

Pleading Reform or Unconstitutional Encroachment? An Analysis of the Seventh Amendment Implications of the Private Securities Litigation Reform Act*

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Abstract

The Private Securities Litigation Reform Act of 1995 (PSLRA) is a hurdle for securities fraud litigation intended to weed out at the motion to dismiss phase cases that lack merit. But the PSLRA's protections are not without cost, which is borne by defrauded investors with meritorious claims who nevertheless cannot meet this increased obstacle to pursuing a claim. This Article addresses whether some courts are applying the PSLRA in a way that violates the Seventh Amendment by impeding a plaintiff's ability to present his case to a jury.

The PSLRA's language is problematically vague, which has led to circuit splits on several important points, most significantly the extent to which the PSLRA requires securities fraud plaintiffs to aver detailed facts supporting the rule 10b-5 cause of action element of scienter. The more stringent of these varying interpretations, reflected in decisions in the Ninth and Tenth Circuits, raises Seventh Amendment concerns. The Sixth and Seventh Circuits have acknowledged these concerns without passing on the constitutionality of the dubiously stringent interpretation. This Article endeavors to answer the question posed by these courts, analyzing the intersection of the PSLRA with Seventh Amendment jurisprudence. This Article concludes that the more stringent interpretations of the heightened pleading requirement for scienter violate the Seventh Amendment by usurping the jury's prerogative to resolve disputed questions of material fact and, in particular, the inferences to be drawn from those facts.

I. The Private Securities Litigation Reform Act of 1995

A. Securities Fraud Litigation and Pleading Under the Federal Rules of Civil Procedure

In 1995, Congress enacted the Private Securities Litigation Reform Act (PSLRA)¹ in response to an increasing trend in “strike suits” – securities fraud claims devoid of merit and brought for nuisance or settlement value, typically following a decline in stock price.² Most of these securities fraud claims are pursued under Securities and Exchange Commission (SEC) rule 10b-5.³ This rule generally prohibits false, misleading, or deceitful statements in connection with the purchase or sale of securities.⁴ “In general, a [rule 10b-5 private] securities fraud claim has six elements: (1) a material misrepresentation or omission; (2) scienter; (3) connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.”⁵

Prior to the PSLRA, the pleading of rule 10b-5 claims was governed by Federal Rule of Civil Procedure 9(b), which provides heightened requirements for fraud claims in general.⁶ This is a singular exception to the liberal requirements of the notice-pleading system established by the Federal Rules of Civil Procedure,⁷ which in most cases calls merely for a “short and plain statement of the claim showing that the pleader is entitled to relief.”⁸ Rule 9(b) goes further and places an extra burden on fraud claimants by requiring them to state with particularity the circumstances constituting the alleged fraud.⁹ Although the general purpose of the pleading phase is merely to notify both parties of the claims and defenses at stake,¹⁰ the heightened requirements of Rule 9(b) have been justified as a necessary deterrent to the sort of lightly-made nuisance suits to which fraud allegations lend themselves.¹¹ By 1995, however, the proliferation of rule 10b-5 strike suits suggested to Congress that Rule 9(b) was not functioning as a sufficient deterrent, and the PSLRA was enacted to raise the pleading bar even further for securities fraud private plaintiffs.¹²

B. Raising the Bar at the Pleading Phase

After the PSLRA, it is no longer sufficient for plaintiffs asserting claims under rule 10b-5 to aver “the circumstances constituting fraud ... with particularity.”¹³ Not only was this particularity requirement explicitly strengthened by the PSLRA,¹⁴ but plaintiffs were also required to aver specific facts with regard to the defendants’ scienter:¹⁵

(b) Requirements for securities fraud actions.

- (1) In any private action arising under this title in which the plaintiff alleges that the defendant—
 - (A) made an untrue statement of a material fact; or
 - (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall 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.

- (2) Required state of mind. In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, *state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.*¹⁶

Prior to the PSLRA, the courts of appeal had divergent interpretations of Rule 9(b)'s general requirement for averring scienter¹⁷ in the context of rule 10b-5 claims, with the Second and Ninth Circuits at opposite extremes. There was general agreement that the minimum substantive level of scienter required under rule 10b-5 was recklessness,¹⁸ but the Second Circuit required plaintiffs to plead facts supporting a "strong inference" that defendants possessed the requisite culpability.¹⁹ The Ninth Circuit, conversely, required only conclusory allegations of scienter.²⁰ The Second Circuit further looked to motive and opportunity as indicative of the necessary "strong inference" that defendants had acted recklessly or intentionally.²¹

C. The New Circuit Splits

The PSLRA's heightened pleading requirement for scienter incorporated the words that were used in the Second Circuit's preexisting standard to the extent that a "strong inference" was required, but Congress did not elaborate on what facts would be sufficient to meet the standard.²² As a result, a new circuit split emerged, with the polarized circuits flip-flopped

in their relative stringency. The previously more lenient Ninth Circuit now imposes the most onerous burden on securities fraud plaintiffs, ruling that motive and opportunity, the elements of the pre-PSLRA Second Circuit test, are not sufficient.²³ The Second Circuit has hewed to an approach that is, by comparison, more receptive to sustaining claims at the motion to dismiss stage, by continuing to apply its motive and opportunity test as a sufficient means of establishing scienter under the PSLRA.²⁴

The conflict over the extent to which allegations of motive and opportunity are sufficiently probative of scienter reflects ambiguity that also manifests itself in a separate and more general circuit split regarding the inferences that a court may draw from the facts pleaded in a rule 10b-5 complaint.²⁵ Even though a court must presume all pleaded facts to be true when evaluating the sufficiency of a complaint,²⁶ a court has considerable latitude in evaluating whether those facts actually support the claim. If the facts do not support the necessary elements of the claim, then dismissal under Rule 12(b)(6) is appropriate.²⁷ Plaintiffs and defendants might stipulate to the authenticity of documents or the occurrence of certain events (facts), for example, but dispute what those documents or events establish in terms of the elements of the claim (inferences). A judge has limited discretion at the pleading stage to assess the inferences the plaintiff seeks to draw from the pleaded facts,²⁸ but the ambiguous PSLRA pleading requirements, along with the stated policy goals of the PSLRA, have led some courts to exercise that discretion in a broader fashion than may be constitutionally permissible.²⁹

D. Drawing Inferences and Constitutional Implications

Supreme Court jurisprudence addressing the proper balance between judge and jury has established that “for purposes of the motion to dismiss ... all reasonable inferences that can be drawn from the pleadings *are* drawn in favor of the pleader.”³⁰ The judge’s discretion ordinarily is limited to determining the independent reasonableness of each competing inference, and dismissing a claim only when there are not sufficient facts or *a* reasonable inference from those facts to support each necessary element of the cause of action.³¹ If the allegations are such that “fair-minded men may draw different inferences,” then ultimately it is the duty of the jury – not the judge – to weigh the competing inferences and come to a conclusion.³²

This approach is in direct tension with the Sixth and Ninth Circuits’ interpretations of the PSLRA, under which, at the pleading stage, plaintiffs

are entitled to only the most plausible of competing inferences in support of scienter.³³ These two circuits have held that at the motion to dismiss stage a judge may weigh reasonable competing inferences, any one of which might be drawn by a competent jury, with the potential effect of dismissing a claim that is “reasonably” (but in the judge’s mind less likely than not) supported by the facts alleged. Since questions pertaining to the balance between judge and jury are inherently grounded in the Seventh Amendment right to jury trial,³⁴ this tension may have constitutional implications, raising questions about the propriety of the Sixth and Ninth Circuits’ interpretations of the PSLRA’s pleading requirements.

In *Gompper v. VISX*, for example, the Court of Appeals for the Ninth Circuit began by expressing agreement with the lower court’s determination that the complaint simply did not meet the “strong inference” requirement of the PSLRA.³⁵ In response to the plaintiffs’ expressed concern about whether the courts should be assessing competing inferences at the motion to dismiss stage, the court continued:

To accept plaintiffs’ argument that the court is required to consider only inferences favorable to their position would be to eviscerate the PSLRA’s strong inference requirement by allowing plaintiffs to plead in a vacuum.... Since [an inference urged by plaintiffs from the facts pleaded] is reasonable and warranted, the argument goes, the court should accept it, and refuse to consider any other equally plausible inferences that could be drawn from the same set of facts.³⁶

Finding that the facts pleaded supported “equally if not more plausible” inferences that did *not* support the cause of action, the court rejected the argument that the court should consider only reasonably drawn inferences that support the plaintiffs.³⁷ “[T]he court must consider *all* reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs”³⁸ to determine whether “*on balance*, the plaintiffs’ complaint gives rise to the requisite inference of scienter.”³⁹

Before further addressing the PSLRA intersection with the Seventh Amendment it is necessary to understand the parameters of the Seventh Amendment and how the courts have applied it in the context of pre-trial and some post-trial motions.

