

A Primer on Taking a Securities Fraud Class Action to Trial

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Abstract

The author provides a primer on the intricacies involved in bringing a securities fraud case to trial. He begins with an overview of the federal securities laws and the current climate of securities litigation. Most importantly, the author provides insight on how to sustain a complaint brought under the Private Securities Litigation Reform Act of 1995. He also examines the difficulty in preserving genuine issues for trial under summary judgment attacks. Finally, the author explains how to use “traditional” trial techniques such as voir dire, the opening and closing arguments, and witness impeachment in a complex area of the law.

I. Introduction

There is a saying that there are four truths in any trial: “your truth, the other side’s truth, the truth that the fact finder is going to adopt, and what really happened.”¹ In case law, academic literature, professional literature and in popular culture, trials are often characterized as battles and the

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¹ Donald S. Davidson, *Standards for Pleadings: Drafting Claims, Answers, and Dispositive Motions in Arbitration*, in *SECURITIES ARBITRATION 2002: TAKING CONTROL OF THE PROCESS*, at 385, 394 n.4 (PLI Corp. Law & Practice, Course Handbook Series No. 1327, 2002).

lawyer as the client's champion.² "Like football players or armed warriors, they are licensed to compete with the serious aim of defeating the opposing side."³ Scholars contend that the legal system is premised on the idea that a trial should be "a fair fight."⁴ Litigation can indeed be characterized as a "fight," though it is one for truth and justice.

In securities fraud class action litigation, the very nature of the laws at issue puts the search for truth at the forefront of "the battle," especially during trial. Indeed, the winning closing argument in the securities fraud class action trial against the Apollo Group, the parent company of the for-profit education corporation University of Phoenix, referred to the application of the federal securities laws as a method for ensuring that "the integrity of our capital markets will continue to be protected" from those whose conduct rattles "confidence in our financial institutions, in our banks, [and] in our financial markets."⁵ "Transparency and reliability of U.S. corporate governance systems, accounting and financial reporting standards, and related requirements for internal control structures, over time, lead to the kind of growth in value that is desired by long-term investors, who depend on clear and reliable financial reporting."⁶

The lead plaintiff, Policeman's Annuity and Benefit Fund of Chicago, pressed the *Apollo Group Securities Litigation* through trial to a verdict, on behalf of a class of investors seeking damages for fraud, against the

² Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 225 (1995); see also Christine Alice Corcos, *Portia Goes to Parliament: Women and Their Admission to Membership in the English Legal Profession*, 75 DENV. U. L. REV. 307, 346 (1998).

³ Corcos, *supra* note 2, at 346 (citation omitted).

⁴ Anthony X. McDermott & H. Mitchell Caldwell, *Did He or Didn't He? The Effect of Dickerson on the Post-Waiver Invocation Equation*, 69 U. CIN. L. REV. 863, 870 (2001) (citing JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 10 (1993); A. Lawrence Lowell, *The Judicial Use of Torture*, 11 HARV. L. REV. 220, 297 (1897)).

⁵ Transcript of Record at 3843:13-17, *In re Apollo Group, Inc. Securities Litigation*, CV 04-2147-PHX-JAT (Lead) (D. Ariz. Jan. 30, 2007). Stephen R. Basser, lead attorney on behalf of investors, explained to the jury during closing argument: "[W]e are here . . . to make sure that there is redress, that this law, this great law is applied and by its application the integrity of our capital markets will continue to be protected." See also *id.* at 3921:1-4 (arguing on behalf of the lead plaintiff, on behalf of the class, and on behalf of "the integrity of our financial markets").

⁶ Jeffrey A. Barrack, *Sarbanes-Oxley and Capital Market Competitiveness*, CORP. GOVERNANCE, A SUPPLEMENT TO THE LEGAL INTELLIGENCER, Nov. 20, 2006, at CG5.

company, its chief executive officer and its chief financial officer.⁷ The Honorable James A. Teilborg, who presided over the *Apollo Group* case, noted that a case does not reach trial “without a lot of hard fighting, perhaps even a little bloodshed along the way. . . . [J]ust like any contact sport, a little bit of that probably is inevitable.”⁸ This is especially so in securities fraud trials, which serve to deter future distortion of truth in the market place by holding persons accountable for their wrongful conduct.

While jurors appreciate that “trial is combat between two competing sides . . . [and] expect lawyers to be advocates and gladiators, . . . [they also] expect the lawyers to be civil and maintain decorum.”⁹ Judges and juries take particular notice where lawyers are “willing and able to fight for their clients [and who] do so professionally.”¹⁰ As the Honorable

⁷ *In re Apollo Group, Inc. Sec. Litig.*, CV 04-2147-PHX-JAT (D. Ariz. Jan. 30, 2007) (entering jury verdict judgment in favor of plaintiffs); *see also In re Apollo Group, Inc. Sec. Litig.*, 509 F. Supp. 2d 837 (D. Ariz. 2007) (concluding fact issues remained on the parties’ cross motions for summary judgment); *In re Apollo Group, Inc. Sec. Litig.*, 395 F. Supp. 2d 906 (D. Ariz. 2005) (denying Defendant’s motion to dismiss). The Apollo Group, Inc. Securities Litigation trial began on August 14, 2007 with a jury verdict entered on January, 16 2008. The case is still ongoing with pending motions for a new trial pursuant to Federal Rule of Civil Procedure 59, judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), and remittitur.

⁸ Transcript of Record, *supra* note 5, at 4100:19-24. Commenting on the parties’ counsel, Judge Teilborg continued, “but you all have arisen above it and what I have seen has just been truly exemplary.” *Id.* at 4100:23-24. *But see* United States v. Cutler, 58 F.3d 825, 840 (2d Cir. 1995) (affirming misdemeanor criminal contempt on defense counsel for violating orders prohibiting extrajudicial statements).

⁹ Judge Randy Wilson, *What Do Jurors Say About Trial Lawyers?*, TEX. B. J., Feb. 2005, at 152, 154.

¹⁰ Transcript of Record, *supra* note 5, at 4125:9-20. Judge Teilborg noted for the jury after the verdict was rendered in the *Apollo Group* trial:

I think this should be obvious to you but some of you may not have experienced that many trials, but you’ve had the privilege of seeing, I believe, our legal profession at its finest. You’ve had the privilege of seeing superb lawyers, lawyers who are highly trained, that have thoroughly prepared this case, and I’m sure you don’t doubt that one[-]minute the amount of preparation that’s gone into this case, the professionalism that they have exhibited to one another. And I will tell you that’s not always present in every case. They’ve been willing and able to fight for their clients but do so professionally and, in my judgment, their clients have all been superbly represented.

Id.

Joseph M. McLaughlin of the United States Court of Appeals for the Second Circuit described in a 1995 decision reviewing the result of the final Gotti trial: “[The] advocate is . . . entitled—indeed encouraged—to strike hard blows, but not unfair blows. Trial practice . . . tactics do not include eye-gouging or shin-kicking.”¹¹ Judge McLaughlin quoted Chief Justice Alexander Cockburn, who in November 1864 addressed a “distinguished assembly” of barristers in London as follows: “[T]he arms which an advocate wields he ought to use as a warrior, not as an assassin. . . . He ought to know how to reconcile the interests of his clients with the eternal interests of *truth and justice*.”¹²

Institutional investors, like the Policeman’s Annuity and Benefit Fund of Chicago, which in January 2008 secured the jury verdict on behalf of Apollo Group investors, are heeding this call, spurred by the Private Securities Litigation Reform Act of 1995 (PSLRA), which was intended to encourage institutional investors to lead securities fraud cases.¹³ In a public statement, the Chicago policeman’s retirement fund Executive Director, John Gallagher, thanked the jurors for their service, noting that “their verdict will help all of us as investors to incrementally increase the accuracy, reliability and . . . timeliness of reporting critical information to the market, so that individual or institutional investors can fairly evaluate the risks involved in investing in public companies.”¹⁴ These are precisely the “interests of truth and justice” that transform a securities fraud trial into the noble fight that drew out “loud cheers” and thunderous applause in response to Chief Justice Cockburn’s address to his distinguished audience in London.¹⁵

¹¹ *United States v. Cutler*, 58 F.3d 825, 840 (2d Cir. 1995); *accord* Jessie K. Liu, *Just the Facts*, 106 YALE L. J. 1953 (1997).

