

actual invention and would make the obviousness finding based only on the problem to be solved and the ordinary skill level. Such a finding would be entitled to a strong presumption of correctness.⁸² The benefits of combining such a bifurcated system with an adversarial process are clear: the adversarial process would allow prior art to come to light without the patent examiner being required to undertake an in-depth prior art search on his own, while the bifurcated system would prevent hindsight bias on the part of the patent examiner.

The Court's decision in *KSR* did little to resolve outstanding patent law problems and left many questions unanswered. However, given the Court's institutional competency, it is not clear it could have done much better.⁸³ Real change addressing hindsight bias and overissuance problems in tandem will have to come from the efforts of Congress and the PTO, with the courts playing an oversight role only in extreme circumstances. The best the Court could have hoped to do in *KSR* may have been to offer a hint to that effect. Instead, the Court merely offered a solution unlikely to combat hindsight bias and unlikely to reduce patent overissuance problems in any systematic way.

F. Private Securities Litigation Reform Act

“Strong Inference” Pleading Standard. — In passing the Private Securities Litigation Reform Act of 1995¹ (PSLRA), Congress sought to curb abusive private securities litigation by requiring that plaintiffs “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”² Although Congress enacted this “strong inference” standard to provide uniformity concerning the plaintiff's burden, the PSLRA failed to achieve that goal; it instead produced disarray among the circuit courts over how high Congress intended to set the bar for pleading scienter.³ Last Term, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,⁴ the Supreme Court resolved the circuit split by holding that a “strong inference” of scienter “must be cogent and at least as compelling as any opposing inference

⁸² *Id.* at 36.

⁸³ See Stephen H. Philbin, *Judge Learned Hand and the Law of Patents and Copyrights*, 60 HARV. L. REV. 394, 395 (1947) (“Patent law may present questions which cannot be decided by objective tests, but depend for solution largely upon the personal views of the judge.”).

¹ 15 U.S.C. § 78u-4 (2000).

² *Id.* § 78u-4(b)(2).

³ See Laura R. Smith, Comment, *The Battle Between Plain Meaning and Legislative History: Which Will Decide the Standard for Pleading Scienter After the Private Securities Litigation Reform Act of 1995?*, 39 SANTA CLARA L. REV. 577, 578–79 (1999) (describing the circuits' “contradictory interpretations of the [PSLRA] scienter standard”).

⁴ 127 S. Ct. 2499 (2007).

of nonfraudulent intent.”⁵ While the majority sought to provide a workable test for determining whether a plaintiff’s inference is “strong,” a closer analysis of that test reveals fundamental inconsistencies that will likely to lead to continued confusion among the lower courts.

Tellabs, Inc. manufactures high-tech communications devices for use in fiber-optic networks.⁶ Beginning in late 2000 and continuing through the first half of 2001, Tellabs’s executives made a series of statements to investors, assuring them that the company’s flagship device was continuing to sell at a record pace and that its next-generation device was already shipping to satisfy “very strong” demand.⁷ During the same time period, the company lowered its profit estimates, apparently as a result of softening demand for its flagship device and its failure to begin shipping the next-generation device.⁸ Ultimately, in June 2001, Tellabs announced revenues well below previous estimates, and its stock dropped from a high of \$67 to \$15.87.⁹

Shortly thereafter, the plaintiff shareholders filed a class action suit on behalf of all investors who bought Tellabs stock in the relevant time period.¹⁰ The plaintiffs alleged that company executives’ knowingly false statements concerning demand for the company’s products had induced them to buy stock at artificially inflated prices.¹¹ The complaint specifically contended that Tellabs president and CEO Richard Notebaert misled investors into believing that demand for the company’s flagship product was strong, when in fact that demand was declining, and that its next-generation product was shipping, when in fact it was not.¹² The district court dismissed the complaint, holding that the plaintiffs’ “conclusory allegations regarding [Notebaert] d[id] not create a strong inference that he acted with the requisite state of mind under the PSLRA.”¹³

The Seventh Circuit reversed in relevant part. Writing for the court, Judge Wood¹⁴ acknowledged that the PSLRA “unequivocally raise[d] the bar for pleading scienter.”¹⁵ However, the court also noted

⁵ *Id.* at 2505.

⁶ *Id.*

⁷ *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 592–93 (7th Cir. 2006).

⁸ *See id.*

⁹ *Id.* at 593.

¹⁰ *Tellabs*, 127 S. Ct. at 2505.