II. The Seventh Amendment

The Seventh Amendment to the Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.⁴⁰

The Seventh Amendment receives high praise for its role in protecting fundamental values of our democratic system.⁴¹ Professor Moore described the Seventh Amendment as

a fundamental constitutional right ... held in the highest legal regard as are all of the Bill of Rights. The Supreme Court has stated that the continuation of the jury as a fact finding entity is of such importance and occupies such an established tool in our jurisprudence that any attempt at curtailment of the right to a jury trial should be scrutinized with the utmost care.⁴²

On its face, the Seventh Amendment might lead an aggrieved plaintiff to perceive that he has an inalienable right to present every aspect of his claim to a jury. But the text of the amendment limits the cases to which the jury right extends, and the Supreme Court's evolving Seventh Amendment jurisprudence, spurred by efficiency mechanisms introduced by the Federal Rules of Civil Procedure, has effectively reduced, somewhat, the substantive protection afforded by the amendment, even in cases where it applies.⁴³ Nevertheless, fundamental principles relating to the proper balance between judge and jury remain sacrosanct under the protection of the Seventh Amendment.⁴⁴

A. The Scope of the Seventh Amendment

The right to a jury is preserved only for suits at common law, as distinguished from equity and admiralty.⁴⁵ The distinction between law and equity hinges on the relief sought; historically, courts of law had authority to grant monetary damage awards while courts of equity provided injunctions and specific performance.⁴⁶ As the distinction between law and equity blurred over the past two hundred years, especially after the Federal Rules of Civil Procedure merged the two litigation forms into a single action,⁴⁷ courts looked for historical analogues in classifying modern actions for Seventh Amendment purposes.⁴⁸ In order to determine whether the jury right applies to a particular claim, modern analysis now looks to the nature of the remedy sought as well as the type of court that would

have historically adjudicated the claim.⁴⁹ Today, if a claim seeks, in whole or in part, legal relief – as opposed to an injunction or specific performance – the jury right is preserved.⁵⁰ It makes no difference whether the action is grounded in statutory or common law.⁵¹

B. The Substance of the Guarantee of a Right to a Jury Trial

Even in a *type* of case where the jury right is guaranteed, certain questions that arise in the course of adjudication may be (and in fact should be) answered by the judge.⁵² The judge's limited power in this regard usually does not infringe upon the scope of a litigant's right to have his claim tried by a jury.⁵³

Supreme Court jurisprudence on the allocation of questions between judge and jury may best be described as malleable. Professor Miller has summarized the pivotal issue:

A reasoned and principled approach to this allocative decision is vital to prevent judicial encroachment on the jury's prerogative. That requires understanding the manner by which courts decide whether to take issues from a jury, either by pretrial disposition or at trial. The subject is an important one. Although historically "law" and "fact" were little more than classification labels, they now serve as surrogates for assigning decisionmaking authority as between judges and juries - a matter of constitutional magnitude. Without a framework for analyzing and delineating the respective functions of judges and juries, we risk distortion of our day-in-court principle and jury trial guarantee, and meaningful appellate review becomes difficult, if not impossible. Unfortunately, the subject is frustrating because the jurisprudential canvas is extremely indistinct and, in many respects, blank.⁵⁴

The bright-line rule – which is only the beginning of the analysis – is that questions of fact are for the jury and questions of law for the judge.⁵⁵ For example, a judge must decide the question of law whether strict liability or negligence in a tort action, while a jury must resolve questions of fact relating to the occurrence of disputed events or the veracity of witness testimony.⁵⁶ But the apparent simplicity of the bright-line rule breaks down when it comes to drawing the line between fact and law,⁵⁷ a problem that is exacerbated by the conclusory manner in which some courts

articulate fact/law labels, circularly defining a question as one of law on the ground that it is properly answered by a judge (when in fact, a question is properly answered by a judge *because* it is one of law).⁵⁸

Even when multiple questions are readily classified as law or fact, the outcome of litigation frequently hinges on the *application* of legal standards, which presents mixed questions of fact and law.⁵⁹ If, in the previous example, the judge determined that negligence was the applicable standard, and the jury concluded that the defendant had committed certain acts alleged by the plaintiff, then whether or not those acts were sufficient to satisfy the negligence standard would constitute a mixed question of fact and law.⁶⁰ Judges have traditionally shown as much deference to the jury's resolution of these mixed questions as to questions of pure fact,⁶¹ although the Supreme Court's evolving summary judgment jurisprudence may have encouraged judges to take this sort of question into their own hands more frequently.⁶²

In Seventh Amendment jurisprudence, the mandate that juries must determine all issues of fact is counterbalanced by the equally well established principle that the jury right does not "attempt to regulate matters of pleading or practice ... its aim is not to preserve mere matters of form and procedure, but substance of right."⁶³ The procedural devices of dismissal for failure to state a claim,⁶⁴ summary judgment,⁶⁵ and judgment as a matter of law⁶⁶ serve to expedite adjudication by granting courts authority to bypass the jury in rendering final disposition.⁶⁷ Each of these procedural devices exemplifies "regulation of pleading or practice" not subject to Seventh Amendment restrictions.⁶⁸ Other than timing, the only difference between a motion to dismiss under Rule 12(b)(6) and a motion for summary judgment under Rule 56 or for judgment as a matter of law under Rule 50 is that the *historical facts* alleged in the complaint are presumed true under Rule 12(b)(6), while the veracity of those allegations is tested under Rules 50 and 56.⁶⁹ But inferences and mixed questions of fact and law arising from those alleged facts are subject to the same threshold examination at each phase.

A single, uniform, and consistent principle guides analysis in each of these phases, whether in regard to a question about the merits of a factual allegation on a motion for summary judgment, or the relative likelihood of competing inferences on a motion to dismiss.⁷⁰ That principle is the "reasonable person" or "reasonable jury" standard, a consideration that should permeate any decision to bypass the jury, regardless of when in

the adjudication process that decision is made. At the same time, the permissive exception carved out in Seventh Amendment jurisprudence for procedural mechanisms does not give Congress or the judiciary carte blanche to implement such mechanisms:⁷¹

The Seventh Amendment right to a jury trial generally does not mean that the jury is allowed to decide matters related to procedure or practice. Therefore, even though many procedural mechanisms in litigation may have the effect of limiting or even diminishing the jury's choices, they are constitutionally permissible, provided that the court adheres to the standard specified in the Federal Rules of Civil Procedure and formed by court decisions that limit authority of the court to encroach on the province of the jury.⁷²

These devices bypass the jury in a *constitutionally permissible manner* because their implementation is strictly predicated upon the absence of any disputed questions in the jury's domain.⁷³ Although these principles are well established, their constitutional underpinnings have not been clearly articulated by the Supreme Court. Nevertheless, the Court's analysis of similar procedural mechanisms, such as summary judgment and judgment as a matter of law, is instructive. For example, the prescriptions for judgment as a matter of law are constitutionally grounded, as explained by Professor Moore:

To avoid a constitutional challenge related to Rule 50, the trial court must view the evidence most favorably towards the non-moving party and must find that there is only one reasonable conclusion as to the proper verdict. When the trial court usurps the jury's function by weighing the credibility of witnesses or considering the evidence in a light favorable to the movant, the entry of judgment under Rule 50(a) or (b) constitutes an improper denial of the non-moving party's right to a jury trial under the Seventh Amendment.⁷⁴

When examined in light of general principles of the Seventh Amendment, the constitutional basis for the prescribed boundaries of these analogous mechanisms appears eminently extendable to Rule 12(b)(6) doctrine. Of course, as described above,⁷⁵ there is often much disagreement over whether such disputed questions exist that must be submitted to the jury. The provision of the PSLRA addressed in this Article purports only to regulate pleading, but it does so by imposing more demanding requirements to plead facts, thereby expanding the use of Rule 12(b)(6) to dis-

pose of cases at the pleading phase.⁷⁶ If the heightened pleading requirements of the PSLRA lead courts to weigh and then resolve issues that properly belong to the jury, then either the statute fails to regulate “pleading or practice” in a constitutionally permissible manner or, at the very least, the courts are applying the statute in a constitutionally impermissible manner.⁷⁷

III. The PSLRA’s Intersection with Seventh Amendment Jurisprudence

A. Background

Although much ink has been spilled over the circuit splits resulting from the ambiguity of the PSLRA’s pleading requirements,⁷⁸ remarkably little attention has been paid to the potential Seventh Amendment implications.⁷⁹ In *City of Monroe Employees Retirement System v. Bridgestone Corp.*,⁸⁰ the Sixth Circuit recently noted that its interpretation of the pleading requirements, which does not entitle the plaintiff to all reasonable inferences, may infringe on the jury right:

[T]he Seventh Amendment to the Constitution provides that “the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” Traditionally, there has been a right to jury trial for securities fraud claims. The Reform Act compels dismissal unless the facts pleaded in the Complaint produce a “strong inference that the defendant acted” with scienter. One might argue that for cases where a juror could conclude that the facts pleaded showed scienter, but that conclusion would not be the most plausible of competing inferences, a Seventh Amendment Problem is presented.⁸¹

The *Monroe* court, however, did not provide any deeper analysis because the constitutional issue had not been raised by the parties.⁸² In *Makor Issues & Rights, Limited. v. Tellabs, Inc.* (which the Supreme Court will hear this term),⁸³ the Seventh Circuit echoed the Sixth Circuit’s constitutional concerns also without passing on the issue or providing significant analysis:

While we express no view on whether the Sixth Circuit’s approach is in fact unconstitutional, we think it wiser to adopt an approach that cannot be misunderstood as a usurpation of the jury’s role. In-

stead of accepting only the most plausible of competing inferences as sufficient at the pleading stage, we will allow the complaint to survive if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent.⁸⁴

No other cases have been found in which a court of appeals has commented on the potential for Seventh Amendment implications in interpreting the PSLRA's pleading requirements.

B. Sources of Confusion

Seventh Amendment jurisprudence speaks clearly in terms of the fact/law dichotomy in articulating the line between judge and jury questions,⁸⁵ while affirming the constitutionality of mechanisms properly implemented to regulate practice and procedure.⁸⁶ Three aspects of a dismissal under Rule 12(b)(6), the procedural mechanism invoked when securities fraud plaintiffs fail to meet the PSLRA's heightened pleading requirements for scienter,⁸⁷ may obfuscate the potential for Seventh Amendment implications in this context.