¹² *Cutler*, 58 F.3d at 841 (citing *TIMES* (London), Nov. 9, 1864), *quoted in* 5 ENCYCLOPEDIA BRITANNICA 941 (1947) (emphasis added).

¹³ Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (1995) (establishing procedures, *inter alia*, for the following: appointment of a lead plaintiff to run case and supervise lawyers (*e.g.*, § 78u-4(a)); pleading requirements for securities fraud actions (*e.g.*, § 78u-4(b)); limitations on damages (*e.g.*, § 78u-4(e)); and rules on proportionate responsibility (*e.g.*, § 78u-4 (g))).

¹⁴ Press Release, Barrack Rodos & Bacine, Barrack Rodos & Bacine Announces Jury Verdict for Apollo Group, Inc. Investor Class, (Jan. 16, 2008) (on file with author), available at <http://www.barrack.com/cs.nn=/apollo-verdict-pr>.

¹⁵ *Cutler*, 58 F.3d at 841.

When it comes to trial, prosecuting the federal securities laws is aimed at protecting our capital markets.

[The federal securities laws are] designed to protect the integrity of the capital markets. Protecting and preserving, maintaining, if you will, the integrity of the capital markets is so very vital to the best interests of this country, to the best interests of the economy of this country. . . . What we have [where there is a violation of the securities laws] is an assault on the integrity of our capital markets. It is an assault because at its core, what the federal securities laws requires is that you speak the truth. When you speak, you must speak the truth to the market, not half truths, not parsimonious statements, not generalities; speak the truth!¹⁶

In that context, a defendant's conduct may be described as "effectively . . . assaulting the integrity of our capital markets, [because] he was choosing the path of deflection rather than the path of simply making a full, adequate disclosure and speaking the truth."¹⁷ Indeed, there are even deceptive "disclosure techniques that a defendant can deploy [to] be done in such a way so as to camouflage, mask, if you will, the impact that the disclosure of the truth is having on the price of the stock."¹⁸ A securities fraud trial aims at the search for truth.

This Article describes certain strategic shifts generally arising in the securities litigation field, with specific reference to those among the defense and plaintiff bars, which have given rise to a recent up-tick in securities fraud trials.¹⁹ In addition, this Article discusses the procedural thresholds litigants must overcome to get to a jury and a verdict, including procedures associated with the motions to dismiss, for summary judgment, *in limine*, and arguments on the evidence. Finally, this Article discusses specific trial techniques: *voir dire* of fact witnesses, impeachment of a witness with inconsistent deposition testimony and conduct of concealment, and delivery of the opening statement and the closing argument. The purpose of this Article is to describe these characteristics

¹⁶ Transcript of Summary Judgment Motion Hearing at 5:21-6:23, *In re Apollo Group, Inc. Sec. Litig.*, 509 F. Supp. 2d 837 (D. Ariz. 2007).

¹⁷ *Id.* at 9:20-24.

¹⁸ *Id.* at 69:9-13.

¹⁹ See Jeffrey A. Barrack, *Shift in Litigation Strategy Sends More Securities Cases to Trial*, LEGAL INTELLIGENCER, Mar. 25, 2008, at 7.

of federal securities trials because, while “trials in securities cases are so rare,”²⁰ when faced with the prospect of one, there are numerous issues to consider and parties should have a resource to assist their decision making. This primer seeks to modestly serve as such a resource.

II. Securities Cases Are More Apt to Go to Trial in the Future

Since the inception of the Private Securities Litigation Reform Act of 1995, only a half dozen securities fraud cases have made it to a jury.²¹ Nonetheless, there seem to be a number of indicators pointing to an increase in taking securities fraud cases to a trial before a jury. The most important indicator is premised on common sense business decision-making; specifically, the cost benefit analyses involved in taking a securities fraud case to trial. The PSLRA has addressed this issue by placing more control in the hands of the plaintiff with the most at stake in each case, usually an institutional investor.²² Essentially, the PSLRA allows institutional investors to compete upon motion for the role as lead plaintiff, and establishes the movant with the largest economic interest as the presumptive winner.²³ In doing so, according to Kevin LaCroix, of OakBridge Insurance Services, the “institutional investor lead plaintiff is clearly calling the shots, and is clearly willing to run the risk of trial.”²⁴

Another industry trend that tends to move securities cases towards trial is the fact that the courts are clarifying the requirements for pleading a

²⁰ Kevin LaCroix, *Defense Verdict in JDSU Securities Trial; Meanwhile, Ninth Circuit Reverses Thane International Securities Lawsuit Verdict*, D & O DIARY, Nov. 27, 2007, <http://www.dandodiary.com/2007/11/articles/securities-litigation/defense-verdict-in-jdsu-securities-trial-meanwhile-ninth-circuit-reverses-thane-international-securities-lawsuit-verdict/>.

²¹ See Barrack, *supra* note 19, at 7 (illustrating the potential for more securities fraud cases).

²² H.R. REP. NO. 104-369 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 733; SEN. REP. NO. 104-98 (1995).

²³ H.R. REP. NO. 104-369 at 33-4.

²⁴ Kevin LaCroix, *A Securities Lawsuit Goes to Trial*, D & O DIARY, Oct. 24, 2007, <http://www.dandodiary.com/2007/10/articles/securities-litigation/a-securities-lawsuit-goes-to-trial/>.

cause of action under the securities laws. In short, the plaintiffs and defendants are becoming more aware of the “playing field.” For example, in *Dura Pharmaceuticals v. Broudo*, the United States Supreme Court clarified the loss causation element necessary for a securities fraud claim.²⁵ In another decision, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Court clarified the standard for reviewing the scienter, or state of mind, allegations in a complaint being challenged on a motion to dismiss.²⁶ Further clarifying securities law causes of action, the Court, in *Stoneridge Investment Partners v. Scientific-Atlantic*, affirmed one of the fundamental principles of pleading a primary violation of the securities laws when a complaint seeks to hold a non-speaking defendant responsible for securities fraud.²⁷ Although each of these cases is addressed more fully below, it is important to note here that each case specifically addressed pleading a cause of action in securities litigation.

The final indication of a shift towards more securities fraud trials can be seen in evaluating the incentives of trying such cases in front of a jury. The *JDS Uniphase* trial, in which the plaintiffs alleged \$50 billion in damages, resulted in a defense verdict.²⁸ This sort of decision encourages defendants to weigh the benefits of going to trial versus the risk of large monetary plaintiff settlements.²⁹ Similarly, the *Apollo Group* verdict, which represented the largest securities verdict for plaintiffs in recent history, has emboldened investors to forgo settlements in favor of jury decisions. Thus investors as well as issuers, officers and directors are recognizing the value of their constitutional “right to a speedy and public trial by an impartial jury.”³⁰

²⁵ 544 U.S. 336, 342 (2005) (holding that “an inflated purchase price will not by itself constitute or proximately cause the relevant economic loss”).

