UCLA
UCLA Law & Economics Series

Title
Insider trading and securities fraud

Permalink
https://escholarship.org/uc/item/2734g37g

Author
Park, James J

Publication Date
2025

Peer reviewed

eScholarship.org Powered by the California Digital Library
University of California

3. Insider trading and securities fraud

James J. Park

1. INTRODUCTION[1]

In a typical year, the Securities and Exchange Commission (SEC) brings a few dozen enforcement cases against individuals for insider trading.[2] These cases are usually settled before they can prompt a decision by a court. Many of the issues raised by insider selling are more frequently litigated in securities fraud class actions that allege a corporation issued a material misrepresentation that inflated its stock price than in stand-alone insider trading cases. Private plaintiffs will often argue that because a material misrepresentation coincided with sales by insiders who knew of the misrepresentation, the misrepresentation was not just due to negligence but part of a scheme to defraud investors. In doing so, they satisfy the element of scienter needed to bring a viable securities fraud claim under Rule 10b-5.[3] Plaintiffs are often able to discover insider sales by looking at SEC disclosures where public company officers are required to report such sales.[4] It is not uncommon for sales to coincide with the period where a stock was allegedly higher than it should have been because of securities fraud.

Because it is also common for executives to sell their shares for innocuous reasons, courts have been skeptical that allegations of insider trading in a securities fraud case necessarily support a finding of scienter. They have thus developed an extensive doctrine that governs whether insider sales are sufficiently "unusual" or "suspicious" so that they can support an inference of fraudulent intent. A substantial number of decisions in securities fraud cases thus essentially define when sales by corporate managers should trigger judicial scrutiny. Some commentators have argued that these doctrines create judicial heuristics that courts use to arbitrarily dismiss securities class actions.

The preoccupation of the courts with whether insider trading is sufficient for a securities fraud claim to proceed is problematic to the extent that it results in an unduly narrow conception of securities fraud. While some securities frauds are motivated by insider enrichment,

[1] Thanks to Micah Sperling and Carolyn Stephens for their excellent research assistance.

[2] See, e.g., Sec. & Exch. Comm'n, Addendum to Division of Enforcement Press Release Fiscal Year 2022 (2022), https://www.sec.gov/files/fy22-enforcement-statistics.pdf (reporting the filing of 36 civil actions and 7 administrative actions with insider trading allegations in 2022).

[3] To state a securities fraud claim under Rule 10b-5, a private plaintiff must establish: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258, 267 (2014).

[4] Section 16 of the Securities Exchange Act requires such reports. See Securities Exchange Act of 1934 § 16(a), 15 U.S.C. § 78p (2018).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

others are not. It would be a mistake to assume that a lack of insider sales means that managers did not act with an intent to deceive investors.

The chapter discusses how insider trading and securities fraud became linked by the federal courts in Rule 10b-5 litigation. It presents data showing that while insider trading allegations have been an important part of securities fraud claims, a significant majority of securities class actions do not include such allegations. Moreover, insider trading allegations in securities fraud cases declined significantly starting around 2010 through most of the decade, suggesting that the link between insider trading and securities fraud is not always constant. One possibility is that the judicial heuristics erected by the courts have made it less likely that a securities class action complaint can establish scienter through an allegation of insider trading. Such allegations have declined as plaintiffs' attorneys have come to realize that courts are likely to reject the theory that insider sales evidence fraudulent intent. Plaintiffs are often able to find evidence of recklessness by corporate managers and thus do not always need to allege that individual managers were enriched by an alleged securities fraud.

The chapter also discusses whether the decline in the number of insider trading allegations in securities fraud lawsuits may be evidence that certain types of insider trading have become less frequent. The introduction of Rule 10b5–1 plans in 2001 increased the incentive for executives to plan their stock sales in advance and spread them out over time. Such plans may have reduced the number of abrupt sales that are typical of insider trading and would be reflected in securities class action complaints. Moreover, by the end of the 2000s, federal appellate courts ruled that trading under a Rule 10b5–1 plan can create a presumption that stock sales do not support a finding of scienter. The increased use of Rule 10b5–1 plans may thus have made it more difficult for plaintiffs to use evidence of insider sales to satisfy the scienter element of Rule 10b-5. With the SEC's new amendments to Rule 10b5–1 in 2023, there is a possibility that insider sales will become even less likely to support claims that an executive acted with fraudulent intent.

2. A SHORT HISTORY OF INSIDER TRADING AND SECURITIES FRAUD

Insider trading and securities fraud are both typically prosecuted under Rule 10b-5. In a standalone insider trading claim, an insider will exploit their informational advantage to profit without using their position to issue a misleading statement. In a securities fraud claim, the company issues a material misstatement to inflate the price of its stock. In order to establish a Rule 10b-5 violation, the plaintiff must show that the misstatement was motivated by scienter, or fraudulent intent. One way to meet the scienter requirement is to allege that corporate insiders committed fraud so that they could sell their shares at inflated prices. Because of the frequency of insider sales, it is common for some sales to occur within the period of an alleged securities fraud. Courts thus began to develop tests for distinguishing insider sales that were sufficiently "unusual" or "suspicious" to support a claim that personal enrichment was the motivation for a corporate misstatement.

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

2.1 Some Early Cases

Securities fraud by larger public corporations was not a major regulatory concern until the 1970s.[5] The two decades after the SEC approved Rule 10b-5 in 1948 were a time of economic prosperity for the United States. Large public companies were so powerful and successful that they did not need to deceive investors about their financial performance. The SEC viewed securities fraud as a problem isolated to the smaller public companies that traded on over-the-counter markets rather than exchanges.[6]