First, because Rule 12(b)(6) is a procedural mechanism that regulates the pleading phase, there may be a tendency to view application of the rule at the threshold stage of a case as immune from Seventh Amendment challenges or even implications.⁸⁸ Second, the Supreme Court's direct pronouncements on the constitutional implications of judicial usurpation of the jury's role in drawing inferences have not come in the specific context of the motion to dismiss for failure to state a claim under Rule 12(b)(6).⁸⁹ Third, no factual determinations are to be made at the pleading phase since all historical *facts* alleged by the plaintiff are presumed true at that phase.⁹⁰

These reasons may explain why some courts have perceived the PSLRA's pleading requirements as authority effectively to ignore the general rules⁹¹ that "for purposes of the motion to dismiss ... *all* reasonable *inferences* that can be drawn from the pleadings are drawn in favor of the pleader"⁹² and that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁹³ If these principles are grounded in the Seventh Amendment jury right, as this Article posits, then regardless of congressional intent, no statute may be interpreted or applied in a manner that contradicts them.⁹⁴

C. Clarifying the Confusion

Procedural mechanisms that permit bypass of the jury have always been limited to cases with no disputed questions that belong to the jury.⁹⁵ The PSLRA therefore raises constitutional concerns if it results in the use of Rule 12(b)(6) to resolve an arguably disputed issue of fact in conjunction with applying the appropriate legal standard that should be addressed by the jury. In analyzing the PSLRA's intersection with Seventh Amendment jurisprudence, the question then becomes how to ascertain when there is a question pertaining to scienter that the jury should decide. The answer lies in the relationship among questions of fact, mixed questions of fact and law, and inferences. The nebulous fact/law dichotomy,⁹⁶ including the grey area of mixed questions,⁹⁷ has already been described. The Tenth Circuit has noted the relationship between inferences and the fact finding process in general:

Faced with two seemingly equally strong inferences, one favoring the plaintiff and one favoring the defendant, it is inappropriate for us to make a determination as to which inference will ultimately prevail, lest we invade the traditional role of the factfinder.⁹⁸

An inference may be thought of as the answer to a mixed question of fact and law, which involves applying legal principles or standards to facts.⁹⁹ An inference is the glue that holds the two together, requiring inductive, as opposed to deductive, reasoning¹⁰⁰ – that is, a leap of sorts, based on external supporting knowledge or mere intuition.¹⁰¹ An inference is the answer to the question “What does this fact mean (in the context of the case)?”. These characteristics are what make inferences inherently suited for jury determination.¹⁰²

D. Analysis

Since securities fraud claims seek legal, as opposed to equitable, relief, the Seventh Amendment right to a jury attaches to rule 10b-5 actions and the implementation of the PSLRA must consequently comport with the substantive guarantees provided by the Seventh Amendment.¹⁰³ Because failure to meet the pleading requirements results in loss of any opportunity to present one's case to a jury through dismissal for failure to state a claim,¹⁰⁴ the PSLRA's potential to infringe on the right to jury trial depends on characterization of the requirements.¹⁰⁵ If the PSLRA does nothing more than require plaintiffs to adduce additional facts in its com-

plaint when the existence of questions within the jury's domain is not apparent at the pleading phase, then the PSLRA functions as a constitutionally permissible regulation of pleading or practice.¹⁰⁶ But if judges use the PSLRA to dismiss cases even when there are questions that are properly within the province of the jury, then the procedural device is implemented in a constitutionally impermissible manner.¹⁰⁷ Specifically, if the court engages in drawing inferences at the pleading phase, it can usurp questions from the jury because the jury's role as fact finder often extends beyond pure questions of fact to mixed questions of fact and law.¹⁰⁸ Even though all facts averred in a complaint are presumed true at the pleading phase, in deciding a motion to dismiss a court may nevertheless infringe on a plaintiff's jury right by improperly drawing inferences from those facts in order to reach dispositive conclusions about determinative mixed questions of fact and law.¹⁰⁹

Scienter is a quintessential mixed question of fact and law belonging in the jury's domain.¹¹⁰ Therefore, a disputed issue of material fact exists whenever a reasonable jury could conclude that a defendant acted recklessly or intentionally based on the facts alleged in the complaint.¹¹¹ This assertion is widely supported by the federal courts of appeal, as illustrated in *Croley v. Matson Navigation Co.*,¹¹² which emphasizes the jury's role in making state of mind determinations:

Knowledge on the part of the company can be proved only by showing the state of mind of its employees. The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.¹¹³

These observations, written in the context of a review of a summary judgment, are no less pertinent at the pleading phase.¹¹⁴ The purpose of the pleading phase has already been discussed,¹¹⁵ and the issue on a motion to dismiss is "whether a claim is so specious that the plaintiff should not be entitled to offer evidence to support it,"¹¹⁶ a question antecedent to factual disputes. As a mixed question of fact and law, scienter is ultimately answered by inferences drawn from facts,¹¹⁷ whose veracity is either presumed (at the Rule 12(b)(6) phase)¹¹⁸ or determined on the basis of the

testimony and evidence provided (at the trial, Rule 50, or Rule 56 phase).¹¹⁹ Since inferences provide an answer to the question of scienter, if two or more conflicting inferences appear reasonable at the pleading phase, then two or more reasonable outcomes must exist, and it cannot “appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹²⁰

By taking it upon themselves to balance reasonable competing inferences in determining scienter, the Sixth and Ninth Circuits have effectively made scienter a matter of law in making decisions on motions to dismiss (even though dismissal under Rule 12(b)(6) for failure to meet the heightened pleading requirements does not constitute a finding of the defendant’s actual level of scienter). This is inappropriate because: (1) it is contrary to historical tradition, a factor relevant in Seventh Amendment analysis;¹²¹ (2) scienter does not fit within the established definition of question of law;¹²² and (3) established doctrine prohibits judges from answering even pure questions of law when those questions are intertwined with the merits of the case.¹²³

1. Tradition

Having established the level of deference that state of mind determinations, in securities fraud claims and in general, historically receive as mixed questions of fact and law belonging to the jury,¹²⁴ it is useful to compare a securities fraud action under rule 10b-5 to a negligence action in tort. Each type of claim involves an element of culpability that is customarily resolved by the jury.

Tort law jurisprudence preserving the issue of negligence for the jury is voluminous,¹²⁵ and echoes many of the principles and policy considerations espoused by this Article.¹²⁶ Most tort law analysis in this context involves motions for summary judgment (which are rarely appropriate in negligence claims),¹²⁷ but is nevertheless pertinent to this analysis because of the practical equivalence of the principles underlying Rules 12(b)(6), 50, and 56 in relation to the scope of the Seventh Amendment for the limited purposes of questions addressed in this Article.¹²⁸

In a negligence claim, it is appropriate to bypass the jury through summary judgment only when an undisputed issue of fact negates a claim, such as the non-existence of a purported master/servant relationship that was grounds for bringing suit against a defendant,¹²⁹ or a showing that the plaintiff does not fall within the protected class of a statute upon

which his right of action was based.¹³⁰ Absent such dispositive issues that are properly decided by the court, negligence must be decided by a jury because “even when the facts are undisputed ... reasonable men could reach different conclusions and inferences from those facts.”¹³¹

Similar logic prevails in allocating state of mind questions in securities fraud actions. Where a Rule 10b-5 claim has not been negated by an affirmative defense, historical tradition dictates that the issue of scienter belongs to the jury and may not be decided as a matter of law.¹³²

2. Definition of Question of Law

The importance of allocating questions between judge and jury based on reasoned analysis of the qualities and characteristics of each question, instead of mere conclusory fact/law labels, has already been discussed.¹³³ Professor Miller defines questions of law as those that “involve[] the resolution of principles generally applicable to a class of cases.”¹³⁴ Questions of fact have been defined by Professor Kirgis as those requiring “inductive inferences about the transactions or occurrences in dispute.”¹³⁵

Scienter is unique to each defendant and a determination in one circumstance will be of little or no probative value in other securities fraud claims because no two sets of facts and allegations are identical. As an example, a defendant’s sale of stock prior to a significant drop in share price may be suspicious enough to support a strong inference of scienter.¹³⁶ While there are general criteria for evaluating whether a securities transaction can give rise to an inference of scienter,¹³⁷ the facts pleaded in each case must be examined to determine if the plaintiff has satisfied the burden of pleading a “strong inference” of scienter.¹³⁸ If two defendants each sold the same amount of stock one week before the share price plunged, it could be determined that one defendant had merely been engaging in routine portfolio diversification while the other’s actions were suspicious enough to support a strong inference of scienter.¹³⁹ To make this determination, a host of relevant factors may be considered, including the amount of stock sold, both in terms of gross value and as a percentage of the defendant’s total holdings;¹⁴⁰ the defendant’s established investment patterns;¹⁴¹ and the ratio between the defendant’s profits from the sale of stock and the defendant’s regular salary.¹⁴²

Since every human act or series of related acts arguably is unique to the circumstances presented, it is apparent why the question of reasonableness of conduct has been left to the ad hoc determination of juries.¹⁴³

Because of its idiosyncratic nature, scienter is manifestly not within the definition of question of law put forth by Professor Miller. Instead, scienter falls within Professor Kirgis' definition of question of fact, which includes all questions "requir[ing] inductive inferences about the transactions or occurrences in dispute."¹⁴⁴