²⁶ 127 S. Ct. 2499, 2509 (2007).

²⁷ 128 S. Ct. 761, 769 (2008). The *Stoneridge Investment Partners* Court further indicated that in order to bring a private action the “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 the security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” *Id.* at 768 (following *Dura Pharm. v. Broudo*, 544 U.S. at 341-42).

²⁸ LaCroix, *supra* note 24.

²⁹ *But see id.* (finding that defendants are unwilling to go to trial and risk having a jury wipe out their insurance coverage).

³⁰ U.S. CONST. amend. VI.

III. The Purpose of the Federal Securities Laws

The antifraud provisions of the federal securities laws govern the exchange of securities in the market.³¹ Among Congress's objectives when passing the Securities Exchange Act of 1934³² was "to insure honest securities markets and thereby promote investor confidence" after the market crash of 1929.³³ Congress sought "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."³⁴

It is worth looking at comments from the congressional record to get a sense of the underlying purpose of the federal securities laws. In the House Report dated April 27, 1934, members of Congress discussed the Securities Exchange Bill of 1934 and their intent when enacting it:

No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price. *Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value. There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.* The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market. That is why in many cases it is so carefully guarded. *Delayed, inaccurate, and misleading reports are the tools of the*

³¹ See generally Jeffrey A. Barrack, *Auditor Responsibility Under the Federal Securities Laws*, 29 AM. J. TRIAL ADVOC. 1, 8-10 (2005) (discussing the standards in the Securities Exchange Act of 1933 and 1934).

³² 15 U.S.C. § 78 (West 1934).

³³ SEC v. Zandford, 535 U.S. 813, 814 (2002); see United States v. O'Hagan, 521 U.S. 642, 658 (1997).

³⁴ *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963)); see also *Zandford*, 535 U.S. at 819-20 (discussing the purpose behind Congress's requirement of full disclosure and the reasons concerning the requirement).

unconscionable market operator and the recreant corporate official who speculate on inside information. Despite the tug of conflicting interests and the influence of powerful groups, responsible officials of the leading exchanges have unqualifiedly recognized in theory at least the *vital importance of true and accurate corporate reporting as an essential cog in the proper functioning of the public exchanges.*³⁵

While discussing an amendment to the Exchange Act, in the Senate Report dated April 14, 1975, senators further noted the intent of the law:

The basic goals of the Exchange Act remain salutary and unchallenged: to provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without undue preferences or advantages among investors, to ensure that securities can be purchased and sold at economically efficient transaction costs, and to provide, to the maximum degree practicable, markets that are open and orderly.³⁶

As Judge Teilborg instructed the jury in the *Apollo Group* trial, “Congress has enacted securities laws designed to protect the integrity of the financial markets. . . . [Claims brought under] Section 10(b) [and Rule 10b-5 promulgated thereunder,] . . . in essence prohibit[] acts of deception in connection with the purchase or sale of a securities”³⁷ As such, a federal securities fraud trial serves the policy of transparency codified in the securities laws—win, lose or draw.

IV. Getting a Securities Fraud Case to Trial

A. The Complaint Must Be Sustained

The complaint must be sustained for there to be any chance that the case will get to trial. In the *WorldCom Securities Litigation*, litigated to trial against Arthur Andersen in the Southern District of New York before the Honorable Denise L. Cote, the court decided motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and explained that

³⁵ H.R. REP. NO. 73-1383, at 11 (1934) (emphasis added).

³⁶ S. REP. NO. 94-75, at 182 (1975).

³⁷ Transcript of Record, *supra* note 5, at 4079:12-4080:12.

to state a cause of action under section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, a “plaintiff must allege that the defendant, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that plaintiff’s reliance on defendant’s action caused injury to the plaintiff.”³⁸ When sustaining the class action complaint in the *Apollo Group Securities Litigation*, Judge Teilborg ruled that the provisions of the PSLRA largely govern whether the pleading is sufficient.³⁹ The court explained that fraud claims must also satisfy the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.⁴⁰

Pursuant to the PSLRA, a complaint must “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”⁴¹ The complaint must also “state with particularity facts giving rise to a strong inference that defendant acted with the required state of mind”⁴²—the defendant’s knowing or reckless willingness “to deceive, manipulate, or defraud.”⁴³ In the Ninth Circuit, a plaintiff must show that the defendant “acted with intentionality or deliberate recklessness or, where the challenged act is a forward looking statement, with ‘actual knowledge . . . that the statement was false or misleading.’”⁴⁴ “Every [c]ourt of [a]ppeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or

³⁸ *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2003 WL 21488087, at *5 (S.D.N.Y. June 25, 2003) (citing *Lawrence v. Cohn*, 325 F.3d 141, 147 (2d Cir. 2003) (quoting *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 161 (2d Cir. 2000)); see also 15 U.S.C. § 78j(b) (1934); 17 C.F.R. § 240.10b-5 (1951); *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001).

³⁹ *In re Apollo Group, Inc. Sec. Litig.*, 395 F. Supp. 2d at 908.

⁴⁰ *Id.* (citing *In re GlenFed, Inc., Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1995) (en banc)).

⁴¹ *Id.* (quoting 15 U.S.C. § 78u-4(b)(1) (2000)).

⁴² *Id.* (quoting 15 U.S.C. § 78u-4(b)(2) (2000)).

⁴³ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); see 15 U.S.C. § 78u-4(b)(1), (2) (2000).

⁴⁴ *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001) (quoting 15 U.S.C. § 78u-5(c)(1)) (citation omitted).

recklessly”⁴⁵ In addition, the plaintiff must plead the existence of a duty to disclose.⁴⁶

As noted above, in recent years the United States Supreme Court has handed down a series of decisions addressing pleading claims under the federal securities laws. In its April 2005 decision in *Dura Pharmaceuticals v. Broudo*, the Supreme Court ruled that the loss causation element of the securities fraud claim may not be alleged merely by asserting that a plaintiff purchased stock at artificially inflated prices; rather, a plaintiff must also allege that she suffered an economic loss proximately caused by the defendants’ wrongful conduct.⁴⁷ In *Dura* the Supreme Court required the securities fraud plaintiff to allege in some fashion that as “the truth became known” and the market learned about the true facts, “the share price fell.”⁴⁸ Justice Breyer wrote that the securities fraud action provides redress only for the “‘loss’ the purchaser sustains ‘when the facts . . . become generally known’ and ‘as a result’ share value ‘depreciates.’”⁴⁹ Loss causation issues are currently some of the most hotly contested issues facing securities litigants.

⁴⁵ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2507 n.3 (2007) (citation omitted).

⁴⁶ *In re Apollo Group, Inc. Sec. Litig.*, 395 F. Supp. 2d at 908 (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) (stating that “[s]ilence, absent a duty to disclose is not misleading under Rule 10b-5”)).

⁴⁷ 544 U.S. 336, 338 (2005). *Dura* highlights the interplay in securities cases between economic loss and the fraud-on-the-market theory upheld in 1988 by the Supreme Court in *Basic*, 485 U.S. 224, as a sufficient basis for a presumption of reliance: “The fraud on the market theory 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.” *Basic*, 485 U.S. at 241. The theory posits that, unless defendant can show otherwise, “an investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed.” *Id.* at 247. While *Basic* dealt with “transaction” causation, the requirement that the plaintiff purchase securities at a price inflated by misrepresentation, *Dura* addressed “loss,” or “proximate,” causation—the causal connection between a defendant’s material misrepresentations and plaintiff’s losses. *Dura*, 544 U.S. at 344. *Dura* requires a plaintiff to plead and prove losses attributable in some form of revelation of wrongfully concealed or misrepresented information. *Id.*

⁴⁸ *Dura*, 544 U.S. at 347; see Jeffrey A. Barrack, *Does High Court Mean the Buyer Must Beware in Securities Markets?*, LEGAL INTELLIGENCER, Sept. 25, 2006, at 8.