It was not until 1968 that a major appellate decision extensively analyzed a fact pattern involving allegations of securities fraud and insider trading. *SEC v. Texas Gulf Sulphur Co.*[7] is most famous as an early insider trading decision that scrutinized the purchase of securities by insiders of a mining company before the announcement of its discovery of a significant amount of copper ore. What is not as well-appreciated is that the decision also analyzed some of the issues raised by the release of misleading information by a public corporation. Texas Gulf Sulphur (TGS), which traded on the Midwest Stock Exchange, circulated a press release that was arguably "deceptive". As news of the ore find circulated, the company issued a statement that "rumors of a substantial coppery discovery ... exaggerate the scale of operations, and mention plans and statistics of size and grade of ore that are without factual basis and have evidently originated by speculation of people not connected with TGS".[8] The company insisted that "more drilling would be required for proper evaluation of this prospect".[9] The SEC claimed that these statements were misleading because "TGS had already discovered 6.2 to 8.3 million tons of proven ore having gross assay values from $26 to $29 per ton."[10] TGS's defense was that its release was accurate because, while a sample had found ore, "there was no assurance of continuity in the mineralized zone".[11]

The Second Circuit's decision in *Texas Gulf Sulphur* did not explicitly conclude that the misleading press release was motivated by the desire to facilitate trading in the company's stock by TGS insiders. Initially, in its discussion of the history of Rule 10b-5, it cited a House Committee Report on the Securities Exchange Act, which asserted that "[d]elayed, inaccurate, and misleading reports are the tools of the unconscionable market operator and the recreant corporate official who speculate on inside information."[12] However, the SEC did not claim that TGS issued the press release with the motive to depress the company's stock price to give the company's insiders more time to make their purchases at a lower price.[13] The Second Circuit

---

[5] For a more extensive discussion of this point, see James J. Park, The Valuation Treadmill: How Securities Fraud Threatens the Integrity of Public Companies 33–34 (2022).

[6] See id.

[7] 401 F.2d 833 (2d Cir. 1968).

[8] Id. at 845.

[9] Id.

[10] Id. at 846.

[11] Id.

[12] Id. at 859.

[13] On the other hand, the Second Circuit noted that the fact that the insiders traded on the information about the mineral find was evidence that the discovery was material to investors. See id. at 851 (observing that the purchase of stock and short-term calls "virtually compels the inference that the insiders were influenced by the drilling results".). It was thus clear that the press release denying such a find was also material.

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

did not require the SEC to make such a showing. The court held that because the agency was only seeking an injunction against TGS,[14] negligence was enough to establish liability for a misleading corporate statement under Rule 10b-5. It used sweeping language in making this point, concluding that "Rule 10b-5 is violated whenever assertions are made ... if such assertions are false or misleading or are so incomplete as to mislead irrespective of whether the issuance of the release was motivated by corporate officials for ulterior purposes."[15] Because the SEC did not need to show that the misstatement was motivated by fraudulent intent, there was no need to argue that the release was deceptive because it permitted insiders to enrich themselves.

Judge Henry Friendly, a former general counsel of a major public company, understood the problem with such a broad liability standard for securities fraud under Rule 10b-5. In a concurrence, he warned that the "consequences of holding that negligence in the drafting of a press release ... may impose civil liability on the corporation are frightening".[16] Perhaps in a world without a large number of securities class action filings, the majority in *Texas Gulf Sulphur* did not appreciate the need for a higher liability standard. Friendly's experience in the corporate world made him more wary. Eight years later, the US Supreme Court heeded Judge Friendly's warning and held in *Ernst & Ernst v. Hochfelder* that a plaintiff must show more than negligence in establishing a violation of Rule 10b-5.[17]

Less than two years after the Second Circuit's decision in *Texas Gulf Sulphur*, the link between insider trading and securities fraud was highlighted in the aftermath of the sudden bankruptcy filing in June 1970 of the giant railroad Penn Central.[18] The SEC issued a report on the company's collapse and concluded that the company's "management acted improperly and engaged in conduct designed to deceive shareholders".[19] It also noted that 15 Penn Central officers sold about 70 percent of their collective stockholdings in the months prior to the company's bankruptcy filing.[20] A lawsuit brought by investors argued that the insiders hid the company's weak financial position and sold their stock before the truth was known.[21] In addition to the insiders, a number of banks sold substantial amounts of their Penn Central stock in the months before the bankruptcy.[22] The insiders claimed that their sales were routine

[14] The SEC successfully sought restitution from individual TGS executives, requiring them to disgorge their insider trading profits. See *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307–08 (2d Cir. 1971).

[15] Id. at 862.

[16] Id. at 866.

[17] 425 U.S. 185 (1977).

[18] For a more extensive discussion of this case, see Park, supra note 5, at 33–39.

[19] Staff Report of the Securities and Exchange Commission to the Special Subcommittee on Investigations, The Financial Collapse of the Penn Central Company 172 (1972).

[20] Id. at 9.

[21] See *In re Penn Central Securities Litigation*, 347 F. Supp. 1327, 1332 (E.D. Pa. 1972). The lawsuit settled for $10 million. See *In re Penn Central Securities Litigation*, 416 F. Supp. 907, 912 (E.D. Pa. 1976).

[22] See The Penn Central Failure and the Role of Financial Institutions, Part V Trading in Penn Central Stock: Financial Institutions and Privileged Information, Staff Report of the Committee on Banking and Currency House of Representatives 91st Congress, Second Session (Nov. 2, 1970).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

and made for the purpose of diversification or to fund retirement.[23] The banks claimed that their decisions to sell were made by divisions without access to inside information. However, the fact that insiders and banks were able to avoid losses because a stock price adjustment was delayed through deceptive tactics showed how corporate deception could be linked to questionable trading.

2.2 Insider Trading and Scienter

The Supreme Court's decision in *Ernst & Ernst* did not clearly define the concept of scienter, the necessary fraudulent intent to establish a Rule 10b-5 violation. The lower courts developed tests for scienter and soon held that insider trading by corporate managers during periods of a material misstatement was evidence that the misstatement was not an innocent mistake. By the 1990s, investors filed Rule 10b-5 class actions regularly against public companies. Because insiders frequently sell stock, it was often possible to allege insider trading during the period of an alleged fraud. In a series of decisions, the Ninth Circuit led the way in developing criteria to determine when insider selling was sufficiently "unusual" or "suspicious" to support a finding of scienter.