As courts struggling to apply the doctrine of claim preclusion can attest, precisely delineating the transactions or occurrences in dispute can be difficult. But some guidelines exist. The transactions or occurrences in dispute always have a more or less direct logical connection to the parties. *They include the conduct, condition, and mental states of the parties themselves, plus any other events or conditions, including conduct and mental states of other people, having a causal, spatial, or temporal connection to the conduct, condition, and mental states of the parties.*¹⁴⁵

This definition conflates questions of fact and mixed questions of fact and law by encompassing both. But this does not belie their distinct nature.¹⁴⁶ Since this definition arises in the context of ascertaining the proper balance between judge and jury, it merely supports the proposition that courts are required to treat certain mixed questions (like scienter) as differentially as pure questions of fact.¹⁴⁷

3. Intertwined with the Merits Doctrine

A final argument against deciding scienter as a matter of law at the pleading stage may be found in the treatment of otherwise pure questions of law that are intertwined or enmeshed with the merits of a case. For example, Rule 12(b)(1) allows dismissal for lack of subject matter jurisdiction,¹⁴⁸ but the courts of appeal have adopted an exception that prohibits dismissal when jurisdictional facts are "enmeshed" with the merits of a case.¹⁴⁹ This exception evolved from two early Supreme Court decisions pre-dating the Federal Rules of Civil Procedure that "suggested that a court could not usurp the role of the jury and decide the merits of a case under the rubric of determining jurisdiction."¹⁵⁰ One of those cases was a tort action brought in federal court on the basis of diversity.¹⁵¹ Even though the amount in controversy is a jurisdictional question in diversity suits, the Court ruled that the disputed amount in controversy was for the jury to decide because it was intertwined with the merits of the case and "in no case is it permissible for the court to substitute itself for the ju-

ry.”¹⁵² This doctrine has evolved into the “intertwined with the merits” exception to Rule 12(b)(1):

Where ... the constitutional right to a trial by jury attaches to a plaintiff’s claim, the only way that Rule 12(b)(1) does not limit the right to a trial by jury is if it is interpreted to apply only to purely jurisdictional facts - that is, those facts that are not intertwined with the merits of the claim. Thus, the “intertwined with the merits” exception to Rule 12(b)(1) is necessary to preserve the plaintiff’s right to a jury trial on any issue involving the merits of the case. Allowing a judge to decide issues that are intertwined with the merits of a plaintiff’s case infringes upon the plaintiff’s right to a trial by jury.¹⁵³

If it is inappropriate for a court to decide what would otherwise be a *pure question of law* such as jurisdiction when the question is “enmeshed” or “intertwined” with the merits of the case, then it cannot be appropriate for a court to do so with scienter – a mixed question of law and fact that is inherently intertwined with the merits, and which both history¹⁵⁴ and qualitative definition¹⁵⁵ relegate to the jury.

IV. Constitutional Avoidance

This Article has established a viable constitutional basis for drawing all reasonable inferences in favor of the plaintiff on a Rule 12(b)(6) motion. Valid competing arguments have been acknowledged and addressed¹⁵⁶ in reaching the conclusion that the Seventh Amendment prohibits courts from weighing reasonable inferences at the pleading phase, and that a court’s discretion is limited to discounting only those inferences which no reasonable jury could reach.¹⁵⁷ This Article has established the existence of legitimate constitutional concerns raised by the Sixth and Ninth Circuits’ interpretation of the PSLRA’s pleading requirements.¹⁵⁸

As the Supreme Court stated in *Jones v. United States*,¹⁵⁹ “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”¹⁶⁰ *Jones* is an example of the Court erring on the side of caution, against infringing on the province of the jury in the criminal context.¹⁶¹ The doctrine of constitutional avoidance is well established in civil actions as well,¹⁶² and thus precludes adopting the approach of the Sixth and Ninth Circuits in interpreting the PSLRA pleading requirements.

The constitutionally untenable conclusions of the Sixth and Ninth Circuits were reached, in part, to avoid nullifying congressional intent, as the courts expressed concern that any less stringent interpretation would fail to “raise the bar” at the pleading phase enough to effectively discourage non-meritorious securities fraud claims.¹⁶³ In so doing, those courts overstepped constitutional bounds.

V. Conclusion

Proponents of the more stringent interpretation of the pleading requirements, where the court weighs competing inferences at the pleading stage, argue that anything less would nullify congressional intent and the purpose of the PSLRA.¹⁶⁴ Even if this was the intent of Congress when it enacted the PSLRA, congressional intent is irrelevant if a statute violates the Constitution,¹⁶⁵ in this situation by depriving a litigant of a constitutional right.

The PSLRA undoubtedly bears a reading that substantively raises the bar for plaintiffs at the pleading phase, even under the relatively liberal interpretation of the pleading requirements supported by this Article that comport with established interpretations of Rule 12(b)(6). Under this interpretation, which maintains the jury’s role in weighing all *reasonable* inferences and entirely avoids constitutional concerns, more specificity may be required in a complaint that would have sufficed before the PSLRA under Rule 9(b) alone. The plaintiff must go further by alleging specific *facts* to support scienter;¹⁶⁶ for example, the existence of memoranda or e-mails indicating the defendant’s culpability.¹⁶⁷

This requirement effectuates the purpose of the PSLRA by making it more difficult than it was under the Rule 9(b) regime for non-meritorious claims to survive the pleading phase. Recall that under Rule 9(b), “[m]alice, intent, knowledge, and other condition of mind of a person [could] be averred generally”; particular factual allegations were required only to support “the circumstances constituting fraud.”¹⁶⁸ The PSLRA extends the particularity requirements beyond the factual circumstances of the alleged fraud to scienter as well.¹⁶⁹

Courts may disagree on the inferences that may properly be drawn from the facts. Under the more stringent interpretation of the PSLRA’s pleading requirements imposed by the Sixth and Ninth Circuits, averring facts about memoranda or e-mails might not be sufficient to survive a motion to dismiss, if the language in the documents is ambiguous or subject to multiple interpretations (even if a reasonable jury could reach an

interpretation that favors the plaintiff).¹⁷⁰ Under the standards articulated by these circuits, the plaintiff's claim would be vulnerable to dismissal unless the documents indicated the defendant's culpability with near certainty, or at least strongly enough that the judge did not find any alternative interpretation more plausible.¹⁷¹

This stringent interpretation is based on the textualist argument that the "strong inference" qualifier requires courts to balance competing inferences against one another because "strong" is a relative term that has no meaning without a source of comparison.¹⁷² Although it is true that relative terms like "strong" have no meaning without context,¹⁷³ it is not necessary to look for competing reasonable inferences to provide a basis for comparison. An equally valid interpretation is that the inference of scienter must be "strong" relative to what was required prior to the PSLRA.¹⁷⁴ Such a strong inference can be established by allegations of *specific facts* – most likely more than would have been required to be set forth in the complaint prior to the PSLRA – from which a reasonable jury could conclude, i.e., *infer*, that a defendant acted with requisite scienter. Therefore, in order for a court to comply with the PSLRA it is not necessary to infringe on the jury's domain by balancing competing *reasonable* inferences. Thus, this Article supports the analysis in *Greebel* that "Congress has effectively mandated a special standard for measuring whether allegations of scienter survive a motion to dismiss. While under Rule 12(b)(6) all inferences must be drawn in plaintiffs' favor, inferences of scienter do not survive if they are merely reasonable..... Rather, inferences of scienter survive a motion to dismiss only if they are both reasonable and 'strong' inferences."¹⁷⁵

At a fundamental level, the scienter pleading standards adopted by the Sixth and Ninth Circuits may suffer from nothing more than a semantic deficiency. The argument is whether in evaluating the sufficiency of a complaint, a court's discretion is limited to evaluating the independent reasonableness of each inference that might be drawn from the pleaded facts, and then dismissing if no single "strong" inference that would support the claim could possibly be drawn by a reasonable jury, or if discretion extends to balancing all competing "reasonable" inferences and dismissing if the inferences that would support the claim appear less likely than opposing inferences. This Article argues in favor of the former, and that the latter interpretation violates the Seventh Amendment.

This important distinction may have little practical effect on the outcome of litigation, since either determination is solely at the judge's discretion so

that a decision to dismiss often can easily be recast in either form. The Ninth Circuit might have concluded in *Gompper*, for example, that no reasonable jury could have possibly inferred scienter from the defendant's pattern of patent litigation. Had such language been used in *Gompper*, then no constitutional questions would have been raised. But the *Gompper* court instead acknowledged the reasonableness of competing inferences that could be drawn from the pleaded facts, and took it upon itself to determine the most likely. In doing so, the court made a dispositive determination about a mixed question of fact and law – scienter – that is firmly in the jury's proper domain. Under the guise of regulating practice and procedure, this sort of judicial determination, although not of pure historical fact, nevertheless usurps a fundamental jury role and eviscerates protections guaranteed by the Seventh Amendment.

Requiring judges to frame their justifications for dismissal in terms of the reasonable jury standard rather than in terms of the relative probability of competing inferences may affect only the language used in decisions and not whether a particular securities fraud claim will survive a Rule 12(b)(6) motion. Nevertheless, requiring adherence to the constraints of the Seventh Amendment will bring the courts of appeal into harmony while affirming both the strength of our Constitution and the sanctity of the jury.

NOTES

* This article grew out of directed research conducted by author Sean Siekkinen under the supervision of Professor Allan Horwich. After completion of a final draft by Mr. Siekkinen as part of the directed research program, the co-authors entered into a full collaboration to complete the Article for submission for publication. Unless otherwise noted, the Article speaks as of December 1, 2006.