⁴⁹ *Dura*, 544 U.S. at 344.

In its June 2007 decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Supreme Court reaffirmed the longstanding policy that private securities litigation is essential to the enforcement of the regulatory scheme of transparency codified in the federal securities laws; the opinion begins with a clear statement in favor of private enforcement of the federal securities laws.⁵⁰ “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 action brought, respectively, by the Department of Justice and the Securities and Exchange Commission.”⁵¹ In its decision, the Supreme Court clarified the standard for reviewing scienter allegations on a motion to dismiss. “A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”⁵² In so doing, the *Tellabs* decision modifies the seminal Rule 12(b)(6) decision of *Conley v. Gibson*⁵³ with respect to the scienter element of a securities fraud claim.⁵⁴

Finally, in January 2008 the Supreme Court decided *Stoneridge Investment Partners v. Scientific-Atlantic*,⁵⁵ in which it affirmed the principles set forth in its 1994 decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, which eliminated civil aiding and abetting liability under the federal securities laws, and set forth the

⁵⁰ 127 S. Ct. 2499, 2507 (2007).

⁵¹ *Tellabs*, 127 S. Ct. at 2504.

⁵² *Id.* at 2510; see Jeffrey A. Barrack, *Supreme Court Renders Investor-Friendly Decision in Tellabs*, LEGAL INTELLIGENCER, Aug. 28, 2007, at 8. The Supreme Court explained that Congress included in the PSLRA “exacting pleading requirements.” *Tellabs*, 127 S. Ct. at 2501. The focus of the *Tellabs* opinion is the PSLRA’s requirement that plaintiffs must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” *Id.* The opinion describes what constitutes a “strong inference” of the required state of mind, or scienter, at the pleading stage of a securities class action lawsuit. *Id.* at 2501-02.

⁵³ 355 U.S. 41, 47 (1957).

⁵⁴ Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. (forthcoming 2008) (citing *Tellabs*, 127 S. Ct. at 2509-10), available at SSRN, <http://ssrn.com/abstract=1010062>.

⁵⁵ 128 S. Ct. 761, 773-74 (2008).

requirements of pleading a primary violation of securities fraud.⁵⁶ These three Supreme Court decisions are now shaping motion-to-dismiss jurisprudence in securities litigation under the PSLRA and Federal Rules of Civil Procedure. The motion to dismiss is thereby the most significant threshold event in a securities fraud case, beyond which the parties must face the trier of fact.⁵⁷

⁵⁶ 511 U.S. 164, 191 (1994).

⁵⁷ In securities fraud class litigation, there is another key threshold procedure, secondary to the motion to dismiss, in connection with class certification under Rule 23 of the federal Rules of Civil Procedure, which requires an evidentiary basis to be satisfied. As such the motion for class certification is the most highly contested secondary threshold in a securities fraud case, and it can be revisited at any time before final judgment. FED. R. CIV. P. 23 (c)(1)(C).

A class action is peculiarly appropriate to resolve claims for violation of the securities laws. *See, e.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224, 230 (1988). “It is well recognized that class actions are a particularly appropriate means for resolving securities fraud actions.” *In re Accredo Health, Inc. Sec. Litig.*, No. 03-2216DP, 2006 WL 1716910, at *11 (W.D. Tenn. Apr. 19, 2006) (citing *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596, 607 (S.D. Ohio 2003); *see also* *Castillo v. Envoy Corp.*, 206 F.R.D. 464, 474 (M.D. Tenn. 2002) (“Courts have generally considered that class actions are the most favorable means of adjudicating federal securities fraud claims.”); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 54 (S.D.N.Y. 1993), *aff’d*, 67 F.3d 1072 (2d Cir. 1995) (noting “preference for class certification in securities cases and the importance of such certification for small securities holders”); *accord* *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

A class may be certified where, after conducting a “rigorous analysis,” the court finds that

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Castillo, 206 F.R.D. at 467-68 (quoting Rule 23(a)); *see also* *In re Am. Med. Sys. Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). Once the “conditions [of Rule 23(a)] are satisfied, the party seeking certification must also demonstrate that it falls within at least one of the subcategories of Rule 23(b).” *In re Am. Med. Sys. Inc.*, 75 F.3d at 1079 (emphasis added). In doing so, litigants often seek to satisfy Rule 23(b)(3), which requires the court to find “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” *Id.* at 1079 n.8. While it is the movants’ burden to demonstrate that the requirements of Rule 23 have been satisfied, “courts cannot make a preliminary inquiry into the merits” of the case. *Castillo*, 206 F.R.D. at 468 (citing *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 178 (1974)); *see* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

B. There Must Be a Genuine Issue Presentable for Trial

In securities cases, there is a wealth of case law regarding pleading, but there are fewer cases describing the *level* of proof necessary for a favorable ruling that will get you to trial.⁵⁸ Traditional standards on summary judgment apply to securities cases.⁵⁹ Where there is a disputed issue of material fact as to each element of the claim the case will survive summary judgment.⁶⁰ “To prevail on its securities-fraud claim, Lead Plaintiff must prove, among other things, that (1) Defendants made a misrepresentation or omission (2) of material fact (3) with scienter (4) that caused the alleged loss.”⁶¹

Litigants must be mindful that the evidence necessary to prevail at summary judgment must be admissible at trial, and parties often challenge the admissibility of fact and opinion evidence in connection with summary judgment and before trial.⁶² In securities fraud cases, this battle

⁵⁸ *In re WorldCom Sec. Litig.*, 352 F. Supp. 2d at 495-96.

⁵⁹ *See In re Apollo Group Inc. Sec. Litig.*, 509 F. Supp. 2d 837, 840-41 (D. Ariz. 2007). In *Apollo Group*, Judge Teilborg explained that summary judgment is only appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.” *Id.* at 840 (citing FED. R. CIV. P. 56(c)). “A dispute about a fact is ‘genuine’ if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). On a motion under Rule 56, the court construes all disputed facts in the light most favorable to the non-moving party. *Id.* (citing *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004)).

⁶⁰ *In re Apollo Group, Inc. Sec. Litig.*, 509 F. Supp. 2d at 840.

⁶¹ *Id.* (citing *Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)).

⁶² It is well-settled that, on a motion for summary judgment under Rule 56, “the court may consider only evidence that would be admissible at trial.” *Schullo v. Town of Cicero*, No. 96 C 8136, 1999 U.S. Dist. LEXIS 7417, *22 (N.D. Ill. Mar. 9, 1999) (citations omitted); *see Gustovich v. AT&T Commc’ns*, 972 F.2d 845, 849 (7th Cir. 1992) (“When acting on a motion for summary judgment the judge considers only evidence that would be admissible at trial.”); *accord Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985) (On a summary judgment motion, the court could not properly consider correspondence that was not supported by affidavit or otherwise authenticated. In the form in which it was presented, it constituted inadmissible

plays out most acutely on summary judgment and *in limine* over the issue of loss causation.⁶³ Often the plaintiff will be required to demonstrate her evidence that there was a corrective disclosure that caused economic injury, and this evidence will be both in the form of the underlying factual evidence as well as expert opinions.⁶⁴ On loss causation issues, where expert opinion and factual issues often overlap, the expert opinion testimony is generally admissible where it is “reliable, *i.e.*, his proposed testimony was ‘derived by the scientific method’ and it ‘fits’ the facts” of the case.⁶⁵

These issues can play themselves out repeatedly through summary judgment, motions *in limine* and objections to evidence at trial. Indeed, as Judge Teilborg explained to counsel during the final pretrial conference in the *Apollo Group* case, while some motions *in limine* may be denied on the papers, he also mentioned that such a ruling

is not indicative of what I think the probability is of an appropriate objection being sustained or overruled. There[are] certainly some of these items that are the subject of a motion *in limine* that I think when the moment comes

hearsay.); *Bee v. Local 719, United Auto Workers*, 744 F. Supp. 835, 836 (N.D. Ill. 1990) (granting a motion to strike exhibits that did not comport with requirements of Rule 56(e), explaining that such requirements “are not to be taken lightly”); *Richardson v. Oldham*, 811 F. Supp. 1186, 1198 (E.D. Tex. 1992); *Nolla Morell v. Riefkohl*, 651 F. Supp. 134, 140 (D.P.R. 1986); *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1235 n.9 (3d Cir. 1993).