¹¹ The complaint alleged violations of the Securities and Exchange Act of 1934, which prohibits the use of a “deceptive device” in contravention of SEC regulations, 15 U.S.C. § 78j(b) (2000), and SEC Rule 10b-5, which prohibits fraud “in connection with the purchase or sale of any security,” 17 C.F.R. § 240.10b-5 (2005).

¹² *Johnson v. Tellabs, Inc.*, 303 F. Supp. 2d 941, 946 (N.D. Ill. 2004).

¹³ *Id.* at 969.

¹⁴ Judge Wood was joined by Judges Ripple and Sikes.

¹⁵ *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 601 (7th Cir. 2006).

that “Congress did not . . . throw much light on what facts will suffice to create” an inference of scienter, which had resulted in a three-way circuit split.¹⁶ The Second and Third Circuits required the plaintiff to allege “either motive and opportunity or strong circumstantial evidence of recklessness or conscious misbehavior.”¹⁷ The Ninth and Eleventh Circuits rejected the “motive and opportunity” standard in favor of more exacting requirements.¹⁸ The rest of the circuits took the middle ground, “reasoning that ‘Congress chose neither to adopt nor reject particular methods of pleading scienter . . . but instead only required plaintiffs to plead facts that together establish a strong inference of scienter.’”¹⁹ While Judge Wood found the middle position “persuasive,”²⁰ she specifically rejected the Sixth Circuit’s holding that “plaintiffs are entitled to only the most plausible of competing inferences,” noting that such an approach could infringe upon a plaintiff’s Seventh Amendment right to a jury trial.²¹ Instead, Judge Wood held that a complaint could survive a motion to dismiss under the PSLRA’s “strong inference” standard “if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent.”²²

The Supreme Court vacated and remanded.²³ Writing for the Court, Justice Ginsburg²⁴ noted that Congress enacted the PSLRA to “curb perceived abuses of the § 10(b) private action” by “instal[ling] both substantive and procedural controls” and “[s]etting a uniform pleading standard.”²⁵ The Court began by noting that the PSLRA did not completely change the pleading standards in § 10(b) actions. As with any 12(b)(6) motion,²⁶ the Court held, courts must still accept the plaintiffs’ allegations as true and must examine the facts holistically rather than determining whether individual allegations, viewed in isolation, meet the PSLRA’s “strong inference” standard.²⁷

¹⁶ *Id.*

¹⁷ *Id.* (quoting *Novak v. Kasaks*, 216 F.3d 300, 309–10 (2d Cir. 2000)) (internal quotation mark omitted).

¹⁸ *See id.* (citing *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1286 (11th Cir. 1999)).

¹⁹ *Id.* (quoting *Ottmann v. Hanger Orthopedic Group, Inc.*, 353 F.3d 338, 345 (4th Cir. 2003)).

²⁰ *Id.*

²¹ *Id.* at 602 (quoting *Fidel v. Farley*, 392 F.3d 220 (6th Cir. 2004)) (internal quotation marks omitted).

²² *Id.*

²³ *Tellabs*, 127 S. Ct. at 2513.

²⁴ Justice Ginsburg was joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, and Breyer.

²⁵ *Tellabs*, 127 S. Ct. at 2508.

²⁶ *See* FED. R. CIV. P. 12(b)(6).

²⁷ *Tellabs*, 127 S. Ct. at 2509.

However, unlike with a typical 12(b)(6) motion, Justice Ginsburg stated, courts must consider “plausible opposing inferences” in determining whether plaintiffs have met the “strong inference” burden — a requirement that the Seventh Circuit erroneously rejected.²⁸ The Court held that Congress intended to require that the inference of scienter be not only reasonable but also “powerful or cogent,” meaning that courts must engage in an “inherently comparative” inquiry.²⁹ Thus, the Court determined that “[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”³⁰ The Court rejected the Second Circuit’s “motive and opportunity” test by declaring that although motive is a “relevant consideration,” its absence is “not fatal.”³¹ Likewise, while acknowledging that “omissions and ambiguities” in a plaintiff’s complaint “count against inferring scienter,” Justice Ginsburg again admonished the courts to conduct a holistic inquiry.³²

Finally, the Court rejected the Seventh Circuit’s conclusion that a comparative pleading test would violate a plaintiff’s Seventh Amendment right to a jury trial.³³ The Court observed that “Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits.”³⁴ The Court then remanded to the Seventh Circuit for determination of whether the plaintiffs’ allegations were sufficient to form a “strong inference” of scienter under the standard articulated in the Court’s opinion.³⁵

Justice Scalia concurred in the judgment. While he found himself “generally in agreement” with the majority’s decision,³⁶ he took issue with the majority’s notion that a “strong inference” can be established when the plaintiff’s inference is only equally as compelling as competing inferences.³⁷ Instead, Justice Scalia believed that “the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.”³⁸ He reasoned that the PSLRA’s “strong inference” language indicated that Congress had not “meant to relax the ordinary rule under which a tie goes to the defendant” but had instead

²⁸ *Id.*

²⁹ *Id.* at 2510.