2.2.1 The Second Circuit

In a series of decisions, the US Court of Appeals for the Second Circuit was the first to emphasize insider trading as a reason why a corporation and its managers might deceive investors. In its 1985 opinion in *Goldman v. Belden*,[24] the Second Circuit noted that an allegation of insider trading was sufficient for a Rule 10b-5 securities fraud complaint to avoid dismissal. The plaintiffs alleged that the company issued misleading projections that it knew were untrue and that its managers "profited from defendants' bullish statements by selling large blocks of their common stock holdings".[25] In order to move past the pleading stage, the court noted that it was sufficient for plaintiffs to allege: (1) the managers "had or had access to the withheld information during the class period"; and (2) the "failure to qualify the bullish statements was intended to permit individual defendants to profit from an inflated market price before the truth became known".[26]

These allegations describe motive and opportunity. The motive for the misrepresentation was to enrich corporate managers. The opportunity to commit fraud was present because the managers controlled the company's public statements. In a 1993 decision, the Second Circuit formalized this motive and opportunity test as one way of establishing a "strong inference of fraudulent intent". In a case involving alleged misrepresentations by the media giant Time Warner about its business plans,[27] Judge Jon Newman described two independent ways to establish scienter. The first was to establish "a motive to commit fraud and an opportunity to do so". The second was "to allege facts constituting circumstantial evidence of either reckless or conscious behavior".[28]

---

[23] See Staff Report of the Sec. & Exch. Comm'n, supra note 19, at 246.
[24] 754 F.2d 1059 (2d Cir. 1985).
[25] Id. at 1070.
[26] Id.
[27] *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259 (2d Cir. 1993).
[28] Id. at 269.

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

A concern with the motive and opportunity test was that because public companies and their managers work to maximize shareholder wealth, they have a general incentive to issue misleading information to increase the stock price. If an allegation that a defendant wanted to inflate a company's stock price was sufficient to establish motive, that element would be easily satisfied in virtually every Rule 10b-5 class action. The Second Circuit thus set limits on what could qualify as a sufficient motive to establish scienter. In *Shields v. Citytrust Bancorp*,[29] plaintiffs alleged misrepresentations with respect to a company's loan losses. In affirming a lower court dismissal of the case for failure to plead scienter, Judge Dennis Jacobs held that generally alleging that managers wanted to prolong their employment was insufficient to establish motive.[30] Managers will always want to keep their jobs and thus plaintiffs would almost always be able to satisfy the scienter requirement of Rule 10b-5 by claiming that managers issued a misstatement to maintain their employment. The Second Circuit clarified that plaintiffs can only show a motive to commit securities fraud by establishing "concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged".[31] The court implied that insider trading would satisfy this standard but was absent in the case before it, observing there was "no claim here that false statements were made in an effort to sell off shares held by management".[32]

The view that insider trading was the main type of conduct that could establish motive and thus scienter was influential. In *Novak v. Kasaks*,[33] the Second Circuit considered whether the passage of the Private Securities Litigation Reform Act (PSLRA), which requires plaintiffs to plead a "strong inference" of fraudulent intent to move past a motion to dismiss,[34] altered its approach to alleging scienter. The court emphasized the theory that securities fraud is generally motivated by insider trading. It noted that the motive "requirement was generally met when corporate insiders were alleged to have misrepresented to the public material facts about the corporation's performance or prospects in order to keep the stock price artificially high while they sold their own shares at a profit".[35] Other circuit courts have also adopted the motive and opportunity test and cited insider trading as the typical evidence of motive.[36]

2.2.2 The Ninth Circuit

The US Court of Appeals for the Ninth Circuit has been influential in developing tests for evaluating Rule 10b-5 claims. Because it includes Silicon Valley, the Ninth Circuit often hears securities fraud claims against technology companies, which tend to have volatile stock prices that can create investor losses and spur a claim of fraud. It has often been more concerned

---

[29] 25 F.3d 1124 (2d Cir. 1994).

[30] Judge Newman, who authored the *Time Warner* decision, was also on the panel. Judge Ralph Winter, a leading expert on corporate and securities law, also sat on both panels.

[31] 25 F.3d at 1130.

[32] Id.

[33] 216 F.3d 300 (2d Cir. 2000).

[34] See 15 U.S.C. §78u-4(b)(2) (requiring that plaintiff "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind").

[35] Id. at 308.

[36] See, e.g., *In re Cabletron Sys., Inc.*, 311 F.3d 11, 40 (1st Cir. 2002) (finding that $177 million in stock sales during the period of alleged securities fraud "suggest further motive for securities fraud, and they combine with other aspects of the complaint to produce a strong inference of scienter").

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

about the impact of excessive litigation on entrepreneurship than other appellate courts. The Ninth Circuit did not adopt the Second Circuit's motive and opportunity test but acknowledged that insider trading was relevant in establishing scienter. At the same time, it has been more wary of permitting cases to proceed solely because insiders sold some stock during the class period.

Four years after the Second Circuit's decision in *Goldman v. Beder*, the Ninth Circuit cited the case in acknowledging that "[i]nsider trading in suspicious amounts or at suspicious times is probative of bad faith and scienter."[37] In a famous Rule 10b-5 class action against Apple Computer alleging that the company misrepresented the prospects of a high-performance disk drive, the Twiggy,[38] the court considered whether the fact that individual defendants in the case had sold $84 million in Apple stock representing 8 percent of their holdings during the class period was sufficient to establish scienter. The Ninth Circuit was not as quick as the Second Circuit to conclude that substantial insider sales were sufficient to establish deceptive intent. It noted that the defendants had sold somewhat more stock in the period before the class period. Their sales during the period of alleged inflation were not "dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information".[39] The Ninth Circuit also emphasized the importance of considering "credible and wholly innocent explanations for the stock sales, ranging from long-standing programs of periodic divestment to the need to free cash to meet matured tax liabilities".[40]

The Ninth Circuit provided defendants with several possible defenses to the allegation that insider sales were sufficient to establish scienter. However, the impact of the *Apple Computer* decision was somewhat limited, perhaps because it evaluated such claims in the context of a summary judgment motion rather than a motion to dismiss. Some district courts in the Ninth Circuit did not apply the test.[41] In 1994, two Silicon Valley practitioners noted that insider sales had become "a major impetus for plaintiffs' filing and aggressively pursuing corporate disclosure cases".[42] They noted that technology growth companies often paid compensation in stock and that courts needed to do more to distinguish routine sales from those that supported an inference of scienter.