⁶³ A motion *in limine* is used to exclude anticipated evidence and seeks a ruling on admissibility out of the presence of the jury; the motion seeks to avoid injection into trial of irrelevant, inadmissible, or prejudicial evidence at any point, including during *voir dire* examinations, opening statements and direct and cross examinations, and thereby seeks to prevent mistrials based on evidentiary irregularities. See BARRON’S LAW DICTIONARY 310 (3d ed. 1991) (citations omitted).

⁶⁴ *In re Apollo Group, Inc. Sec. Litig.*, 509 F. Supp. 2d at 844, 846 (citing No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp., 320 F.3d 920, 934 (9th Cir. 2003); *Basic*, 485 U.S. at 249 n.28 (specifically declining “to adopt any particular theory of how quickly and completely publicly available information is reflected in market price”)); *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642, 648 (1969) (“If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury.”); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) (stating that “cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means” of testing the credibility of an expert opinion).

⁶⁵ *In re Apollo Group Inc. Sec. Litig.*, 527 F. Supp. 2d 957, 964 (D. Ariz. 2007).

there's a very high likelihood that the objection will be sustained, others where I think the objection will be overruled.⁶⁶

Once the record is deemed by the court to demonstrate a material issue of fact in dispute and there exists competent, admissible evidence to present those factual disputes to a jury, the case is ready for trial.⁶⁷

V. Putting on a Securities Fraud Trial

Once a district court determines there to be a sufficient factual issue disputed by competent evidence and permits the parties to present the case to a jury, in a securities fraud class action, a team of lawyers and legal professionals must be assembled in order to “champion” the case. As noted by Judge Teilborg after the jury recessed from the courtroom to commence deliberations in the *Apollo Group* trial, a securities case requires “talent and preparation, both in terms of the mechanical preparation, which is obviously huge, that goes into a case like this. The technical preparation, the preparation for . . . examination and cross-examination of witnesses. . . . The preparation for evidentiary objections and responses to those objections” must be “thorough and foresighted.”⁶⁸ The arguments must—“in every instance”—be “well-prepared and well-presented throughout the case.”⁶⁹ The use of “technical people” and

⁶⁶ Transcript of Record Final Pretrial Conference at 69:18-25, *In re Apollo Group, Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT (D. Ariz. Jan. 30, 2008).

⁶⁷ Even so, issues of loss causation, for example, are likely to be addressed throughout trial, on objections to evidence and motions for judgment as a matter of law. *See* Transcript of Record, *supra* note 5, at 1863:22-1865:2 (overruling evidentiary objection ruling that plaintiff may properly prove “a causal connection between the economic losses suffered and the defendants’ misrepresentations”); *id.* at 2266:21-2267:23 (denying motion for judgment as a matter of law).

[I]t is a question for the jury to decide whether or not and when there was a corrective disclosure. Seems to me this jury can conclude that the facts did, to use, I think, a word the plaintiffs have used, did dribble into the marketplace, and that the [UBS] analyst Kelly Flynn and [her] reports of [September 20, 2004] did, indeed, connect dots in such a way that they became the corrective disclosure.

Id. at 2266:21-2267:23.

⁶⁸ Transcript of Record, *supra* note 5, at 4099:24-4100:7.

⁶⁹ *Id.* at 4100:7-9.

“support people,” including audio-visual specialists who work “firsthand here in the courtroom,” is essential to presenting a securities fraud case.⁷⁰ In a securities fraud class action trial, “behind many of the legal arguments and the evidentiary presentation is a lot of hard work by a lot of people.”⁷¹ A successful securities fraud trial requires nothing less than “superb lawyers, lawyers who are highly trained, that have thoroughly prepared” the case.⁷²

Once the above concerns have been addressed and trial begins, having a mastery of courtroom technique will benefit everyone involved—the parties, counsel, the judge and most importantly, the jurors. At a securities trial, an investor “must then prove her case by a ‘preponderance of the evidence.’ Stated otherwise [with regard to the required state of mind], she must demonstrate that it is *more likely* than not that the defendant acted with scienter.”⁷³ Three specific trial techniques used during the *Apollo Group* trial, *inter alia*, were successful in persuading the jury to render a verdict in favor of the class: (1) the *voir dire* of fact witnesses, (2) the impeachment of witnesses, and (3) the delivery of the opening statement and closing argument.⁷⁴ Indeed, these may be counted among the “tools to keep jurors engaged” during a federal securities trial.⁷⁵

A. Voir Dire of Fact Witnesses

Voir dire is from the Old French language meaning “to speak true.”⁷⁶ When one uses the term “*voir dire*” it is usually a reference to either

⁷⁰ *Id.* at 4100:25-4101:2.

⁷¹ *Id.* at 4101:4-6.

⁷² *Id.* at 4125:12-14.

⁷³ See *Tellabs v. Makor Issues & Rights*, 127 S. Ct. 2499, 2513 (2007) (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)).

⁷⁴ *In re Apollo Group, Inc. Sec. Litig.*, No. CV04-2147-PHX-JAT (D. Ariz. Jan. 30, 2008).

⁷⁵ See Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL, Mar. 1, 2008, at 32-37 (offering other techniques, including the use of a “mini-opening” during voir-dire, preliminary instructions, permitting jurors to take notes, the use of interim summations, and permitting jurors to ask questions).

⁷⁶ Gil L. Sapir, *Qualifying the Expert Witness: A Practical Voir Dire*, FORENSIC MAG. (Feb./Mar. 2007), available at <http://www.forensicmag.com/articles.asp?pid=132>.

examination of prospective jurors during jury selection procedures or examination of a proffered expert on her underlying qualifications. *Voir dire* during jury selection may be used to determine jurors' qualifications for service, determine whether cause exists to challenge or excuse any jurors, and to provide juror information so that the parties may exercise their peremptory challenges.⁷⁷ *Voir dire* in connection with an expert usually occurs when, "after the proponent of an expert witness asks questions of the witness to bring out the person's qualifications, the opposing attorney is allowed to *voir dire* the witness to bring out matters that might prevent his qualification as an expert."⁷⁸

During the *Apollo Group* securities trial, counsel for the lead plaintiff employed an effective *voir dire* technique with fact witnesses during defense counsel's direct examination of a witness.⁷⁹ The technique is deployed rather simply. Upon utterance of a question that assumes facts—the answer to which lacks foundation or otherwise has evidentiary deficiencies to admissibility—counsel stands up, states the objection and requests permission "to ask a question on *voir dire*."⁸⁰ If permitted, counsel then respectfully asks questions that are expected to undermine the admissibility or weight of the witness's testimony. Once that testimony is adduced on *voir dire*, counsel requests a ruling from the court.⁸¹

For example, in the *Apollo Group* trial, when the defendant chief financial officer was on the stand during direct examination in the defendants' case-in-chief and was asked by her counsel if she had an opinion about whether certain practices at issue had violated federal law, counsel for the lead plaintiff stood up and requested permission to probe the bases for any such opinion:

⁷⁷ See BARRON'S LAW DICTIONARY 521-22 (3d ed. 1991).