³⁰ *Id.*

³¹ *Id.* at 2511.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 2512.

³⁵ *Id.* at 2513.

³⁶ *Id.* at 2515 (Scalia, J., concurring in the judgment).

³⁷ *See id.* at 2513.

³⁸ *Id.*

“explicitly strengthen[ed] that rule by extending it to the pleading stage of a case.”³⁹

Justice Scalia argued that the majority had failed to make a crucial distinction between a *possibility* and an *inference*. He reasoned that “[i]f a jade falcon were stolen from a room to which only A and B had access,”⁴⁰ there might be a strong *possibility* that B was responsible for the theft.⁴¹ However, a possibility of involvement does not lead to an *inference* of involvement, as the word “inference’ connotes belief in what is inferred.”⁴² As no one could “form a strong belief” that either A or B had committed the crime on this information alone, there could be no “strong inference” in such a situation.⁴³ Despite his disagreement, Justice Scalia reasoned that his test would almost certainly produce the same results as the Court’s.⁴⁴

Justice Alito also concurred in the judgment, disagreeing with the majority on two grounds. First, he found that the PSLRA’s language clearly required that a plaintiff show a “strong inference” of scienter only from facts alleged “with particularity.”⁴⁵ Justice Alito took issue with the Court’s conclusion that “‘omissions and ambiguities’ merely ‘count against’ inferring scienter,” reasoning that such a reading would strip the particularity requirement of meaning.⁴⁶ Second, although he found that Congress had provided “very little guidance” concerning the interpretation of the PSLRA’s “strong inference” standard, he agreed with Justice Scalia’s construction of that term, reasoning that it would bring the PSLRA pleading test in line with those used at the summary judgment stage, rather than creating a “test previously unknown in civil litigation” as the majority had done.⁴⁷

Justice Stevens dissented. In his view, the ambiguity of the “strong inference” wording granted “significant lawmaking authority” to the courts to determine how it functions.⁴⁸ He believed that using the “probable cause” standard from criminal law would be “both easier to apply and more consistent with the statute” than the majority’s test.⁴⁹ Justice Stevens argued that the privacy interests of civil defendants in avoiding discovery in unmeritorious cases were similar to the privacy interests of criminal defendants, which are protected by the probable

³⁹ *Id.* at 2514.

⁴⁰ *Id.* at 2513.

⁴¹ *See id.* at 2513 n.*.

⁴² *Id.* (internal quotation marks omitted).

⁴³ *Id.*

⁴⁴ *See id.* at 2514.

⁴⁵ *Id.* at 2516 (Alito, J., concurring in the judgment).

⁴⁶ *Id.* (quoting *id.* at 2511 (majority opinion)).

⁴⁷ *Id.* at 2516.

⁴⁸ *Id.* at 2517 (Stevens, J., dissenting).

⁴⁹ *Id.*

cause standard.⁵⁰ He reasoned that “probable cause” was roughly equivalent in normal English usage to “strong inference,” and that Congress would not have wanted to make it more difficult to bring a civil case than a criminal one.⁵¹ Moreover, he argued, the probable cause standard would not require the court to weigh competing inferences in those cases in which the inference was clearly strong.⁵² Justice Stevens felt that the *Tellabs* plaintiffs’ complaint had established the requisite scienter because it would clearly satisfy the probable cause standard.⁵³

The *Tellabs* case at first glance appears to determine the meaning of “strong inference” under the PSLRA using a reasonable and straightforward test, which requires courts to determine whether the inference is “cogent and at least as compelling as any opposing inference of non-fraudulent intent” that one could draw from the facts alleged.⁵⁴ A closer reading of the majority’s test, however, reveals two plausible readings of its language, neither of which is fully consistent with the majority’s reasoning. Although one reading of the majority’s test is ultimately the more plausible one, the ambiguity in the test will likely create continued discord in the lower courts.

