

New Ninth Circuit Decision Makes Alleging Scierter Easier for Plaintiffs

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In the years following the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA), plaintiffs have tried numerous approaches to satisfying the PSLRA's stringent requirement to plead a "strong inference" of scierter. One oft-tried method is to assert that senior executives, often named as individual defendants alongside the company, must have been aware of facts underlying the alleged fraud because the information involved related to the business's "core operations." Courts have split over whether such "core operations" allegations satisfy the PSLRA, and, until earlier this week, the Ninth Circuit imposed one of the more stringent standards on plaintiffs. That is no longer the case.

In *South Ferry LP #2 v. Killinger*, the Ninth Circuit squarely addressed the issue of "whether a scierter theory that infers that facts critical to a business's 'core operations' or an important transaction are known to a company's key officers satisfies the PSLRA's heightened pleading standard." In light of the Supreme Court's holding in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007), the Ninth Circuit noted in tentative language that "perhaps" certain of its earlier leading decisions (*In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999); *In re Vantive Sec. Litig.*, 283 F.3d 1079 (9th Cir. 2002); and *In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843 (9th Cir. 2003)) "are too demanding and focused too narrowly in dismissing vague, ambiguous, or general allegations outright." While it did not go so far as to conclude that *Tellabs* overruled those earlier decisions, the *South Ferry* court held that motions to dismiss under the PSLRA require courts "to consider the totality of circumstances, rather than to develop separately rules of thumb for each type of scierter allegation." Thus, it concluded that "[v]ague or ambiguous allegations are now properly considered as part of a holistic review when considering whether the complaint raises a strong inference of scierter."

On the specific question of whether pleading that alleged misstatements concerned "core operations" can give rise to a strong inference of scierter, the court found that such allegations "may be relevant and help to satisfy the PSLRA scierter requirement in three circumstances." First, they may be "used in any form along with other allegations" that combine to create a strong inference of scierter. Second, "such allegations may independently satisfy the PSLRA where they are particular and suggest that defendants had actual access to the disputed information." Third, in "rare circumstances," the "core operations" allegations alone may satisfy the PSLRA "where the nature of the relevant fact is of such prominence that it would be 'absurd' to suggest that management was without knowledge of the matter." The Ninth Circuit declined to determine whether the complaint in *South Ferry* met the appropriate standard because *Tellabs* was decided after the district court issued its underlying