⁷⁸ Sapir, *supra* note 76.

⁷⁹ At trial, this technique was employed by William G. Fairbourn, a founding member of Bonnett, Fairbourn, Friedman & Balint.

⁸⁰ See, e.g., Transcript of Record, *supra* note 5, at 1507:10-25 (*voir dire* to probe memory of witness); *id.* at 1793:3-22 (*voir dire* to probe foundation for lay opinion); *id.* at 2706:22-2707:21 (*voir dire* to probe timing on sequence of events); *id.* at 2827:5-2828:24 (*voir dire* to probe hearsay nature of a document); see also *United States v. Williams*, 259 Fed. App'x 281, 283 (11th Cir. 2007) ("Williams's counsel then requested, and the district court granted, permission to *voir dire* the [fact] witness.").

⁸¹ Transcript of Record, *supra* note 5, at 1507:10-25, 1793:3-22, 2706:22-2707:21, 2827:5-2828:24.

Q: Could I ask a question on *voir dire*?

THE COURT: You may.

VOIR DIRE EXAMINATION:

Q. During the time that you worked for UOP, your duties did not include any supervision of any of the enrollment counselors, did it?

A. No, it did not.

Q. And there were others at UOP who had titles or job responsibilities that included interpretation of Title IV requirements?

A. Some of my employees did, yes.

Q. And . . . that was something that you had delegated to others, [you] did not hold yourself out as being an expert or knowledgeable in [that area], true?

A. I wasn't an expert, but I was knowledgeable.

OBJECTION: There's a lack of foundation, Your Honor, for her to offer any opinions.⁸²

This technique can be quite persuasive where the objection is sustained based on the *voir dire*. Even where it is overruled, counsel creates an opportunity to challenge the weight of the testimony in front of the jury in an appropriate manner. A federal district court is authorized by Rule 611(a) of the Federal Rules of Evidence to permit such persuasive use of the *voir dire* interrogation technique of a fact witness.⁸³

B. Impeachment

“Impeachment, or destructive cross-examination, refers to the right of a party to challenge a witness’s credibility and the completeness of the account given by the witness. Impeachment may expose the witness’s partiality, motive, prior convictions, character for untruthfulness, and prior inconsistent statements, as well as a lack of perception or recollection.”⁸⁴ “The credibility of a witness may be attacked by any party,

⁸² *Id.* at 1793:4-21.

⁸³ Rule 611(a) states: “The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” FED. R. EVID. 611(a).

⁸⁴ EDWARD D. OHLBAUM, OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE § 607.06 (1998-99 ed.).

including the party calling the witness.”⁸⁵ “The Federal Rules of Evidence do not specifically address when or how a party may impeach a witness . . . and courts have been reluctant to hamper counsel’s use of [reasonable] impeachment technique[s].”⁸⁶ Both “impeachment by self-contradiction” and “impeachment by contradiction” may be executed at trial through the use of extrinsic evidence.⁸⁷ Prior deposition testimony or a relevant memorandum are often used for these purposes, and can be quite effective during a federal securities fraud trial.

1. Impeachment Using Prior Inconsistent Deposition Testimony

A classic impeachment technique is impeachment with prior inconsistent deposition testimony where the witness’s earlier testimony is inconsistent with the witness’s trial testimony.⁸⁸ Because inconsistency is fundamentally a jury question, the primary legal issues for admissibility are authentication and confrontation.⁸⁹ Thus, when impeaching a witness on the stand at trial with her prior inconsistent deposition testimony, Rule 613(b) of the Federal Rules of Evidence requires the witness to be confronted with the prior testimony in order for the prior statement to be admissible into evidence.⁹⁰

Impeachment with a prior inconsistent statement generally requires three foundational steps: creditation, commitment, and confrontation.⁹¹

⁸⁵ FED. R. EVID. 607.

⁸⁶ GLEN WEISSENBERGER ET AL., FEDERAL EVIDENCE § 607.4 (4th ed. 2001) (discussing exposure of bias or interest). Case law continues to define the parameters of this type of impeachment; the exposure of potential bias or interest has always been considered highly relevant. *Id.*

⁸⁷ *Id.* §§ 607.4-607.5 (impeachment by contradiction). Rule 613(b) of the Federal Rules of Evidence requires that a prior inconsistent statement of a witness, other than a party admission, is admissible only if the witness is given an opportunity to explain or deny the inconsistent statement. FED. R. EVID. 613(b).

⁸⁸ OHLBAUM, *supra* note 84, § 607.06.

⁸⁹ WEISSENBERGER ET AL., *supra* note 86, § 613.1 (impeachment by self-contradiction); *see also id.* § 613.6 (citing *United States v. Barrett*, 539 F.2d 244, 254 (1st Cir. 1976)); OHLBAUM, *supra* note 83, § 607.13[1]; *see also id.* § 613.11 (need for authentication of witness’s prior statement).

⁹⁰ WEISSENBERGER ET AL., *supra* note 86, § 613.2; OHLBAUM, *supra* note 84, § 607.16.

⁹¹ OHLBAUM, *supra* note 84, § 613.09.

Creditation requires establishing that the prior deposition testimony is more believable or persuasive than the trial testimony, *e.g.*, that the prior statement was made under oath after substantial preparation.⁹² Creditation may also serve to establish a foundation that the witness in fact made the prior statement.⁹³ Commitment requires one to “pin down the witness’s in-court testimony” by having the witness repeat or confirm the testimony presented to the jury.⁹⁴ Finally, confrontation requires asking the witness to confirm that the prior testimony was in fact made.⁹⁵

In the *Apollo Group* litigation, the undersigned member of lead counsel had a rare opportunity to impeach a witness multiple times using the witness’s prior deposition testimony. The examination was of a senior vice president of the defendant corporation. At trial the witness was asked the following question about the use of the phrase “smoke and mirrors,” referring to efforts to avoid detection by the Department of Education, which he had answered in the affirmative at his prior deposition:

Q. [The use of the phrase] bothered you, didn’t it?

A. Not necessarily

Q. Didn’t bother you?

A. I was concerned.

Q. That’s not what I asked you. It bothered you, didn’t it?

A. Not necessarily.⁹⁶

Upon hearing this denial at trial, the inconsistency with the affirmative answer at the prior deposition became apparent to counsel.

The first step to impeachment was to credit the prior deposition testimony:

Q. You took a deposition in this case, right?

A. I did.

⁹² *Id.* When impeaching a trial witness with more than one statement from the prior deposition, creditation need not be repeated. *Id.*; *see also* Transcript of Record, *supra* note 5, at 2664:22-2665:4 (Judge Teilborg noting that creditation need not be repeated).

⁹³ OHLBAUM, *supra* note 84, § 613.11 (proof of making statement and establishing foundation).

⁹⁴ *Id.* § 613.09.

⁹⁵ *Id.*

⁹⁶ Transcript of Record, *supra* note 5, at 2633:7-18.