In *Provenz v. Miller*,[43] another decision reviewing a summary judgment decision, the Ninth Circuit emphasized the *Apple* test in analyzing whether insider sales were sufficient to establish scienter. That case involved claims of improper revenue recognition by a computer company and allegations of sales by insiders. The Ninth Circuit concluded that there was sufficient

---

[37] *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1117 (1989).

[38] For a more extensive discussion of this case, see Park, supra note 5, at 50–71.

[39] *In re Apple Computer Sec. Litig.*, 886 F.2d. at 1117. The point that insider trading requires unusual trading has been made in stand-alone insider trading cases. See, e.g., *Sec. & Exch. Comm'n v. Musella*, 748 F. Supp. 1028, 1038–39 (S.D.N.Y. 1989) (noting the question of whether trades were "unusually large in light of [] previous trading history").

[40] Id. See also *Ronconi v. Larkin,* 253 F.3d 423, 435 (9th Cir. 2001) (observing that "not every sale of stock by a corporate insider shows that the stock price is about to decline. A corporate insider may sell stock to fund major family expenses, diversify his portfolio, or arrange his estate plan").

[41] Jordan Eth & Michael Dicke, Insider Stock Sales in Rule 10b-5 Corporate Disclosure Cases: Separating the Innocent from the Suspicious, 1 Stan. J.L. Bus. & Fin. 97, 118–20 (1994).

[42] Id. at 99.

[43] 102 F.3d 1478 (9th Cir. 1996).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

evidence for a case to proceed against the Chairman and CEO of the company, who sold 20 percent of his shares during the class period. The President of the company had sold six times as much during the class period as he did in the prior year, which was also sufficient to deny summary judgment. However, other defendants had innocent reasons for selling and were granted summary judgment.[44]

The Ninth Circuit built on *Provenz* in its *Silicon Graphics* decision to set forth a more formal test for assessing whether insider sales supported scienter.[45] That case signaled a more restrictive approach to finding scienter after the passage of the PSLRA. The court instructed that in the Ninth Circuit, "particular facts giving rise to a strong inference of deliberate recklessness, at a minimum, is required to satisfy the heightened pleading standard under the PSLRA".[46] The court acknowledged that, even under this "deliberate recklessness" test, "unusual" or "suspicious" sales could support a finding of scienter.[47] Citing *Provenz*, it instructed that in evaluating whether insider sales were sufficient, courts should consider "(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."[48] In applying this standard to the facts of the case, it held that there were insufficient allegations to support scienter with respect to two officers who sold 43.6 and 75.3 percent of their shares. The first officer's sales were a small percentage of the total sales by all of the officers during the class period. The second officer's sales were a high percentage of the total sales, but the Ninth Circuit reasoned that he had an innocent reason to sell because of the expiration of prior restrictions that had prevented him from selling. Moreover, the second officer did not have access to information relating to the corporate misstatement.

The factors cited by *Silicon Graphics* were basically a reiteration of points made in the *Apple* case. The case signaled a more restrictive approach because, in applying those factors, the court concluded that even large sales by individual officers might not be sufficient to establish scienter. Because securities frauds are often rooted in group decision making, the benefit to all officers collectively is more relevant than sales by individuals.[49]

Courts in the Ninth Circuit have routinely applied the *Silicon Graphics* factors to find that insider selling is insufficient to support a finding of scienter.[50] There is essentially a presumption in that circuit that "[i]nsider sales are not inherently suspicious."[51] Moreover, Hillary Sale has documented that courts over the years have developed additional "judicial heuristics" to

---

[44] Id. at 1491.

[45] *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999).

[46] Id. at 974.

[47] Id. at 986.

[48] Id.

[49] See, e.g., *Webb v. SolarCity Corp.*, 884 F.3d 844, 856–57 (9th Cir. 2018) (finding no scienter because two of the insiders had sold no stock during the class period); *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1067 (9th Cir. 2008) (finding that an insider's sale of 37 percent of his stock was not sufficient to indicate scienter because there were no "corroborative sales" by other insiders).

[50] See, e.g., *City of Sunrise Firefighters' Pension Fund v. Oracle Corp.*, 527 F. Supp. 3d 1151, 1191 (N.D. Cal. 2021) (finding that sales of 17 percent of insider's stock during the class period were sufficiently similar to sales of 12.8 percent of insider's stock before the class period, so sales were not suspicious).

[51] *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1092 (9th Cir. 2002).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

find that insider sales are not "unusual" or "suspicious".[52] They have counted stock options in calculating the total stock holdings of insiders, making it more difficult to find that an insider sold a high percentage of stock.[53] They have found that additional purchases of stock during the class period can offset sales during the class period.[54] They have required the timing of insider sales to maximize the profits of the insiders.[55] Sale concludes that "district courts have eagerly and overwhelmingly" used such "heuristics to eliminate cases on motions to dismiss that are arguably better preserved for summary judgment".[56] Stephen Bainbridge and Mitu Gulati have raised the possibility that these insider trading tests were developed by busy judges to move complex cases off their docket. They question whether such tests were developed through thoughtful consideration of whether the greater prevalence of stock compensation means that insider sales are less likely to be "suspicious".[57] Ann Morales Olazabal and Patricia Sanchez Abril offer a different perspective on the judicial tests developed to identify abnormal insider trading.[58] They conclude that such tests are an appropriate way for courts to identify greed by corporate insiders that typifies scienter.[59]

The Ninth Circuit's rigorous approach to assessing whether insider trading supports a finding of scienter has not entirely eliminated the relevance of insider sales. Plaintiffs are often able to point to significant insider sales to persuade courts that the complaint sufficiently alleges scienter.[60] The Ninth Circuit has not always applied the *Silicon Graphics* test rigidly.

---

[52] Hillary A. Sale, Judicial Heuristics, 35 U.C. Davis L. Rev. 903 (2002).

[53] See, e.g., *In re Herbalife, Ltd. Sec. Litig.*, 2015 U.S. Dist. LEXIS 186970, at *10–11 (C.D. Cal. 2015) (finding that vested stock options diluted sales made by defendant during class period); *Plevy v. Haggerty,* 38 F. Supp. 2d 816, 834 (C.D. Cal 1998) (holding that options vesting during the class period must be considered when analyzing whether the percentage of shares sold was suspicious).