The problematic nature of the majority’s test arises from two inherent ambiguities. To modify Justice Scalia’s example,⁵⁵ suppose that three people, A, B, and C, had equal access to a room from which a jade falcon was stolen, and the owner sued A for the theft. A court seeking to apply the majority’s test would face two interpretive difficulties.

First, the majority’s “any opposing inference” language can be interpreted to mean either “all opposing inferences collectively” or “each opposing inference individually.” Under the former interpretation (“collective comparison”), the plaintiff’s inference of scienter with respect to A would be weighed against the inferences with respect to B and C at the same time. Under the latter interpretation (“individual comparison”), however, the plaintiff’s inference with respect to A would be weighed first against the inference with respect to B and then against the inference with respect to C.

This interpretative choice raises the second inherent ambiguity in the majority’s test: properly determining the appropriate inferences to balance. Again, there are two logical readings of the term “inference.”

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *Id.* at 2503 (majority opinion).

⁵⁵ *See id.* at 2513 (Scalia, J., concurring in the judgment); *see also id.* at 2510 n.5 (majority opinion).

First, under a collective comparison test, there would only be two relevant inferences, the one in favor of A's scienter and the (collective) one against it. This reading of the majority's test would ultimately result in plaintiffs having to show that their inferences are at least 50% probable, thus closely aligning the pleading stage with the preponderance of evidence standard used at trial. Thus, if there were three suspects, the plaintiff suing A would not prevail, as the chance that A stole the falcon would be only one out of three.

However, the individual comparison reading of the majority's test might in some circumstances allow a plaintiff to proceed to trial when his inference had a probability less than 50%. Such a situation would arise when the inferences favoring the plaintiff and the inferences favoring the defendant were "split" for purposes of pleading analysis. There are several possibilities, none of which are foreclosed outright by the majority's opinion. The court could balance inferences that certain factual scenarios occurred; for instance, it could balance the inference "A stole the falcon" against the inference "B stole the falcon" and then against the inference "C stole the falcon."⁵⁶ Alternatively, the court could balance competing inferences that the defendant's behavior fell within a legal category; thus, it would balance "A recklessly took the falcon" against "A negligently took the falcon."⁵⁷

The individual comparison system would distance the pleading standard from the plaintiff's burden at trial. At trial, the plaintiff has the burden of proving his case by a preponderance of the evidence, making it irrelevant whether B or C stole the falcon so long as A did not. However, A would survive a motion to dismiss, as it would be as likely that A stole the falcon as it was that B stole the falcon or that C stole the falcon. While such a result may not seem to fully comport with the requirement of a "strong inference," several lower courts adopted pre-*Tellabs* tests that would allow the plaintiff to continue beyond the pleading stage with an inference that was less than 50% probable.⁵⁸

The *Tellabs* opinions themselves provide conflicting evidence concerning whether the majority meant to establish a system of individual or collective comparison. Both Justice Scalia and Justice Alito clearly read the majority's rule as requiring collective comparison. Justice

⁵⁶ This type of "inference" was clearly posited by Justice Scalia's original jade falcon hypothetical. See *id.* at 2513 (Scalia, J., concurring in the judgment).

⁵⁷ This distinction would be most relevant to § 10(b) actions, which typically require proof of some level of recklessness or knowledge, and not just negligence, on the defendant's part. See *id.* at 2507 n.3 (majority opinion).

⁵⁸ For instance, the Seventh Circuit's "reasonableness" test almost certainly did not require that the plaintiff's inference be 50% probable. See *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 602 (7th Cir. 2006); see also *id.* at 601 (describing other circuits' pre-*Tellabs* tests).

Scalia criticized the majority for allowing the plaintiff to recover when his inference is only as probable as the competing inferences, preferring instead a system in which the plaintiff's inference would need to be "*more plausible* than the inference of *innocence*."⁵⁹ Justice Alito likewise seemed to view the majority's opinion as establishing a collective comparison test. He determined that the majority's test required that "the inference of scienter must be at least as strong as the inference of *no scienter*" and further characterized the majority's test as "posing a binary choice (either the facts give rise to a 'strong inference' of scienter or they do not)."⁶⁰ Furthermore, both Justice Alito and Justice Scalia seemed to believe that the change from the majority's "at least as compelling" rule to Justice Scalia's "more compelling" rule would not make much of a practical difference.⁶¹ Moreover, the fact that the majority failed to correct any misinterpretation of its test on the part of Justices Alito and Scalia weighs heavily in favor of the collective comparison reading of the majority's test.