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¹ Pub. L. No. 104-67, 109 Stat. 737 (1995).

² See Black's Law Dictionary 1475 (8th ed. 2004) (defining "strike suit"); Michael A. Perino, Securities Litigation After the Reform Act 1019 (2006) (discussing Congressional intent to address strike suits).

³ 17 C.F.R. § 240.10b-5 (2006), promulgated pursuant to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2000).

⁴ *Id.* The private right of action under rule 10b-5 is a creation of the courts, which have for the most part determined its parameters. See 9 Louis Loss & Joel Seligman, Securities Regulation 4311-38 (3d ed. rev. 2004) (discussing the evolution of implied rights of action under the Securities Exchange Act of 1934); *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404

U.S. 6, 13 n.9 (“It is now established that a private right of actions is implied under § 10(b).”). While the PSLRA itself makes no specific reference to rule 10b-5, those parts of the statute that amended the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a – 78mm (2000 & Supp. III)) were expressly designed in large measure to address private causes of action under rule 10b-5. H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

⁵ *Ezra Charitable Trust v. Tyco Int’l, Ltd.*, 466 F.3d 1, 6 (1st Cir. 2006).

⁶ “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” Fed. R. Civ. P. 9(b).

⁷ *See Swierkiewicz v. Sorema*, 534 U.S. 506, 513 (2002) (describing Rule 9(b) as a limited exception to the general simplified pleading standard articulated by Rule 8(a)).

⁸ Fed. R. Civ. P. 8(a)(2).

⁹ Fed. R. Civ. P. 9(b). *See generally* 1 James Wm. Moore, Allan D. Vestal & Philip B. Kurland, *Moore’s Manual: Federal Practice & Procedure* § 9.11[2][b][i] (2006).

¹⁰ 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1182 (3d ed. 2004) (“the function of a pleading in federal practice is to inform the opposing party and the court of the nature of the claims and defenses being asserted by the pleader and, in case of an affirmative pleading, the relief being demanded”). *See also Sorema*, 534 U.S. at 515 (“Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits.”).

¹¹ *See* 5A Wright & Miller, *supra* note 10, § 1296. (offering six justifications for heightened pleading requirements for fraud: (1) “to safeguard potential defendants from lightly made claims charging the commission of acts that involve some degree of moral turpitude . . . by impart[ing] a note of seriousness and encourage[ing] a greater degree of pre-institution investigation by the plaintiff”; (2) to weed out “allegations of fraud or mistake [which] are advanced only for their nuisance or settlement value and with little hope that they will be successful on the merits”; (3) to “show whether the alleged injustice is severe enough to warrant the risks and difficulties inherent in a re-examination of old and settled matters”; (4) to “deter the filing of suits solely for discovery purposes”; (5) to provide defendants with a “substantial amount of particularized information about the plaintiff’s claim in order to . . . prepare a responsive pleading and an overall defense”; and (6) to provide the careful scrutiny necessary because “claims of this type often form the basis for ‘strike suits’”).

¹² The PSLRA-imposed heightened pleading standard, which applies only to private suits, was one of several procedural changes implemented by the PSLRA for the purpose of reducing strike suits. *See Perino, supra* note 2, at 1023-28 (discussing the PSLRA’s provisions for: case organization requirements; pleading and proof requirements; mandatory discovery stay; damages; sanctions; safe harbor for forward-looking statements; and class action procedures). This Article focuses exclusively on the pleading requirements, particularly with regard to scienter.

¹³ Fed. R. Civ. P. 9(b).

¹⁴ Michael B. Dunn, Note, *Pleading Scienter After the Private Securities Litigation Reform Act: Or, A Textualist Revenge*, 84 Cornell L. Rev. 193, 200 n.32 (1998).

¹⁵ *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 & n.12 (1976) (establishing that scienter is a necessary element in a cause of action under rule 10b-5).

¹⁶ 15 U.S.C. § 78u-4(b)(1)-(2) (2000) (emphasis added). The required stated of mind referred to is scienter. *See supra* text accompanying note 5.

¹⁷ “Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” Fed. R. Civ. P. 9(b).

¹⁸ It is generally agreed that the PSLRA did not change the substantive scienter requirement, and that securities fraud plaintiffs must still plead and prove at least recklessness on the defen-

dants' part. *See* Dunn, *supra* note 14, at 239-47. However, some ambiguity exists in the Ninth Circuit. *See id.* at 231-36 (discussing *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (coining the phrase "deliberate recklessness")). For the purposes of this Article, recklessness is presumed to be a sufficient level of scienter to state a cause of action under rule 10b-5 after the PSLRA.

¹⁹ *See In re Time Warner, Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993).

²⁰ *See In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1545-47 (9th Cir. 1994).

²¹ *See Time Warner*, 9 F.3d at 269 (establishing motive and opportunity test); *Shields v. Cititrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994) (defining motive and opportunity).

²² *See* David F. Herr, *Annotated Manual for Complex Litigation* § 31.32 (4th ed. 2006) ("Although the PSLRA incorporated language from Second Circuit jurisprudence requiring the plaintiff to allege with particularity all 'facts giving rise to a strong inference that the defendant acted with the required state of mind,' Congress declined to expressly codify the Second Circuit standard. Nor did Congress define the 'required state of mind' or change the scienter plaintiffs must prove."); Dunn, *supra* note 14, at 217 (discussing the PSLRA's legislative history, and explaining why "the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness") (quoting H.R. Conf. Rep. No. 104-369, at 48 n.23 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 747 n.23).

²³ *See* Ann Morales Olazabal, *The Search for "Middle Ground": Towards a Harmonized Interpretation of the Private Securities Litigation Reform Act's New Pleading Standard*, 6 *Stan. J.L. Bus. & Fin.* 153, 167-74 (2001) (discussing the three-way circuit split that has developed, with the Second and Ninth Circuits' standards at opposite extremes, and several circuits taking a middle ground by adopting a standard that looks to motive and opportunity as probative, but not necessarily sufficient, in establishing a strong inference of scienter).

²⁴ *See id.*

²⁵ *See infra* text accompanying notes 26-39.

²⁶ *See* 5B Wright & Miller, *supra* note 10, § 1357 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

²⁷ *See* 15 U.S.C. § 78u-4(b)(3)(A) (2000) ("the court shall, on the motion of any defendant, dismiss the complaint if the [pleading] requirements ... are not met"). Fed. R. Civ. P. 12(b)(6) provides that a defendant may move to dismiss a complaint prior to answering on the ground that the complaint "fail[s] to state a claim upon which relief can be granted."

²⁸ *See* 5B Wright & Miller, *supra* note 10, § 1357 (stating that "for purposes of the motion to dismiss ... all reasonable inferences that can be drawn from the pleadings are drawn in favor of the pleader," which requires judicial discretion in determining which inferences are "reasonable" and which are not) (citing dozens of Supreme Court and federal appellate decisions).

²⁹ *See* discussion *infra* Part III.

³⁰ 5B Wright & Miller, *supra* note 10, § 1357 (emphasis added). *See also* 1 Moore et al., *supra* note 9, § 11.24[1] (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)).

³¹ *See* Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 *Ohio St. L.J.* 1125, 1152 (2003) ("[T]he Seventh Amendment 'requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them ...' [But w]here the evidence supporting a proposition is overwhelming, or ... there is no evidence for a proposition, a jury decision would add nothing; by definition, a question about such a proposition could be answered only one way.") (quoting *Galloway v. United States*, 319 U.S. 372, 396 (1943)).

³² *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

^{33.} *Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002) (concluding that although plaintiffs' allegations of aggressive patent litigation by the defendants could indicate that defendants knew their patents were invalid and establish scienter, the "more plausible" inference was that defendants believed their patents were valid); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 553 (6th Cir. 2001) (en banc) (stating that "the 'strong inference' requirement means that plaintiffs are entitled only to the most plausible of competing inferences," but finding that plaintiffs had met the pleading requirements for scienter even under the stringent interpretation).

^{34.} See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U.L. Rev. 982, 1075-76 (2003) (stating that "pretrial disposition does not raise questions of constitutional dimensions" when no genuine issue of material fact exists, and consequently that "the question of when a court may determine a case before trial 'as a matter of law' has taken on greater significance - one that reaches some of our system's most cherished traditions") (emphasis added).

^{35.} 298 F.3d at 896.

^{36.} *Id.* at 896-97.

^{37.} *Id.* at 897.

^{38.} *Id.*

^{39.} *Id.* (emphasis added).

^{40.} U.S. Const. amend. VII.

^{41.} See Miller, *supra* note 34, at 1077 ("[Jury trial] has been revered as a method of establishing the truth and as a safeguard against both the imposition of a morality by the elite and a tyranny of the state. The essential values of jury trial have been the secret deliberations and the rendering of relatively impartial decisions by a group of citizens representing society rather than deferring to the opinions, reasoning, and conclusions of a single judge.") (internal citations omitted). See also *Sioux City & P. Ry. Co. v. Stout*, 84 U.S. 657, 664 (1873) ("It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.").

^{42.} 3 Moore et al., *supra* note 9, § 22.01[1] (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) and several federal district and appellate court decisions).

^{43.} See Paul W. Mollica, Federal Summary Judgment at High Tide, 84 Marq. L. Rev. 141, 218 (2000) (concluding that the Supreme Court's recent summary judgment jurisprudence has affected the jury right, possibly to the point of constitutional concern); Margaret L. Moses, What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence, 68 Geo. Wash. L. Rev. 183, 183 (2000) ("the parameters of the jury trial right have changed over time, generally, although not exclusively, in the direction of restricting the jury's role").