[54] See, e.g., *Applestein v. Medivation, Inc*., 2011 U.S. Dist. LEXIS 92230, at *25–26 (C.D. Cal. 2011) (finding that significant sales by insiders were offset by purchases during the class period).

[55] *In re Vantive Corp. Sec. Litig.,* 283 F.3d at 1094–95 (finding timing of sales not suspicious because stock continued to rise after insider sales); *Ronconi v. Larkin*, 253 F.3d 423, 435–436 (9th Cir. 2001) (finding no scienter when insiders sold stock for $54 when the price eventually rose to $74); *In re Alteryx Sec. Litig*., 2021 U.S. Dist. LEXIS 193324, at *13–15 (C.D. Cal 2021) (finding no scienter when sales were made evenly during the class period); *In re Nike Sec. Litig*., 181 F. Supp. 2d 1160, 1169–70 (D. Or. 2002) (finding that insider sales at $49 a share were not suspicious because stock rose to $60 a share).

[56] Sale, supra note 52, at 904–05.

[57] See Stephen M. Bainbridge & G. Mitu Gulati, How Do Judges Maximize? (The Same Way Everyone Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions, 51 Emory L.J. 83, 132–33 (2002).

[58] See Ann Morales Olazabal & Patricia Sanchez Abril, In Honor of Walter O. Weyrauch: The Ubiquity of Greed: A Contextual Model for Analysis of Scienter, 60 Fla. L. Rev 401 (2012).

[59] Id. at 440.

[60] See, e.g., *City of Miami v. Quality Sys. (In re Quality Sys.)*, 865 F.3d 1130, 1147 (9th Cir. 2017) (finding scienter when insider sold 87 percent of his holdings for an amount equal to seven times his annual salary in the relevant year); *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp*., 320 F.3d 920, 939 (9th Cir. 2003) (reversing district court finding of no scienter when virtually all of the company's insiders sold most

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

In a securities fraud case involving Oracle, the appellate court found scienter when an insider sold only two percent of his stock because the amount of the sale was $900 million.[61] The court explained that "[i]n the past, we have given great weight to the percentage of stock sold ... However, where, as here, stock sales result in a truly astronomical figure, less weight should be given to the fact that they may represent a small portion of the defendant's holdings."[62]

The Ninth Circuit's requirement that a plaintiff establish that insider sales were "suspicious" and "unusual" has been influential. The Second Circuit has adopted the test.[63] A number of other circuits also closely scrutinize insider sales to assess whether they support a finding of scienter.[64] The wide adoption of the test indicates consensus that not all insider sales during the class period are sufficient to establish fraudulent intent.

3. UNJUST ENRICHMENT AND SECURITIES FRAUD

One view of securities fraud is that companies deceive investors primarily because individual corporate managers want to preserve the value of their stock compensation. Securities fraud reflects the well-known problem of agency costs, where faithless agents act in a way that furthers their own interests at the expense of a principal. This unjust enrichment rationale for prohibiting securities fraud can be contrasted with an efficient markets rationale that prioritizes deterring the issuance of misleading information that distorts the value of stock prices.

The impact of the *Silicon Graphics* insider trading test was limited by a surge of securities frauds at the turn of the twentieth century. Some of these cases involved substantial insider sales that were suspicious enough to support a finding of scienter. For example, Jeff Skilling, the CEO of Enron, was not only criminally convicted for securities fraud but also on one count of insider trading.[65] The SEC brought civil charges against executives of Qwest, a company

---

of their shares during class period); *In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 875 (N.D. Cal. 2004) (finding that an insider's sale of 21 percent of their owned stock led to a "weak" inference of scienter).

[61] *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1232 (9th Cir. 2004).

[62] Id. at 1232. In an earlier case, a district court held that scienter could be found if a defendant made a significant financial return, regardless of the percentage of stock sold. See *In re SeeBeyond Techs Corp. Sec. Litig.*, 266 F. Supp. 2d 1150, 1169 (C.D. Cal. 2003).

[63] See, e.g., *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir. 1995) (finding that some insider sales were not "unusual" because of timing and other insider sales were not a significant percentage); see also *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 85 (2d Cir. 1999) (noting that several insiders sold large positions); *In re Gentiva Sec. Litig.*, 971 F. Supp. 2d 305, 324 (E.D.N.Y. 2013) (citing Silicon Graphics factors).

[64] See, e.g., *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1253 (11th Cir. 2008) (noting that "[s]tock sales or purchases timed to maximize returns on nonpublic information weigh in favor of inferring scienter"); *Higginbotham v. Baxter Inter. Inc.*, 495 F.3d 753, 759 (7th Cir. 2007) (noting failure of complaint to allege that insider sales "were abnormally high during the period before public disclosure" of negative information); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 540 (3d Cir. 1999) (noting that "mere fact" of sales is insufficient but if "sales were unusual in scope or timing, they may support an inference of scienter").

[65] See *U.S. v. Skilling*, 554 F.3d 529, 542 (5th Cir. 2009).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

that allegedly inflated its revenue to meet market projections, for both securities fraud and insider trading.[66] The successful federal criminal case against Qwest's CEO, Joseph Nacchio, proceeded solely on insider trading claims.[67] In limiting their case, prosecutors avoided the difficulty of establishing that Nacchio knew that Qwest's accounting was false. They only needed to establish that the CEO had inside information about Qwest's ability to meet its projections and that he traded on that information.