There are several reasons, however, to believe that the majority actually had in mind the individual comparison of inferences. First, if the majority wanted to adopt a collective comparison test, it chose a needlessly complicated way of doing so. Rather than simply saying that the plaintiff's inference must be 50% probable or that it must be weighed against the "inference of innocence," as Justice Scalia formulated it, the majority instead chose the more convoluted language of "cogent and at least as compelling as any opposing inference." The seemingly deliberate complexity of the majority's test suggests that it might have had something more complicated than a 50% rule in mind.

Moreover, the majority specifically held that the plaintiff's inference is not required to be the most plausible inference in a case,⁶² and noted that the PSLRA's pleading requirement was "but one constraint among many" for "screen[ing] out frivolous suits."⁶³ Under a collective comparison regime, these comments would have little meaning. While it is technically true that the plaintiff's inference would not have to be *most* plausible, that distinction rests on the thin line between 50% probable and greater than 50% probable. Likewise, a collective comparison system would make the Court's comments about the PSLRA's other provisions apply only to the set of cases in which the inferences were in equipoise, a set that even Justice Alito admitted was very

⁵⁹ *Tellabs*, 127 S. Ct. at 2513 (Scalia, J., concurring in the judgment) (second emphasis added).

⁶⁰ *Id.* at 2516 (Alito, J., concurring in the judgment).

⁶¹ *See id.* at 2516 (suggesting that the difference between the majority's test and Justice Scalia's test "is unlikely to make any practical difference"); *id.* at 2515 (Scalia, J., concurring in the judgment) (declaring his views "generally in agreement" with the majority).

⁶² *Id.* at 2510 (majority opinion).

⁶³ *Id.*

small.⁶⁴ These comments would make far more sense if some plaintiff were allowed to survive a motion to dismiss even when his inference was less than 50% probable.

Adding to the confusion is the majority's inclusion at several points of a seemingly separate cogency prong in addition to the comparative inquiry to determine whether the plaintiff's inference is "compelling."⁶⁵ Although it is not clear that the "cogency" prong is a separate part of the test because the majority failed to elaborate how the court is to determine cogency, its inclusion at all might suggest that the majority wanted inferences to be compared individually. Under a collective comparison rule, a separate cogency test would be meaningful under two circumstances. First, it would be meaningful if the majority defined a "cogent" inference as one having greater than a 50% chance of being correct. However, this interpretation of "cogent" fails because the majority explicitly rejected the notion that the plaintiff's inference must be the most plausible.⁶⁶

Second, a cogency inquiry would have force under a collective comparison regime if that analysis was not a comparative one at all. That is to say, the majority might have envisioned the comparative analysis as different in kind from the cogency analysis. Justice Stevens posited that a judge can, in some circumstances, know that an inference is strong independent of any other competing inferences, although he gave little guidance for identifying such cases.⁶⁷ One can easily conceive of a non-comparative cogency test that would look only to the face of the plaintiff's complaint, taking into account factors like internal consistency and the judge's sense of the plausibility of the plaintiff's story.

However, it seems unlikely that the majority wanted to adopt a non-comparative inquiry in addition to the comparative inquiry: they termed the analysis "inherently comparative" and said that inferences "*must* be compared" to determine their strength.⁶⁸ Moreover, if the majority did in fact wish to adopt such an inquiry, it seems likely that the opinion would have more explicitly laid out how courts should conduct such an analysis.

⁶⁴ See *id.* at 2516 (Alito, J., concurring in the judgment).

⁶⁵ The majority's test includes this "cogency" requirement in two articulations. See *id.* at 2505 (majority opinion) ("cogent and at least as compelling as any opposing inference"); *id.* at 2510 (same). However, other articulations of the majority's test do not mention the "cogency" prong. See *id.* at 2511 (holding that the reviewing court must determine whether "a reasonable person [would] deem the inference of scienter at least as strong as any opposing inference"); *id.* at 2513 (stating that the plaintiff's inference must "plead facts rendering an inference of scienter *at least as likely* as any plausible opposing inference").

⁶⁶ See *id.* at 2510.

⁶⁷ See *id.* at 2516 (Stevens, J., dissenting).

⁶⁸ *Id.* at 2510 (majority opinion).