^{44.} See Mollica, *supra* note 43 at 203-04 ("[T]he Seventh Amendment limits summary judgment in much the same way as due process: by constitutionalizing a procedure (a jury trial) that must be extended to any civil litigants presenting a contested issue of an outcome-determinative fact."); Fed. R. Civ. P. 38(a) (explicitly affirming the sanctity of the Seventh Amendment jury right in the context of the Federal Rules of Civil Procedure).

^{45.} See *Parsons v. Bedord*, 28 U.S. 433, 447 (1830) ("In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.").

^{46.} See Black's Law Dictionary 1320 (8th ed. 2004) (defining "equitable remedy").

^{47.} See Miller, *supra* note 34, at 1078.

⁴⁸ See *Moses*, supra note 43, at 187-98 (discussing the emergence and evolution of the historical test).

⁴⁹ See *Dairy Queen v. Wood*, 369 U.S. 469 (1963) (upholding jury right for legal claim even though it would have historically been heard in equity). The action in question in *Dairy Queen* arose out of a trademark licensing controversy. Respondent sought an accounting in order to quantify damages, and the district court subsequently denied petitioner's request for jury trial on grounds that accounting claims were historically decided by the court. The Third Circuit affirmed the district court's decision, but the Supreme Court overruled, stating that "[w]here both legal and equitable issues are presented in a single case, only under the most imperative circumstances can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Id.* at 472-73. See also *Tull v. United States*, 481 U.S. 412, 417-18 (1987) ("First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second we examine the remedy sought and determine whether it is legal or equitable in nature.").

⁵⁰ See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (upholding jury right for legal issues intertwined with equitable issues).

⁵¹ See *Curtis v. Loether*, 415 U.S. 189, 193-94 (1974). Application of the Seventh Amendment to statutory claims has the anomalous effect of prohibiting Congress from restricting the right to trial by jury in private rights of action that Congress is nonetheless free to abolish entirely.

⁵² See *Kirgis*, supra note 31, at 1147-50 (defining three basic types of questions falling within the court's exclusive authority).

⁵³ See *Kirgis*, supra note 31, at 1152 ("courts have consistently held that judges may make ... decisions [about certain questions] without violating the Seventh Amendment") (citing *Galloway v. United States*, 319 U.S. 372 (1943)).

⁵⁴ *Miller*, supra note 34, at 1082 (citing Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal. L. Rev. 1867, 1867-68 (1966)).

⁵⁵ See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958) (stating that "under the influence – if not the command – of the Seventh Amendment," questions of fact are assigned to the jury); *Walker v. New Mexico & So. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897) ("[The Seventh Amendment] requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."); *Ex Parte Peterson*, 253 U.S. 300, 310 (1920) ("The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."); *Gasoline Prods. Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931) ("All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law."); *Moses*, supra note 37, at 200 ("The substance that must be preserved, therefore, is the jury's role as finder of fact.").

Modern Supreme Court jurisprudence has taken some fact-based questions, such as patent construction and the amount of civil penalties, away from the jury. See *Markman v. Westview Instruments*, 517 U.S. 370 (1996) (reserving questions of patent interpretation for the court on grounds of capability and expertise); *Tull v. United States*, 481 U.S. 412 (1987) (equating amount of civil penalties to criminal sentencing ranges, and concluding that both fall within the court's discretion). But the Court has also affirmed the jury right for such factual questions as whether deprivation of property use advances legitimate public interests in inverse condemnation claims and the imposition of statutory damages. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

This Article accepts the general proposition that *Markman* and *Tull* do not denigrate the Supreme Court's overall commitment of questions of fact to the jury. See *Moses*, supra note 43, at

243-57 (concluding that Markman's holding is specifically limited to the context of patent claims, and discussing subsequent Supreme Court jurisprudence affirming the commitment of questions of fact to the jury).

⁵⁶ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 423, 360 (1974) ("It matters little whether the standard be articulated as 'malice' or 'reckless disregard of the truth' or 'negligence,' for jury determinations by any of those criteria are virtually unreviewable.").

⁵⁷ See Peter B. Rutledge, *The Standard of Review for the Voluntariness of a Confession on Direct Appeal in Federal Court*, 63 U. Chi. L. Rev. 1311, 1325 (1996) ("Courts and scholars have characterized the distinction between fact and law as a 'formalistic riddle,' 'increasingly hazy,' and as having a 'vexing nature.' Others have suggested that law and fact are not 'static, polar opposites' but have a 'nodal quality' and 'are points of rest and relative stability on a continuum of experience.'") (internal citations omitted).

For definitions that attempt to distinguish between questions of fact and law, see *Kirgis*, supra note 31, at 1158 (distinguishing questions of fact and law by defining a question of fact as one which "requires for its answer inductive inferences about the transactions or occurrences in dispute," and a question of law as all others) and *Miller*, supra note 34, at 1083 (defining a question of law as one which "involves the resolution of principles generally applicable to a class of cases").

⁵⁸ See *Miller*, supra note 34, at 1083 (stating that a "reasoned and principled approach to this allocative decision is vital to prevent judicial encroachment on the jury's prerogative," and finding it "unsettling" that in many cases "the question of judge or jury authority seems to have been made on the basis of conclusory assertions as to what is fact and what is law, without any apparent reasoning or inquiry as to the appropriate judge-jury equilibrium").

⁵⁹ See *Pullman-Standard, Inc. v. Swint*, 456 U.S. 273, 289-90 (1982) (defining mixed questions of fact and law as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated").

⁶⁰ See *Miller*, supra note 34, at 1083-84 ("Negligence is the paradigmatic mixed question of law and fact.").

⁶¹ See *id.* (quoting James B. Thayer, "Law and Fact" in *Jury Trials*, 4 Harv. L. Rev. 147, 170 (1890)). State of mind is a mixed question of fact and law historically belonging in the jury's domain.

⁶² See *Miller*, supra note 34, at 1085-86 (citing *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985)).

⁶³ *Moses*, supra note 31, at 199-200 (citing *Walker v. New Mexico & So. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897)). See also *Ex parte Peterson*, 253 U.S. 300, 309-12 (1920) ("[The Seventh Amendment] does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence... New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right.").

⁶⁴ Fed. R. Civ. P. 12(b)(6). For the dismissal for failure to state a claim standard (Rule 12(b)(6)), see *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

⁶⁵ Fed. R. Civ. P. 56. For the summary judgment standard (Rule 56), see 10A Wright & Miller, supra note 10, § 2727 ("[A] court may enter [summary] judgment only when it appears that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' The district court has no discretion to enlarge its power to grant summary judgment beyond the limits prescribed by the rule. It may grant a Rule 56 motion only when the test set forth therein has been met and must deny the motion as long as a material issue remains for trial.") (citing, inter alia, *Simler v. Conner*, 372 U.S. 221 (1963), *U.S. v. W.T. Grant Co.*, 345 U.S. 629

(1953), and *Associated Press v. United States*, 326 U.S. 1 (1945)). See *Beard v. Banks*, 126 S. Ct. 2572, 2578 (2006) (stating that all justifiable inferences must be drawn in favor of the non-moving party on motion for summary judgment) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

⁶⁶ Fed R. Civ. P. 50. For the judgment as a matter of law standard (Rule 50), see Fed. R. Civ. P. 50(a)(1) (“If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law.”). See also 3 Moore et al., *supra* note 9, § 22.01[5][k] (“A court may enter a judgment as a matter of law under Rule 50(a) on grounds of lack of pleading or proof of a material issue, or absence of any controversial issues of fact on which reasonable people could differ.”) (emphasis added.)); *Galloway v. United States*, 319 U.S. 372, 396 (1943) (affirming the jury’s fundamental role in drawing reasonable inferences in the context of a motion for directed verdict, the historical predecessor of judgment as matter of law); *Lavendar v. Kurn*, 327 U.S. 645, 653 (1946) (making a similar affirmation in the context of appellate reversal of a jury verdict).

⁶⁷ See *Miller*, *supra* note 34, at 996-97 (stating that procedural changes “aim to promote active judicial case management, to streamline and limit the discovery process, and to encourage non-jury - indeed, nonjudicial - methods of dispute resolution”).

⁶⁸ See Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 Wash. U.L.Q. 687, 695-704 (2004) (discussing Supreme Court jurisprudence upholding modern procedural devices).

⁶⁹ See 5B Wright & Miller, *supra* note 10, § 1356 (distinguishing between Rule 12(b)(6), which “only tests whether the claim has been adequately stated in the complaint” and Rule 56, which “goes to the merits of the claim . . . and is designed to test whether there is a genuine issue of material fact,” while acknowledging that the “distinction between the two procedural devices is not substantial in many situations”).

⁷⁰ As a further example of the extent to which summary judgment and motion to dismiss are conflated, a court may sua sponte convert a Rule 12(b)(6) motion into a Rule 56 motion, effectively making a ruling on the merits at the pleading phase. See Fed R. Civ. P. 12(b) (“If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”); 1 Moore et al., *supra* note 9, § 11.24[3] (describing the documents and records that may be examined by the court in evaluating a Rule 12(b)(6) motion, and discussing the criteria and process for converting a motion to dismiss for failure to state a claim into a motion for summary judgment).