Because of high-profile cases like Enron, there has been a tendency to conclude that securities fraud is mainly driven by unjust enrichment by corporate executives.[68] In one case that reached the US Supreme Court, *Tellabs*, the defendant argued that the "lack of a pecuniary motive" for its misrepresentations precluded a finding of liability under Rule 10b-5.[69] The Supreme Court rejected this argument, noting that while "personal financial gain may weigh heavily in favor of a scienter inference", the absence of such a motive was "not fatal".[70] This language sent a somewhat mixed message in that while it permitted the case to proceed without an allegation of insider trading, it implied that evidence of some concrete benefit would be typical in a securities fraud case. After *Tellabs*, a number of circuit courts have held that a defendant may assert that the absence of insider trading weighs against an inference of scienter. For example, in a 2008 decision, the Eleventh Circuit Court of Appeals explained: "Stock sales or purchases timed to maximize returns on nonpublic information weigh in favor of inferring scienter; the lack of similar sales weighs against inferring scienter."[71] In a decision by Judge Easterbrook, the Seventh Circuit weighed the absence of insider sales in concluding that managers did not act with scienter with respect to alleged misrepresentations about a problem with its business in Brazil.[72] It concluded that "the absence of any demonstration that [the class period] was an unusual period for managerial sales means that the complaint lacks the required 'strong' demonstration of scienter".[73]

In earlier work, I argued that cabining securities fraud within an unjust enrichment theory is too restrictive.[74] A focus on "'concrete benefits' has the danger of creating a substantial disconnect between the efficient-markets view of Rule 10b-5—that its purpose is to deter misstatements that hurt the ability of the market to value stocks—and its actual implementation, which tends to target cases in which individuals are unjustly enriched".[75] Securities fraud prohibitions are meant to generally ensure that stock markets are not tainted with fraud.[76] To

---

[66] See *Sec. & Exch. Comm'n v. Nacchio, et al*., Civ. Action No. 05-cv-480, (D. Colo. July 15, 2008), https://www.sec.gov/litigation/complaints/2011/comp21825.pdf.

[67] See *United States v. Nacchio*, 573 F.3d 1062 (10th Cir. 2009) (en banc).

[68] See, e.g., John C. Coffee Jr., What Caused Enron – A Capsule Social and Economic History of the 1990s, 89 Cornell L. Rev. 269, 277 (2004) (noting that securities frauds permitted managers to sell stock at an inflated price).

[69] *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 555 U.S. 308, 325 (2007).

[70] Id.

[71] *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1253 (11th Cir. 2008).

[72] *Higginbotham v. Baxter Intern., Inc.* 495 F.3d 753 (7th Cir. 2007).

[73] Id. at 759.

[74] James J. Park, Rule 10b-5 and the Rise of the Unjust Enrichment Principle, 60 Duke L.J. 345, 392–94 (2010).

[75] Id. at 392.

[76] Even insider trading regulation can be understood as policing the integrity of periodic disclosures. See James J. Park, Insider Trading and the Integrity of Mandatory Disclosure,

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

the extent that a corporation and its managers have sufficient knowledge that material misrepresentations are significantly distorting the fundamental value of the corporation's stock price, there should be securities fraud liability even without evidence of unjust enrichment. Indeed, history has shown that the primary driver of corporate securities fraud is the pressure to meet short-term earnings projections rather than to facilitate insider trading by corporate managers.[77]

4. DECLINING ALLEGATIONS OF INSIDER TRADING IN SECURITIES CLASS ACTIONS

The relationship between insider trading and securities fraud has not been extensively examined by corporate and securities law scholars for at least a decade. There was a documented rise in insider trading allegations after the passage of the PSLRA, which required plaintiffs to provide evidence of scienter at an early stage of the case. The securities frauds of the late 1990s and early 2000s likely confirmed the perception that insider trading and securities fraud claims are tightly intertwined. This Part presents data showing that insider trading allegations in securities class actions steadily declined over much of the last decade but have more recently returned. It discusses possible causes for the decline.

4.1 Prior Studies

A number of prior studies have tracked insider trading allegations in securities class actions, but they are somewhat dated. A study by Pritchard and Sale examined Rule 10b-5 class actions where a court issued a decision on a motion to dismiss from 1996 to 2002.[78] They found that half of these cases included an allegation of insider trading by corporate managers.[79] More than half (58 percent) of the cases in the data set filed in the Ninth Circuit had an insider trading allegation, while less than half (38 percent) of the cases in the data set filed in the Second Circuit had an allegation of insider trading.[80] They found that allegations of insider trading were associated with higher dismissal rates, suggesting that courts did not find a claim of insider trading to be persuasive evidence of fraud.[81]

Other studies examine complaints rather than decisions on motions to dismiss. Nelson, Johnson, and Pritchard studied complaints in securities class actions filed against a sample of computer companies from 1991 to 2000.[82] They found that 61.4 percent of these complaints included an insider trading allegation.[83] About 80 percent of the data set cases filed after the

---

2018 Wisc. L. Rev. 1133.

[77] See Park, supra note 5.

[78] A.C. Pritchard & Hillary A. Sale, What Counts As Fraud? An Empirical Study of Motions to Dismiss Under the Private Litigation Reform Act, 2 J. Emp. Legal Stud. 125 (2005).

[79] Id. at 142.

[80] Id.

[81] Id. at 146.

[82] Marilyn F. Johnson, Karen K. Nelson, & A. C. Pritchard, Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act, 23 J. L. Econ. & Org. 627 (2006).

[83] Id. at 637.

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

passage of the PSLRA contained an allegation of insider trading, suggesting that plaintiffs were adapting to the law by including more particular allegations of fraud.[84] However, the inclusion of an insider trading allegation was not associated with a successful outcome for the case.[85]

4.2 Data

Table 3.1 summarizes data on securities class action filings from 1996 to 2019, compiled by Institutional Shareholder Services (ISS) Securities Class Action Services. This ISS data set recorded whether a complaint had allegations that "point to sales by insiders before a drop in stock price".[86] I made adjustments to the data set so it only includes class actions alleging that securities fraud inflated the stock price of a public company. Class actions that do not make such allegations (such as those that only assert claims relating to proxy misstatements) were excluded.

The data set shows that insider trading allegations were asserted in a minority of class actions from 1996 through 2019. Typically, about 15–20 percent of the actions in the ISS data set alleged insider trading. With the exception of two years, where around 40 percent of securities class actions involved such a claim, it is typical for more than 70 percent of securities class actions filed in a year to not allege insider trading. This is notable in that it demonstrates that insider trading is far from an essential element in a securities fraud case brought under Rule 10b-5. Plaintiffs in these cases can instead assert allegations of recklessness so they need not point to individual enrichment by corporate executives.[87]

Starting around 2010, there was a notable decline in securities class actions alleging insider trading. For almost a decade, less than 10 percent of actions included claims of insider selling. In 2018 and 2019, there was a significant uptick in insider trading allegations. Just under 20 percent of the complaints filed during this later period asserted insider trading.