Q. And during the deposition you swore to tell the truth, right?
A. Yes.⁹⁷

The witness was then directed to commit to what he just told the jury, by for example, getting him to confirm that he “swore to tell the truth here, didn’t you?”⁹⁸ And then the witness was confronted with a direct quotation of the prior inconsistent deposition testimony:

Q. During the deposition you were asked: “Okay. Are you familiar with the phrase smoke and mirrors?”
“Answer: I saw it referenced.
“Question: In the Program Review Report, correct?
“Answer: Yes.
“Question: How did you—how did you feel about it when you saw that reference in the Program Review Report?
“Answer: It was a misstatement.
“Question: Did it bother you?
“Answer: Bother me how so?
“Question: Did it bother you, make you upset to see the Department of Education Program Review Report that talked about the use of smoke and mirrors by Apollo?
“Answer: It was a statement out of—I didn’t know if it was true or not. If it was made.
“Question: Okay.
“Answer: I never heard it.
“Question: So you are saying that it didn’t bother you?
“Answer: It bothered me that the Department had that perception.”
[Q.] You said that, didn’t you, in your deposition?
A. I do recall that. I do recall that.
Q. Can we believe that based on what you said at your deposition [that] it did bother you?
A. It bothered me. . . .
Q. That was a true statement?
A. Yes.⁹⁹

A sharp impeachment interrogation can be emphasized with a follow up question like: “Which answer would you like this jury to believe, sir, the

⁹⁷ *Id.* at 2633:19-23.

⁹⁸ *Id.* at 2633:24-25.

⁹⁹ *Id.* at 2634:1-2635:9.

answer you gave at the deposition or the answer you gave today?”¹⁰⁰ Impeachment techniques like this can be devastating to the credibility of trial witnesses and can substantially bolster the stature of impeaching counsel in the eyes of the jurors.

2. Impeachment Using Acts of Concealment

Another classic impeachment technique is impeachment by contradiction, where a witness’s trial testimony is contradicted by physical evidence, other accounts, or by the witness’s inconsistent conduct.¹⁰¹ During the *WorldCom* securities trial against Arthur Andersen, the evidence of the accounting firm’s liability tended to take the form of extrinsic evidence, including audit working papers that had been altered, covered with white-out tape, or gone missing.¹⁰² Evidence of concealment can render a trial examination quite exciting—and persuasive—for jurors.¹⁰³

Arthur Andersen had “criticized [WorldCom Inc.’s] practice of shifting expenses off its bottom line more than a year before the company began hiding \$3.8 billion in line costs, according to a copy” of a work paper, the original of which went missing at trial, but a copy of which was shown to jurors at the accounting firm’s fraud trial in Manhattan.¹⁰⁴ When questioned about the missing document, the auditor denied seeing it.¹⁰⁵ In response, counsel for the lead plaintiff suggested that the witness “attempt to locate the original document by searching through the binders of Arthur Andersen’s work papers that were in the courtroom.”¹⁰⁶ “After

¹⁰⁰ *Id.* at 2672:5-6; *see also id.* at 2666:6-7 (“Shall we believe what you’re saying here or should we believe what you’re saying at your deposition, sir?”).

¹⁰¹ OHLBAUM, *supra* note 84, § 607.06.

¹⁰² *Andersen: WorldCom Was Criticized Early, Report Says*, CHI. TRIB., Apr. 21, 2005, at C-2 [hereinafter *WorldCom Criticized Early*].

¹⁰³ For public access to the lead plaintiff’s analysis of the evidence against Andersen in connection with summary judgment proceedings, including analysis of relevant documents and testimony, see <http://www.worldcomlitigation.com/courtdox/2004-09-17LPMemoInOppAAMotSJ.pdf>.

¹⁰⁴ *WorldCom Criticized Early*, *supra* note 102, at 3-2.

¹⁰⁵ Regina Calcaterra, *Notes from the Trial*, BARRACK, RODOS & BACINE, Apr. 19-21, 2005, http://www.barrack.com/cs=worldcom/trial_notes (last visited Apr. 4, 2008).

¹⁰⁶ *Id.*

several minutes of searching, [the audit partner] returned to the stand and said he did not see the original document in the work papers.”¹⁰⁷

In a prior deposition of the auditor, the undersigned member of lead counsel asked the witness to hold the document with the white-out up to the light to read through the altered, whited-out portion.¹⁰⁸ The missing document seemed to have been doctored in an attempt to hide Andersen’s concerns.¹⁰⁹ During the trial, the video of the prior deposition testimony was played for the jury to impeach the auditor with the contradictory facts.¹¹⁰ The WorldCom jurors watched as the videotape played, they watched as the witness was shown the original document and, at the request of the undersigned, held it up to the light to read a portion that had been whited-out. In contrast to his trial testimony, the witness’s deposition testimony was that the altered portion of the working paper stated that Arthur Andersen was going to recommend that WorldCom restrict its capitalization.¹¹¹ The document as altered suggested otherwise. The alteration of the document, the fact that the document was missing at trial, and the witness’s evasiveness were each emphasized by the simple methods of impeaching by contradiction.

This type of impeachment by contradiction, using acts of concealment to impugn the truthfulness of a witness, is demonstrably effective with jurors. “We thought [the lead plaintiff’s] lawyers were putting on a better case because they had a better case to put on,” a WorldCom juror said in a post-trial statement.¹¹²

C. Delivery of an Opening Statement and a Closing Argument

The proverbial *sin qua non* of a trial lies in the delivery of an opening statement and a closing argument to the jury. Adjudicatory procedure

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *WorldCom Criticized Early*, *supra* note 102, at 3-2.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² David E. Rovella, *Andersen \$65 Million WorldCom Accord Approved by Judge*, BLOOMBERG NEWS, Apr. 26, 2005, ¶ 4 (on file with author).

is just not a trial without these components. Indeed, jury consultants often frame mock trials around the expected opening statement and closing argument, or blend them into what is known in the trade as a “clopensing.”¹¹³

“The purpose of an opening statement is to ‘provide’ background on objective facts while avoiding prejudicial references”¹¹⁴ and “to provide a brief, thumbnail sketch, a general summary of what the case is about.”¹¹⁵ The opening statement is not considered as evidence; counsel is merely outlining the evidence as to what the proof is expected to be.¹¹⁶ “The purpose of an opening statement is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole. It is not an occasion for argument.”¹¹⁷

“The purpose of closing arguments is to assist the jury in analyzing the evidence”¹¹⁸ and “to explain to the jury what it has to decide and what evidence is relevant to its decision.”¹¹⁹ “The purpose of closing argument is persuasion. It is not evidence. It contemplates a liberal freedom of speech and the range of discussion, illustration, and argumentation is wide.”¹²⁰

There is a principle of “primacy” and “recency” that posits a theory whereby jurors “remember[] best what they hear first and last.”¹²¹ Courts

¹¹³ Tara Trask, President and founder of Tara Trask and Associates (<http://www.taratrask.com>), a full service trial consulting practice, explained in an interview: “I generally tell my clients that their presentations for an adversarial focus group should be part opening, part summation.”

¹¹⁴ *United States v. Thomas*, 114 F.3d 228, 247 (D.C. Cir. 1997) (citing *United States v. Small*, 74 F.3d 1276, 1283 (D.C. Cir.), *cert. denied*, 517 U.S. 1229 (1996)).

¹¹⁵ *Morfeld v. Kehm*, 803 F.2d 1452, 1455 n.3 (8th Cir. 1986).

¹¹⁶ *Id.*; see *Brown v. United Missouri Bank, N.A.*, 78 F.3d 382, 387 (8th Cir. 1996).

¹¹⁷ *Testa v. Village of Mundelein, Ill.*, 89 F.3d 443, 446 (7th Cir. 1996) (citing *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring)).