⁷¹ The judiciary’s role in implementing procedural mechanisms is limited to promulgation of the Federal Rules of Civil Procedure (by the Supreme Court) and the interpretation of those rules. See 28 U.S.C. § 2072 (2000) (the Rules Enabling Act grants the Supreme Court “power to prescribe general rules of practice and procedure and rules of evidence” in federal courts but no rule can change substantive law). Lower courts may not, for example, implement heightened pleading standards on their own volition. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (“[Heightened pleading requirements] must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims.”).

⁷² 3 Moore et al., *supra* note 9, § 22.01[5][a].

⁷³ See *Moses*, *supra* note 43, at 202 (“when the Court has approved changes to the jury trial right, it has insisted that such changes must not undermine the fundamental role of the jury to find

facts”). Different locutions have been employed in articulating the standards for evaluating motions under Rules 12(b)(6), 50, and 56, as discussed *supra* notes 64-66.

The standards articulated for summary judgment and judgment as a matter of law are practically equivalent. The Supreme Court described a conflated standard for both motions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“whether a fair minded jury could return a verdict for the plaintiff on the evidence presented”).

^{74.} 3 Moore et al., *supra* note 9, § 22.01[5][k].

^{75.} See *supra* text accompanying notes 55-62.

^{76.} See *supra* text accompanying notes 12-16 and 22-27.

^{77.} See discussion *infra* Part III.D.

^{78.} See, e.g., Michael A. Perino, Did the Private Securities Litigation Reform Act Work?, 2003 U. Ill. L. Rev. 913 (2003); Justin M. Fabella, Note, Does Anyone Know the Required State of Mind?: The Uncertainty Created by the Vagueness of the Private Securities Litigation Reform Act of 1995, 7 Suffolk J. Trial & App. Adv. 81 (2002); Richard H. Walker, The Implications of the Private Securities Litigation Reform Act, 76 Wash U.L.Q. 447 (1998); Dunn, *supra* note 14.

^{79.} But see *Miller*, *supra* note 34, at 1000 (briefly summarizing the PSLRA’s heightened pleading requirements in the context of a general discussion about effects of modern procedural devices on the jury right).

^{80.} 399 F.3d 651 (6th Cir. 2005) (sustaining in part sufficiency of pleading rule 10b-5 claims).

^{81.} 399 F.3d at 683 n.25 (internal citations omitted) (referring generally to the heightening pleading standard imposed by the PSLRA).

^{82.} 399 F.3d at 683 n.25.

^{83.} 437 F.3d 588, 601-02 (7th Cir. 2006) (citing *Monroe*, 399 F.3d at 683 n.25), cert granted, No. 06-484, 127 S. Ct. 853 (2007).

^{84.} 437 F.3d at 602. The court’s language implicitly invokes the doctrine of constitutional avoidance. See discussion *infra* Part IV.

^{85.} See *supra* text accompanying notes 53-62.

^{86.} See *supra* text accompanying notes 63-74.

^{87.} See *supra* text accompanying notes 16, 27.

^{88.} See discussion *supra* Part II.B.

^{89.} See Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 Geo. Wash. L. Rev. 724, 762 n.194 (1993) (“The Supreme Court has never considered whether a Rule 12(b)(6) dismissal violates the Seventh Amendment.”).

^{90.} See 5B Wright & Miller, *supra* note 10, § 1356 (stating that a motion to dismiss at the pleading phase serves only to “test the formal sufficiency of the statement of the claim for relief” and distinguishing from summary judgment, which instead “test[s] whether there is a genuine issue of material fact”); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (“[I]n reviewing the legal sufficiency of petitioner’s cause of action, ‘we must assume the truth of the material facts as alleged in the complaint.’”) (quoting *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991)).

^{91.} See discussion *supra* Part III.A.

^{92.} 5B Wright & Miller, *supra* note 10, § 1357 (emphasis added). See also 1 Moore et al., *supra* note 9, § 11.24[1] (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)).

^{93.} *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

^{94.} See discussion *infra* Part IV (discussing the doctrine of constitutional avoidance).

^{95.} See *supra* text accompanying notes 63-74.

⁹⁶ See supra text accompanying notes 53-62.

⁹⁷ See supra text accompanying notes 61-62.

⁹⁸ *Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1188 (10th Cir. 2003) (disagreeing in part with Gompfer in rejecting the weighing of competing inferences). See also *Florida State Bd. of Adm. v. Green Tree Fin. Corp.*, 270 F.3d 645, 666 (8th Cir. 2001) (holding that in applying the PSLRA pleading requirements that the “strong-inference pleading standard does not license us to resolve disputed facts” at the motion to dismiss stage).

⁹⁹ See *Pirraglia*, 339 F.2d at 1188.

¹⁰⁰ See *Kirgis*, supra note 31, at 1154-55 (describing and contrasting inductive and deductive reasoning).

¹⁰¹ See id. (“In contrast to deductive inferences, inductive inferences involve conjectures about unobserved events or conditions in the world.”).

¹⁰² Cf. 10A Wright & Miller, supra note 10, § 2729 (discussing the jury’s “unique competence in applying the reasonable person standard to a given fact situation” in the context of negligence actions in tort).

¹⁰³ See 9 Wright & Miller, supra note 10, § 2311 (“When the only remedy sought for fraud is [monetary] damages, the action is legal in nature and there is a right to jury trial.”).

¹⁰⁴ See supra text accompanying note 27.

¹⁰⁵ See discussion supra Part III.C.

¹⁰⁶ See id.

¹⁰⁷ See id.

¹⁰⁸ See infra note 113.

¹⁰⁹ See supra Part I.C.

¹¹⁰ See, e.g., *In re Cerner Corp. Sec. Litig.*, 425 F.2d 1079, 1085-86 (8th Cir. 2005) (“Scienter is normally a factual question to be decided by a jury, but the complaint must at least provide a factual basis for its scienter allegations.”).

¹¹¹ In analyzing which mixed questions of law and fact the Seventh Amendment commits to the jury to decide, Professor Miller distinguishes between mixed questions that involve disputed and undisputed facts. The former undeniably belong to the jury. The latter belong to the jury if it is “within the constitutional province of the jury to apply those facts to the applicable legal principles, as described by the judge.” *Miller*, supra note 34, at 1084. This Article is focused on the mixed question of scienter at the pleading phase, where the facts (as distinguished from inferences from those facts) are undisputed because they are presumed true. See supra text accompanying note 90.

¹¹² 434 F.2d 73 (5th Cir. 1970).

¹¹³ 434 F.2d at 77 (5th Cir. 1970). See also *Prochaska v. Marcoux*, 632 F.2d 848, 851 (10th Cir. 1980) (in unreasonable search and seizure case, stating that “[w]here different ultimate inferences may properly be drawn, the case is not one for summary judgment, and questions of intent, which involve intangible factors including witness credibility are matters for the consideration of the fact finder after a full trial and are not for resolution by summary judgment”) (internal citations omitted); *Consolidated Elec. Co. v. United States*, 355 F.2d 437, 438 (9th Cir. 1966) (in contract case, stating that “[w]hen an issue requires determination of state of mind, it is unusual that disposition may be made by summary judgment . . . [i]t is important and ordinarily essential, that the trier of fact be afforded the opportunity to observe the demeanor, during direct and cross-examination, of a witness whose subjective motive is at issue”).

¹¹⁴ See 10B Wright & Miller, supra note 10, § 2730 (“[s]ince the information relating to state of mind generally is within the exclusive knowledge of one of the litigants and can be evaluated only

on the basis of circumstantial evidence, the other parties normally should have an opportunity to engage in discovery”). If one rationale for leaving a question to the jury is to allow plaintiffs the opportunity to gather sufficient evidence to support their claims through the discovery process, then a motion to dismiss at the pleading phase should be scrutinized even more closely than a motion for summary judgment. “Determination of someone’s state of mind usually entails the drawing of factual inferences as to which reasonable people might differ – a function traditionally left to the jury.” *Id.* Under the PSLRA, however, if a motion to dismiss is made the plaintiff is not allowed discovery unless and until the court determines that a cause of action has been stated. 15 U.S.C. § 78u-4(b)(3)(B) (2000) (providing for stay of discovery pending a motion to dismiss).

¹¹⁵ See discussion *supra* Part I.

¹¹⁶ 1 Moore et al., *supra* note 9, § 11.24[1].

¹¹⁷ See discussion *supra* Part III.C.

¹¹⁸ See *supra* text accompanying notes 90.

¹¹⁹ See *supra* text accompanying notes 61-62.

¹²⁰ *Conley*, 355 U.S. at 45-46.

¹²¹ See *infra* Part III.D.1.

¹²² See *infra* Part III.D.2.

¹²³ See *infra* Part III.D.3.

¹²⁴ See *supra* text accompanying notes 110-114. See also 10A Wright & Miller, *supra* note 10, § 2272 (“If evidence contained in the moving party’s affidavit raises subjective questions such as motive, intent, or conscience, there may have to be a trial inasmuch as cross-examination is the best means of testing the credibility of this kind of evidence.”); *Makor*, 437 F.3d at 602 (7th Cir. 2006) (“Scienter is normally a factual question to be decided by a jury, but the complaint must at least provide a factual basis for its scienter allegations.”) (quoting *In re Cerner Corp. Sec. Litig.*, 425 F.3d at 1084-85); *In re K-tel International, Inc. Sec. Litig.*, 300 F.3d 881, 894 (8th Cir. 2002) (“Generally, the issue of whether a particular intent existed is a question of fact for the jury.”) (citing *Press v. Chem. Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999)).

¹²⁵ See 10A Wright & Miller, *supra* note 10, § 2729 (citing and summarizing several dozen state, federal district, and federal appellate court decisions in support of the proposition that summary judgment is rarely appropriate in negligence actions).

