 WL 1872820, at *1 (S.D.N.Y. April 10, 2003).

12. *Id.*

13. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005).

14. *See* 15 U.S.C.A. § 78(bb)(f)(1)(A), *supra* note 7.

15. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 126 S. C. 1503, 1507 (2006).

16. Id.

17. Id. at 1509.

18. Id. at 1512.

19. Id.

20. Id.

21. The Court has relied on plain meaning in dozens, possibly hundreds, of cases involving statutory interpretation. Most recently, for instance, the Court relied on the plain meaning of a provision in the Higher Education Technical Amendments, 28 U.S.C.A. § 1091a(a)(2)(D) (2000), noting that "Congress may not have foreseen all of its consequences of a statutory enactment ...." *Lockhart v. U.S.*, 126 S.Ct. 699, 702 (2005).

22. Ironically, in the same term that the Court decided *Dabit*, Justices Scalia and Thomas each filed opinions in separate cases, complaining that the majority failed to adopt or sufficiently exalt the plain meaning of a federal statute. See *Zedner v. U.S.*, 126 S. Ct. 1976, 1990 (2006) (Justice Scalia concurring and criticizing the majority for resorting to legislative history in the interpretation of the Speedy Trial Act of 1974, 18 U.S.C.A. § 3161 (c)(1) (2000), even if that history is consistent with the plain meaning of the Act) and *Dolan v. U.S. Postal Service*, 126 S. Ct. 1252, 1261 (2006) (Justice Thomas dissenting from the majority's interpretation of the Federal Tort Claims Act, 20 U.S.C.A. § 2680(b) (2000), because the interpretation was inconsistent with the plain meaning of the Act).

23. *Dabit*, 126 S. Ct. at 1512–13.

24. 404 U.S. 6 (1971).

25. 535 U.S. 813 (2002).

26. 521 U.S. 642 (1997).

27. *Dabit*, 126 S. Ct. 1503, 1513 (2006).

28. Id. at 1513–14.

29. Justice Alito, newly appointed to the Court, did not participate.

30. *Dabit*, 126 S.Ct. at 1510.

31. Justices Blackmun, Douglas and Brennan dissented.

32. In an earlier article, I did observe that the Court based its decision in *Blue Chip Stamps* "on policy considerations." Mark J. Loewenstein, The Supreme Court, Rule 10b-5 and the Federaliza-

tion of Corporate Law, 39 Ind. L. Rev. 17, 24 (2005). My point here is that if the characterization of *Blue Chip Stamps* as policy-based or not is critical to the outcome a decision, as I believe it was in *Dabit*, it is important to look at the entire opinion delivered by the Court in *Blue Chip Stamps*.

33. 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952).

34. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732 (1975).

35. Id. at 733–37.

36. Id. at 736.

37. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1514 (2006) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

38. *Dabit*, 126 S. Ct at 1514.

39. I have discussed these cases, and the theme of this section, in Mark J. Loewenstein, The Supreme Court, Rule 10b-5 and the Federalization of Corporate Law, 39 Ind. L. Rev. 17 (2005).

40. 521 U.S. 642 (1997).

41. Id. at 650.

42. Id. at 652.

43. 532 U.S. 588 (2001).

44. Id. at 589-90.

45. Id. at 594.

46. Id. at 595–96.

47. *SEC v. Zandford*, 238 F.3d 559 (4th Cir. 2001), rev'd, 535 U.S. 813 (2002).

48. Id. at 562.

49. *SEC v. Zandford*, 535 U.S. 813 (2002).

50. Id. at 816.

51. Id. at 813.

52. 540 U.S. 389 (2004).

53. Id. at 392–93.

54. 328 U.S. 293 (1946).

55. Id. at 301.

56. See Rodney L. Moore, Note, Defining an "Investment Contract": The commonality Requirement of the Howey Test, 43 Wash. & Lee L. Rev. 1057 (1986); Marc I. Steinberg, Securities Regulation 42–43 (4th ed. 2004) (1986) (discussing vertical commonality).

57. *SEC v. ETS Payphones, Inc.*, 300 F.3d 1281, 1287 (Lay, J., concurring), rev'd sub nom., *SEC v. Edwards*, 540 U.S. 389 (2004).