4.3 What Explains the Decline?

The decline and subsequent recovery of insider trading allegations likely reflects a combination of legal and non-legal considerations. One possible reason that insider trading allegations are not as prominent in securities class actions as they were during the early 2000s is the increasing influence of Rule 10b5–1 plans. In 2000, the SEC adopted various amendments to Rule 10b-5 relating to insider trading.[88] Section (c) of Rule 10b5–1 provides an affirmative defense to a person that a securities "purchase or sale is not on the basis of material nonpublic information" if the person entered into a "contract, instruction, or plan" with respect to the

---

[84] Id.

[85] Id. at 646–47.

[86] See Data Definitions, ISS Securities Class Action Services Data Set (on file with author).

[87] For an argument that securities fraud is often motivated by corporate pressure to maximize shareholder wealth rather than individual enrichment, see James J. Park, Shareholder Wealth Maximization and Securities Fraud, 72 DePaul L. Rev. 395 (2023).

[88] Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,727 (Aug. 24, 2000) (codified at 17 C.F.R. pts. 240, 243, and 249).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

Table 3.1 Insider trading allegations in securities class action filings

Year	Securities Class Actions Alleging Insider Trading	Total Securities Class Actions Filed	Percentage with Insider Trading Allegation
1996	32	79	40.5
1997	24	135	17.8
1998	29	195	14.9
1999	24	179	13.4
2000	33	186	17.7
2001	25	151	16.6
2002	31	212	14.6
2003	40	196	20.4
2004	46	198	23.2
2005	71	163	43.6
2006	28	101	27.7
2007	23	141	16.3
2008	24	144	16.7
2009	13	100	13.0
2010	8	102	7.8
2011	14	152	9.2
2012	3	123	2.4
2013	4	147	2.7
2014	1	152	0.7
2015	3	160	1.9
2016	13	187	7.0
2017	10	205	4.9
2018	38	192	19.8
2019	42	216	19.4

transaction "[b]efore becoming aware of the information."[89] Such "contract, instruction, or plan" must either: (1) specify the amount, price, and date of the transactions; (2) include a "written formula or algorithm" to determine the amount, price, and date of the transactions; or (3) not permit the "person to exercise any subsequent influence over how, when, or whether to effect purchases or sales".[90]

If a corporate manager enters into a Rule 10b5–1 plan substantially before a corporate misstatement is issued, the manager will have a defense if a plaintiff claims that the misstatement was part of a scheme to trade on insider information. Even before the SEC created Rule 10b5–1 plans, the Ninth Circuit noted in its *In re Worlds of Wonder* decision in 1994 that a

[89] 10 C.F.R. § 10b5-1(c) (2022).
[90] Id. at (c)(1)(i)(C).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

pre-existing plan of trading could help rebut the inference of scienter.[91] It took almost a decade after Rule 10b5–1 plans became available for appellate courts to find that such plans could impact whether evidence of insider sales supported a finding of scienter.[92] A 2008 decision by the Ninth Circuit cited *Worlds of Wonder* in a footnote, stating that a Rule 10b5–1 plan "may" negate an inference of scienter.[93] An Eighth Circuit decision in 2008 found that the fact that trades were pursuant to a 10b5–1 plan entered into five months before the sales in question, coupled with the small amount of the sales, meant that the insider trades were not suspicious.[94] A 2009 Third Circuit decision found no scienter with respect to insider trades because they were made pursuant to a Rule 10b5–1 plan and "[d]efendants' trading practices remained consistent year-over-year and each retained a large percentage of his common stock holdings."[95]

The timing of these initial decisions around 2008 is notable in that they were a year or two before the substantial decline in insider trading allegations in securities class actions around 2010. As the circuits made it clear that trading under Rule 10b5–1 plans was presumptively not suspicious and more trades occurred pursuant to such plans, plaintiffs may have shifted away from relying on insider trading theories in their complaints.

On the other hand, even as they initially noted the relevance of Rule 10b5–1 plans to securities litigation, the courts made it clear that a Rule 10b5–1 plan was not a complete defense with respect to a scienter allegation. A 2007 Fifth Circuit decision found that a Rule 10b5–1 plan did not negate a finding of suspicious trading because it was entered into during the class period when the managers would have known about the alleged misrepresentation.[96] In securities litigation arising out of the collapse of the subprime mortgage lender Countrywide, the court found in a 2008 decision that the use of a plan by CEO Angelo Mozilo was not a defense

---

[91] *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1427–28 (9th Cir. 1994).

[92] District courts began holding that Rule 10b5–1 plans could counter an inference of scienter some years before the circuits. See, e.g., *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1117 (N.D. Cal. 2003).

[93] See, e.g., *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1067 n.11 (9th Cir. 2008). That case examined insider sales from 2003 to 2004, a few years after the adoption of Rule 10b5–1.

[94] *Elam v. Neidorff*, 544 F.3d 921, 928–29 (8th Cir. 2008). This case arose out of trading in 2006.

[95] *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 279 (3d Cir. 2009).

[96] *Cent. Laborers' Pension Fund v. Integrated Elec. Servs. Inc.*, 497 F.3d 546 (5th Cir. 2007); see also *Employees' Ret. Sys. of Gov't of the Virgin Islands v. Blanford*, 794 F.3d 297, 309 (2d Cir. 2015) (finding scienter when defendants entered into a 10b5–1 trading plan after the complaint's allegation of the commencement of the fraudulent growth scheme); *Freudenberg v. E*Trade Financial Corp.*, 712 F. Supp. 2d 171, 201 (S.D.N.Y. 2010) (citing cases for the proposition that "trading plans are not a cognizable defense to scienter allegations on a motion to dismiss where, as here, they were adopted during the Class Period"). Courts often view the failure to specify when defendants entered into a plan as precluding the argument that such a plan negates an inference of scienter. See, e.g., *KBC Asset Mgmt. NV v. DXC Tech. Co.*, 19 F.4th 601, 611 (4th Cir. 2021). The fact that a plan was entered into during the class period does not preclude the defendant from asserting other defenses to the claim that a material misrepresentation was motivated by insider trading. See, e.g., *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 585 (2014) (finding no scienter even when defendants entered into a 10b5–1 plan during the class period because they did not have knowledge of the misstatement).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

because he "actively amended and modified his 10b5–1 plans" which "defeat the very purpose of 10b5–1 plans".[97] Even when there is an effective 10b5–1 plan, courts generally look at other considerations in determining whether trading supports an inference of scienter.[98] A Rule 10b5–1 plan may "mitigate any inference of improper motive" but it "does not completely immunize" a defendant from a finding of scienter.[99]

