COMMENT ON "THE NEW SECURITIES FRAUD PLEADING REQUIREMENT"

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I intend to be brief. I am not an academic despite my distinguished career teaching common law pleading. I am in awe of the people that Joel Seligman and Elliott Weiss have been able to get from academe to come to this conference, some of the best people from the best law schools in the land. When I taught common law pleading we never drew any common law pleaders here for a conference like this.

I want to talk a little bit, and maybe in some heretical way, about what I see in this legislation from a trial judge's point of view, including problems that are going to arise and the process of sifting out those problems. I am sure that these problems are in large part evident to all of you. I think we are going to go through a period of extensive litigation just finding out what the parameters of these terms are.

I think it is going to take a lot of litigation to decide where we are going. I think the litigation is going to come in the area of what is a strong inference. The Act, if it is signed by the President, requires that the trial judge make that decision. So we now have to decide not only if an inference is permissible, but also whether it is a strong inference. How does one quantify that? From the facts that are well pleaded regarding materiality, omissions, actions, and the like.

And we then go on to the discovery aspect of the rule and I think that is where we are going to get into more trouble. And I will tell you in a minute why I believe trial judges are going to be faced with this problem. The discovery aspect is that if a motion to dismiss is pending, there is no discovery allowed in the case. Now there are two exceptions to that which will come as no surprise to those of you who litigate on a regular basis. The first exception arises when the court finds that particular discovery is necessary to preserve evidence. That's current rule 26(a), if your district has 26(a), requiring the exchange of evidence. The second exception occurs when discovery is allowed to prevent undue prejudice to that party. Both of those qualifications will be litigated ad nauseam. I can guarantee it. Every case will start with a motion to dismiss, simply, if not entirely, to block discovery. Then the next motion will be to permit discovery under either or both of these exceptions. It is going to take a long time to get that through the appellate process in the various circuits and, if necessary, get it resolved in the United States Supreme Court. So those two areas I think are going to produce a great deal of litigation which will

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impede any uniform implementation of this act and its well intentioned purposes.

I think Elliott Weiss hit it on the head when he said that the judges who interpret this are expected to bring their knowledge of the world with them. And that's fine. Except that he or she may have a different knowledge of the world than you do. And that is the problem with legislation like this. At lunch, Professor Stout mentioned—I think it was she—that there's talk now in Washington that the President will sign the bill but he will sign it with the same kind of baggage that Congress did—saying I'm signing this with the understanding that this is what I think it means. Congress has said—we've enacted this with the understanding that here's what it means. It gives some credence to Scalia's—Justice Scalia's—textualism argument, to discard those kinds of things and look at the exact language of the bill. I think this is going to cause the problem. So again we're going a little far afield from the subject matter of Elliott's fine paper, but the safe harbor provision is going to create the same kind of litigation those varied terms and concepts have been creating for the past twenty years. I don't see—with all deference to the people who have sought this legislation and have done so much hard work to secure it—I don't see that it's going to be any panacea in the area of securities litigation. I think it's going to create problems that will extend the litigation process and which are likely to prevent those persons seeking relief from getting relief in any meaningful time frame because of the extension in the appellate process.