58. 544 U.S. 336 (2005).

59. More specifically, the Court referred to the Reform Act requirement that plaintiffs prove that the defendant's misrepresentations "caused the loss for which the plaintiff seeks to recover." 15 U.S.C.A. §§ 78u-4(b)(4) (2000). However, the Court went to note that the plaintiffs have to allege and prove "the traditional elements of causation and loss." *Dura*, 544 U.S. at 346.

60. *Dura*, 544 U.S. at 339.

61. Id. at 347.

62. "[T]he common law has long insisted that a plaintiff [in a fraudulent misrepresentation case] show not only that had he known the truth he would not have acted but also that he suffered actual economic loss." Id. at 343-44

[63] See William K.S. Wang & Marc I. Steinberg, Insider Trading §§ 15:02-15:03 (2d ed. 2005)

[64] The cases were collected in *In re Crazy Eddie Securities Litigation*, 948 F. Supp. 1154, 1165 (E.D.N.Y. 1996):

> Although damages in securities fraud actions may be calculated in several different ways, they ordinarily are based on out-of-pocket losses—that is, the difference between the purchase price and true value of the stock, or, if bought and sold, the gross economic loss adjusted to reflect that portion of loss attributed to market and other factors. Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 297 (3d Cir. 1991) (out-of-pocket expenses most common method); Astor Chauffeured Limousine Co. v. Runnfeldt Inv Corp., 910 F.2d 1540, 1551 (7th Cir. 1990) (same); Pelletier v. Stuart-James Co., 863 F.2d 1550, 1557 (11th Cir. 1989) (same); Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38, 48–50 (2d Cir.), cert. denied, 439 U.S. 1039, 99 S. Ct. 642, 58 L.Ed.2d 698 (1978); Levine v. Seilon, Inc., 439 F.2d 328, 334 (2d Cir. 1971); see also Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436-38 (9th Cir. 1987) (defining out-of-pocket expenses). Out-of-pocket losses is also the rule for damages caused by common law fraud. See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 (2d Cir. 1994), cert. denied, 513 U.S. 1079, 115 S. Ct. 728, 130 L.Ed.2d 632 (1995). Since RICO plaintiffs are only entitled to damages proximately caused by the predicate acts, American Nat. Bank and Trust Co. v. Haroco, Inc., 473 U.S. 606, 609, 105 S. Ct. 3291, 3292, 87 L.Ed.2d 437 (1985), and the predicate acts claimed here are for securities fraud, plaintiffs' RICO damages are identical to their securities fraud damages.

See also *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1437 (9th Cir. 1987) (collecting additional authorities on the out-of-pocket rule for damages in Rule 10b-5 actions).

[65] 179 U.S. 116 (1900).

[66] Id. at 125 ("[T]he plaintiffs … were entitled to … the difference between the real value of the property at the date of its sale to the plaintiffs and the price paid for it ….")

[67] Id. at 124 (citing *Peek v. Derry*, 37 L.R.Ch. 541, 591, 594 (1887)).

[68] E.g., *Pommer v. Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992). Plaintiff, who purchased stock on the basis of fraudulent misrepresentation that patent had issued when, in fact, it had not, suffers loss at the time of purchase, even if subsequently the patent does issue, because the company was more valuable with a patent than merely with the possibility of a patent issuing. Id. at 628. The court noted: "[d]amages under § 10(b) … usually are the difference between the price of the stock and its value on the date of the transaction if the full truth were known." Id.

[69] *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 344 (2005) (citing *Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189 (2d Cir. 2003). See also *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *Robbins v. Kroger Properties, Inc.*, 116 F.3d 1441 (11th Cir. 1997); Restatement (Second) of Torts, § 548A, cmt. b at 107.

[70] See *Pommer*, 961 F.2d at 628.

[71] See, e.g., Brandon F. White, Dura Pharmaceuticals, Inc. v. Broudo: Supreme Court Case Calls Massachusetts Loss Causation Rule Into Question, Boston B. J., March/April 2006, at 18 (indicating that Massachusetts rule on loss causation is inconsistent with federal rule announced in Dura and, therefore, should be reexamined).