Under an individual comparison regime, however, a separate “cogency” analysis could be given separate force by setting a minimum threshold for the plaintiff to cross before his inference is compared with others from the complaint. For instance, assume that a court determined that an inference could be “cogent” only if its probability was greater than 40%. The plaintiff suing A in the modified version of Justice Scalia’s hypothetical would not survive A’s motion to dismiss because the inference with respect to A would be only 33% probable.⁶⁹ Thus, a cogency bar could be used to prevent plaintiffs from benefiting from the presence of an excessive number of competing inferences in a case. In other words, the cogency threshold would essentially require courts to conduct a type of collective comparison before moving on to an individual comparison inquiry.

While the inherent ambiguities in the majority’s test allow for different plausible interpretations, the collective comparison rule is ultimately preferable from the standpoint of administrability. On the individual comparison reading, the Court left open the very important question of how probable the plaintiff’s inference must be in order to be cogent. The Court addressed the issue of a probability threshold for the plaintiff at oral argument,⁷⁰ and an individual comparison reading would remove any set threshold from the Court’s holding. Such a system would likely result only in another circuit split, with courts differing widely on how probable a cogent inference must be. The “collective comparison” reading of the opinion is thus preferable in that it reads the Court as clearly establishing a 50% rule.

Furthermore, the Court’s lack of guidance on how to define individual inferences would ultimately lead to strange incentives for parties that choose to argue in the alternative. That is, a defendant might be better off arguing for only a single theory that competes with the plaintiff’s inferences rather than showing that there are several competing explanations. Thus, in the falcon scenario, A’s lawyer would be better off arguing that B stole the falcon and that C could not possibly have been the thief, lest he create two inferences that would each weaken the other in comparison to the plaintiff’s.⁷¹ Such incentives

⁶⁹ However, suppose the hypothetical were modified to give A, B, and C unequal access to the room from which the falcon was stolen. If the inference with respect to A was 40% probable, the inference with respect to B was also 40% probable, and the inference with respect to C was 20% probable, then the plaintiff could still survive a motion to dismiss.

⁷⁰ When questioned at oral argument, the defendants’ counsel argued that a “strong inference” was one with a greater than 50% chance of success. Transcript of Oral Argument at 7–8, *Tellabs*, 127 S. Ct. 2499 (2007) (No. 06-484), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-484.pdf. The plaintiffs’ counsel argued that “strong” meant around a 40% chance. *Id.* at 44.

⁷¹ The inference splitting would not inevitably favor the plaintiff. There is no reason why the plaintiff’s “inferences” in favor of scienter should be lumped together, while the defendant’s infer-

based on distinctions that would be immaterial at trial would doubtlessly engender nothing but confusion among both litigants and courts. A collective comparison system, by contrast, would establish a single clear probability threshold — very nearly the same burden that the plaintiff bears at trial.

While the collective comparison system would be simpler to apply and would avoid many of the difficulties of the individual comparison system, the majority's opinion does not allow one to conclude with certainty which system it wanted to adopt. If the Court wanted the plaintiff's inference to be compared against the combined competing inferences that would not allow recovery, then it chose a needlessly complicated way of doing so, both in its formulation and in the inclusion of an ill-defined "cogency" analysis. If the majority wanted the plaintiff's inference to be compared against others in the case individually, then it failed to specify how probable the plaintiff's inference must be and to acknowledge the difficult line-drawing problems of such a system. Because of the inherent interpretational difficulties of the majority's test, it seems unlikely that *Tellabs* will achieve its goal of providing a uniform and workable construction of the PSLRA's "strong inference" language.

G. Review of Administrative Action

1. *Chevron Deference*. — Administrative law scholars have cause to rejoice after the Supreme Court's decision last Term in *Zuni Public School District No. 89 v. Department of Education*,¹ for they have a new wrinkle in the *Chevron*² doctrine from which to produce voluminous commentary. The *Zuni* Court turned a routine statutory interpretation case into a *Chevron* mess by inverting the traditional *Chevron* analysis: the Court looked first to congressional intent and the policies embedded in the statute, and only second to the existence of textual ambiguity. The Court was at pains to confirm two important principles of administrative law: that nondelegation (or, in this case, reverse nondelegation) concerns are indeed part of the *Chevron* analysis; and that administrative agencies are today's common law courts, vested with the authority to bend statutory text to fit policy objectives.

The federal Impact Aid statute³ provides federal assistance to public school districts where a federal presence burdens the district's abil-

ences against scienter should be split. Thus, a plaintiff who argued that the facts established either intentionality or recklessness might also see those inferences individually weighed against the defendant's inferences.

¹ 127 S. Ct. 1534 (2007).

² *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³ 20 U.S.C. §§ 7701–7714 (2000 & Supp. IV 2004).