¹²⁶ Compare *id.* with *supra* text accompanying notes 108-109.

¹²⁷ See *supra* notes 102.

¹²⁸ See discussion *supra* Part III.C.

¹²⁹ See *Wilson v. United States*, 989 F.2d 953 (8th Cir. 1993).

¹³⁰ See *Nolan v. Coating Specialists, Inc.*, 422 F.2d 377 (5th Cir. 1970); *Rodgers v. Balt. & Ohio R.R. Co.*, 323 F.2d 996 (2d Cir. 1963).

¹³¹ *Croley*, 434 F.2d at 75.

¹³² See *infra* Part III.D.2.

¹³³ See *supra* text accompanying notes 55-62.

¹³⁴ *Miller*, *supra* note 34, at 1083.

¹³⁵ *Kirgis*, *supra* note 31, at 1159.

¹³⁶ See *Greebel v. FTP Software*, 194 F.3d 185, 197 (1st Cir. 1999) (“Unusual trading at suspicious times or in suspicious amounts by corporate insiders has long been recognized as probative of scienter.”) (internal citations omitted).

¹³⁷ See, e.g., *In re Silicon Graphics Sec. Litig.*, 183 F.2d 970, 986 (9th Cir. 1999):

Although “unusual” or “suspicious” stock sales by corporate insiders may constitute circumstantial evidence of scienter, [citation omitted] insider trading is suspicious only when it is “dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information.” *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1117 (9th Cir. 1989). Among the relevant factors to consider are: (1) the amount and percentage of shares sold by insiders; (2) the timing of the sales; and (3) whether the sales were consistent with the insider’s prior trading history.

^{138.} *Greebel*, 194 F.3d at 198 (“The vitality of the inference to be drawn depends on the facts, and can range from marginal to strong.”) (internal citations omitted).

^{139.} See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424 (3d Cir. 1997) (“A large number of today’s corporate executives are compensated in terms of stock and stock options. It follows then that these individuals will trade those securities in the normal course of events. We will not infer fraudulent intent from the mere fact that some officers sold stock. Instead, plaintiffs must allege that the trades were made at times and in quantities that were suspicious enough to support the necessary strong inference of scienter.”) (internal citations omitted).

^{140.} See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1423 (3d Cir. 1997) (“Of the three defendants who are alleged to have traded on nonpublic information, plaintiffs have provided us with the total stock holdings of only one defendant.”).

^{141.} See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424 (3d Cir. 1997) (“[W]e have no information as to whether such trades were normal and routine for this defendant.”).

^{142.} See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424 (3d Cir. 1997) (“Nor do we have information as to whether the profits made were substantial enough in relation to the compensation levels for any of the individual defendants so as to produce a suspicion that they might have had an incentive to commit fraud.”).

^{143.} *Miller*, supra note 34, at 1084.

^{144.} *Kirgis*, supra note 31, at 1159.

^{145.} *Kirgis*, supra note 31, at 1159 (emphasis added).

^{146.} See discussion supra Part III.C..

^{147.} See *Kirgis*, supra note 31, at 1157 (“to find a fact means no more than to use inductive, probabilistic reasoning - to draw inferences that exceed the decision maker’s knowledge based on observed data”).

^{148.} Fed R. Civ. P. 12(b)(1).

^{149.} See 3 Moore et al., supra note 9, § 22.01[5][a] (“[i]f an issue of procedure is enmeshed in the substance of the merits of the case, the right to jury is applicable to the issue”).

^{150.} Stefania A. DiTrollo, Comment, Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1), 33 Seton Hall L. Rev. 1247, 1259 (citing *Smithers v. Smith*, 204 U.S. 632, 645 (1907) and *Barry v. Edmunds*, 116 U.S. 550, 565 (1886)).

^{151.} *Barry*, 116 U.S. at 565.

^{152.} *Barry*, 116 U.S. at 565.

^{153.} *DiTrollo*, supra note 150, at 1272-73 (citing *Barry*, 116 U.S. at 565 and *Smithers*, 204 U.S. at 645).

^{154.} See discussion supra Part III.D.1.

^{155.} See discussion supra Part III.D.2.

^{156.} See discussion supra Part III.D.

^{157.} *Id.*

¹⁵⁸ Id.

¹⁵⁹ 526 U.S. 227 (1999).

¹⁶⁰ Id., at 324 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

¹⁶¹ See id. at 325-326. See also, e.g., Irene J. Chase, Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996, 68 U. Chi. L. Rev. 463, 482-83 (2001) (describing the “well established doctrine of constitutional avoidance”) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); Kevin M. Stack, The President’s Statutory Powers to Administer the Laws, 106 Colum. L. Rev. 263, 266 n.11 (2006) (describing classical and modern interpretations of the doctrine) (citing *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) and *DeBartolo Corp.*, 485 U.S. 568).

¹⁶² See, e.g., *Debartolo Corp.*, 485 U.S. at 75 (finding the principle of constitutional avoidance “pertinent” in interpreting the National Labor Relations Act in a civil case); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (applying constitutional avoidance doctrine in civil tort action).

¹⁶³ See *Gompper*, 298 F.3d at 897 (“Such a result would allow all plaintiffs who engage in careful, measured pleading to demonstrate a strong inference of scienter, because district courts would only be allowed to consider reasonably drawn inferences that favor the plaintiffs. Such an analysis would thwart Congress’s basic purpose in raising the bar in the first place; namely, to eliminate abusive and opportunistic securities litigation and to put an end to the practice of pleading fraud by hindsight.”).

¹⁶⁴ See supra text accompanying note 163.

¹⁶⁵ See discussion supra Part IV. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.”).

¹⁶⁶ See 17 C.F.R. § 78u-4(b)(2) (“the complaint shall ... state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind”) (emphasis added).

¹⁶⁷ Internal documents showing that a defendant knowingly engaged in fraud are an extreme example. More common are circumstantial allegations indicating that a defendant acted recklessly. Some frequently recurring fact patterns in securities fraud claims involve inaccurate public statements and violations of generally accepted accounting principles (GAAP). Compare *In re Ancor Commc’ns, Inc. Sec. Litig.*, 22 F. Supp. 2d 999 (D. Minn. 1998) (allegations of inaccurate public statements sufficient to establish strong inference of scienter), and *Novak v. Kasaks*, 216 F.3d 300 (2d Cir. 2000) (allegations of GAAP violations sufficient to establish strong inference of scienter), with *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525 (3d Cir. 1999) (allegations of inaccurate public statements insufficient to establish strong inference of scienter), and *In re Comshare Sec. Litig.*, 183 F.3d 542 (6th Cir. 1999) (allegations of GAAP violations insufficient to establish strong inference of scienter).

These cases demonstrate the fact-specific nature of the scienter inquiry. See discussion supra Part III.D.2. In *Ancor* and *Novak*, inaccurate public statements and GAAP violations, respectively, coupled with additional circumstantial evidence were found to be sufficient to meet the heightened pleading requirements for scienter. But in *Advanta* and *Comshare*, inaccurate public statements or GAAP violations unsupported by any additional allegations were found to be insufficient to meet the pleading requirements. See *Olazabal*, supra note 23, at 174-81 (reconciling these disparate holdings). See also id. at 174-89 (discussing six recurring fact patterns that are the basis for securities fraud claims: inaccurate public statements; GAAP violations; failure to predict effects of legislation; failure to disclose material facts; insider stock sales; and other conscious wrongdoing).

¹⁶⁸ Fed R. Civ. P. 9(b).

¹⁶⁹. See *supra* text accompanying note 16.

¹⁷⁰. See *Gompper*, 298 F.3d at 897 (“when determining whether plaintiffs have shown a strong inference of scienter, the court must consider all reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs”).

¹⁷¹. See *Helwig*, 251 F.3d at 553 (“the ‘strong inference’ requirement means that plaintiffs are entitled only to the most plausible of competing inferences.”).

¹⁷². See *Gompper*, 298 F.3d at 896 (“To accept plaintiffs’ argument that the court is required to consider only inferences favorable to their position would be to eviscerate the PSLRA’s strong inference requirement by allowing plaintiffs to plead in a vacuum.”).

¹⁷³. *Pirraglia*, 339 F.3d at 1187 (“Whether an inference is a strong one cannot be decided in a vacuum. In evaluating the strength of a plaintiff’s inference of scienter, we may recognize the possibility of negative inferences that may be drawn against the plaintiff. We do so, not in a preclusive manner, but in an evaluative manner. That is to say, we consider the inference suggested by the plaintiff while acknowledging other possible inferences, and determine whether plaintiff’s suggested inference is ‘strong’ in light of its overall context.”); Rick M. Simmons, *Pleading Standards Under Pirraglia: The Private Securities Litigation Reform Act v. Federal Rule of Civil Procedure 12(b)(6)*, 81 *Denv. U.L. Rev.* 665,683 (2004) (“It is not possible to determine what, in actuality, is a strong inference without having other inferences for comparison. If the only inferences that could be looked at were those favorable to the plaintiff, it seems that a motion to dismiss could never succeed.”).

¹⁷⁴. See, e.g., *Pirraglia*, 339 F.3d at 1187-88 (holding that if a “plaintiff pleads facts with particularity that, in the overall context of the pleadings, including potentially negative inferences, give rise to a strong inference of scienter, the scienter requirement of the Reform Act is satisfied” and disagreeing with the requirement in *Helwig* that plaintiffs are entitled only to the most plausible inference).

¹⁷⁵. 194 F.3d at 195-96.