¹¹⁸ *United States v. Hasner*, 340 F.3d 1261, 1275 (11th Cir. 2003) (citing *United States v. Iglesias*, 915 F.2d 1524, 1529 (11th Cir. 1990)).

¹¹⁹ *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2000) (citing *Iglesias*, 915 F.2d at 1529).

¹²⁰ *Moore v. Reynolds*, 153 F.3d 1086, 1100 (10th Cir. 1998).

¹²¹ *Keen v. State*, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258, at *37 (Tenn. Crim. App. June 5, 2006), *cert. denied*, 127 S. Ct. 2250 (2007).

have “recognized the accepted psychological impact of the testimony of witnesses presented first or last under the theory of ‘primacy and recency.’”¹²² Courts have also noted “the primacy and recency factors in psychological behavior and decision” as key considerations in connection with both opening and closing arguments.¹²³ “One can frequently look at argument to understand . . . jury behavior in trial verdicts. The ‘why’ is reflective of the ‘what’ that they were told.”¹²⁴

In practice these considerations lead to the conclusion that the opening statement ought to educate jurors that there will be a closing argument that will review all the evidence for them. In addition, the closing should be structured to be cognizant of the primacy and recency factors in psychological behavior and decision-making. Therefore the plaintiff’s securities fraud closing argument should refer back to the opening, in order to link the jurors’ moments of primacy, and it should be structured with its own moments of primacy and recency in order to maximize its effectiveness. By way of recent excellent example, Stephen R. Basser,¹²⁵ the lead trial counsel on behalf the Policeman’s Annuity and Benefit Fund in the *Apollo Group* trial, effectively mastered these techniques in his delivery of the opening statement and closing argument in that trial.¹²⁶

During the opening statement of the *Apollo* trial, Mr. Basser gave the jurors a thumb-nail sketch of what the securities fraud case was about, explaining that “[defendants] violated the golden rule of the relationship between publicly-traded corporations and their investors to tell the truth, and the whole truth. . . . That is the plaintiff’s case. It’s a case about just, you know, telling the truth. And that’s why we’re here.”¹²⁷

Mr. Basser explained how the various parts of the evidence would be presented, that

¹²² *Dudley v. State*, 951 P.2d 1176, 1180 (Wyo. 1998) (citing *Whiteplume v. State*, 841 P.2d 1332, 1340 (Wyo.1992)).

¹²³ *Stewart v. State*, 724 P.2d 439, 446 n.1 (Wyo. 1986).

¹²⁴ *Id.*

¹²⁵ See text accompanying *supra* note 5.

¹²⁶ See generally Transcript of Record, *supra* note 5, at 240-71, 3836-3924, 4040-66 (noting opening statement, initial closing argument, and rebuttal closing argument).

¹²⁷ *Id.* at 258:5-7, 270:5-6.

this case is not going to go in as neatly and precisely, beginning, middle, and end as an opening statement. It's not going to go in like the TV shows and the movies we watch about lawyers. . . . [T]he evidence is going to come in from witnesses, pieces here, pieces there, pieces here, pieces there. We're going to call witnesses from the company that are hostile to us. We're going to have to get it out of them. We had to go get documents from the company. You are going to see [those] documents.¹²⁸

Mr. Bassler then alerted the jurors that there would be a summation during the closing argument: “[A]t the end of the day, I will make a closing statement, and I will put everything together for you. I will put it all together, the whole picture, from all of the evidence.”¹²⁹ The final thing Mr. Bassler told the jurors in his opening statement was: “I appreciate your time very much. Put on your Sherlock Holmes hats, fasten your seat belts, scrutinize the evidence, scrutinize the evidence, so that you can reach a just conclusion,” inviting them to partake in the mystery-adventure of the trial.¹³⁰

The very first thing Mr. Bassler told the jurors when he commenced his closing argument reminded them of that opening statement, linking recency with primacy thereby:

I told you in the opening statement that this was a case where the evidence was going to go in pieces rather than in a chronological order, as if . . . we were reading a book or somebody was telling a consistent story that flows. Instead, we had to kind of go into the lion's den, have documents that were the defendants' documents that we had to retrieve; witnesses that primarily were defense witnesses. . . . And then at the end, as I explained in the opening statement, I would then make a summation to you which would then put everything together, so to speak, and paint the picture.¹³¹

Mr. Bassler then reminded the jury of what the lead plaintiff's case was about:

This case is all about integrity. It's all about telling the truth when you speak. It's all about when you speak, tell people what's going on, give them

¹²⁸ *Id.* at 270:8-17.

¹²⁹ *Id.* at 270:18-21.

¹³⁰ *Id.* at 270:22-25.

¹³¹ *Id.* at 3837:11-22.

the real, the true, the accurate situation. . . . That's what this case is all about, and what the evidence has showed, what the evidence has showed is that because of this plan to conceal that information, to not paint the full picture when they spoke, they violated the federal securities laws.¹³²

Further utilizing the principles of primacy and recency, Mr. Basser structured the closing argument in the *Apollo Group* trial into two components: an initial closing and a rebuttal closing.¹³³ In this manner, the plaintiff had an opportunity to have the "last word" to the jury before the court issued its instructions.¹³⁴

Finally, Mr. Basser implored the jury: "I ask you to stand for the supremacy of the federal securities laws, the integrity of the market, as my clients have done as the [Chicago] Policeman's Annuity [and] Benefit Fund has done, and I ask that you render a verdict."¹³⁵ After two and a half days of deliberation the jury returned with a unanimous verdict for the lead plaintiff and the class of investors it represented for the full amount of requested damages.¹³⁶

VI. Conclusion

When the foreman of the jury in the *Apollo Group* trial delivered the unanimous verdict, and the Deputy Clerk of the Court read aloud the nineteen page verdict form with the federal seal above the Court overseeing the courtroom,¹³⁷ in that moment when "hearts and minds are blinded

¹³² *Id.* at 3840:16-25.

¹³³ *See id.* at 3836:25-3924:5 (initial closing argument); *id.* at 4040:23-4066:2 (rebuttal closing argument).

¹³⁴ *See, e.g.,* Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1208 (9th Cir. 2002); *accord* Clermont v. State, 704 A.2d 880, 893 (Md. 1998).

¹³⁵ Transcript of Record, *supra* note 5, at 4065:22-25.

¹³⁶ *In re Apollo Group, Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT (D. Ariz. Jan. 30, 2008).

¹³⁷ Verdict forms in securities fraud cases are often lengthy because each element of the claim needs to be set forth with regard to each alleged false and misleading statement, in addition to other special interrogatories that are required by the PSLRA. *See* 15 U.S.C. §§ 78u-4(d) (2000) (defendant's right to written interrogatories), 78u-4(f)(2)(b), 78u-4(f)(3), 78u-4(g)(3) (proportionate liability; determination of responsi-

either by the agony of defeat or ecstasy of a victory,”¹³⁸ in that moment, justice was delivered. While the lead plaintiff agreed with it, and the defendants did not, the American form of justice of the federal securities fraud class action jury trial delivered its result. All counsel present were then bestowed with a complement from the court, one of the highest honors in a legal career:

So I say this to the clients and client representatives. To say that you have been well-represented I think is a gross understatement. You have all been incredibly well-represented. I’ve learned much from all of you and I appreciate that, and it’s really been an honor to preside over this case and a pleasure to have all of you in this courtroom.¹³⁹

Win, lose, or draw, when attorneys bring their integrity to their zealous representation of clients, justice works at its finest.

bility).

¹³⁸ See, e.g., Transcript of Record, *supra* note 5, at 4099:17-19.

¹³⁹ *Id.* at 4101:11-17.