Apart from the potency of a Rule 10b5–1 plan as a doctrinal defense to a finding of scienter, it is possible that such plans generally reduced the frequency of abrupt and large sales of securities by insiders that would trigger scrutiny under the *Silicon Graphics* test. As Rule 10b5–1 plans became more established and insiders increasingly relied on them, there may have been fewer unusual sales that plaintiffs believed would establish an inference of scienter.

It is notable that the SEC recently concluded that Rule 10b5–1 plans have not been effective in preventing insiders from exploiting non-public information to profit. A number of "academic studies have found that corporate insiders trading pursuant to Rule 10b5–1 plans consistently outperform the trading of corporate insiders that is not conducted under such plans".[100] In 2022, it adopted various amendments to Rule 10b5–1 to increase the rule's effectiveness.[101] For example, Rule 10b5–1 now requires a cooling-off period of 90 days between the adoption or modification of any Rule 10b5–1 plan and the execution of a trade by a director or officer.[102] Such a requirement would reduce the possibility that an insider adopts a plan that immediately capitalizes on a material misstatement. To the extent that these amendments are effective in tightening up Rule 10b5–1 plans, they might further reduce abnormal insider trading that can serve as a basis for a scienter allegation.

It is also possible that the decline in insider trading allegations in securities class actions reflected non-legal considerations. The sharp decline in stock prices after the 2008 financial crisis would make selling stock less attractive for corporate insiders. The steady but slow recovery in stock prices over the next decade also may not have been conducive to substantial insider sales. Perhaps the return of insider trading allegations in 2018 and 2019 reflected greater selling as the market gradually reached more attractive levels towards the end of the 2010s.

---

[97] *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044, 1068 (C.D. Cal. 2008).

[98] See, e.g., *Jong Min Park v. GoPro, Inc.*, Case No. 18-cv-00193-EMC, 2019 WL 1231175, at *23 (N.D. Cal March 15, 2019) (finding that scienter was "negated" by small sales under 10b5–1 trading plan); *Rodriguez v. Gigamon Inc.*, 325 F. Supp. 3d 1041, 1056 (N.D. Cal. 2018) (finding that automatic sales pursuant to Rule 10b5–1 trading plans did not support a strong inference of scienter and plaintiffs did not show evidence of unusual or suspicious stock sales).

[99] *Yates v. Mun. Portg. & Equity, LLC*, 744 F. 3d 874, 891 (4th Cir. 2014) (finding that sales under a 10b5–1 trading plan "weaken" an inference of fraudulent purpose); see also *NVIDIA Corp. v. City of Westland Police*, 282 A.3d 1, 25 (Del. 2022) (noting that Court of Chancery viewed trades made pursuant to a Rule 10b5–1 plan as potentially suspicious).

[100] Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. 80363, 80363 (December 29, 2022) (to be codified at 17 C.F.R. §§ 229, 232, 240, and 249).

[101] Id. In addition, it made the point that a Rule 10b5–1 plan was not a complete defense to insider trading by bringing an insider trading case against an executive who traded through such a plan. See *Sec. & Exch. Comm'n v. Peizer*, Complaint (C.D. Cal. March 1, 2023), https://www.sec.gov/litigation/complaints/2023/comp-pr2023-42.pdf.

[102] Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. 80367.

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA

The return of insider trading allegations in securities class actions has prompted more decisions on the impact of Rule 10b5–1 plans with respect to scienter. In language that will surely be cited in future cases by defendants, the Second Circuit noted in a 2022 opinion that because a "vast majority of the sales were conducted pursuant to 10b5–1 trading plan, [they] … could not have been timed suspiciously".[103] Given the influence of the Second Circuit, such a decision could chill insider trading allegations in securities class actions in the future. On the other hand, a 2022 Tenth Circuit decision was more skeptical of 10b5–1 plans. It noted that even with a Rule 10b5–1 plan, a defendant "could be motivated to make material misrepresentations … in anticipation of a previously scheduled trade".[104] This decision raises the possibility that even when a Rule 10b5–1 plan has been properly adopted before a misrepresentation, a misrepresentation could be motivated by the insider's knowledge that significant trades will take place.

5. CONCLUSION

Insider trading is generally condemned by the public as unjust enrichment by corporate executives who take advantage of their knowledge of corporate developments to personally profit. Securities fraud by public companies, in turn has been viewed as motivated by insider trading. Corporate managers mislead investors to give themselves more time to sell their stock. Because of the frequency of allegations that corporations misstated their financial performance and the frequency of insider sales, the courts have found it necessary to develop standards that distinguish between routine insider sales and abusive trading that is meant to exploit a temporarily inflated stock price. The advent of Rule 10b5–1 plans has bolstered the case of many defendants that their stock sales were planned in advance and not meant to exploit a securities fraud. There are questions about whether such plans have been successful in reducing insider trading, but the recent SEC amendments will likely increase the effectiveness of Rule 10b5–1 plans and reduce the incidence of abnormal sales that can be the basis for an allegation of fraudulent intent. The percentage of securities class actions based on insider sales is now far from a majority of cases. Rather than reflecting unjust enrichment by individual executives, securities fraud allegations are much more about recklessness by a corporate team with respect to the accuracy of its public disclosures.

[103] *Arkansas Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co*., 28 F. 4th 343, 355–56 (2d Cir. 2022).

[104] *Indiana Pub. Ret. Sys. v. Pluralsight, Inc*.,45 F. 4th 1236, 1266–67 (10th Cir. 2022).

James J. Park - 9781035301218
Downloaded from https://www.elgaronline.com/ at 11/25/2026 12:43:26AM
via University of California, Los Angeles - UCLA