LOSS CAUSATION BY STATUTORY PRESUMPTION: EVENT STUDIES AND THE KOREAN SECURITIES LITIGATION

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ABSTRACT

In the United States, event studies are ubiquitous in securities fraud litigations. This is not so, in South Korea (hereinafter referred to as "Korea"). Unlike the United States where event studies in a securities fraud class action may even be conducted twice to show both reliance and loss causation, they are far less frequently used in Korean securities litigations, even though the Supreme Court of Korea (the "SCK") explicitly allowed the use of an event study in a securities fraud context.

This Article aims to make two contributions. First, it shows that, even though the SCK allowed the use of an event study in the securities fraud context, the Korean statutory scheme both prevents and discourages its use, not only for the plaintiff but also for the defendant. Article 162 and Article 179 of the Financial Investment Services and Capital Markets Act (the "FISCMA"), anti-fraud provisions against corporate defendants, do not require reliance. Without the reliance element, there is no need to prove or disprove reliance through an event study. Article 170 of the FISCMA, an anti-fraud provision against outside auditors, requires reliance. But the SCK adopted a rule presuming reliance, placing the burden on the defendant to disprove reliance. Even though the SCK allows the outside auditor defendant to use an event study to disprove reliance, it is actually very difficult to do so. This discourages defendants from paying for and submitting an event study.

Article 162 and Article 170 of the FISCMA have the presumption of damages clauses, again requiring the defendant to rebut the presumption by disproving loss causation. Because the presumption of damages clause means that the plaintiff need not allege a corrective

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disclosure, it is even more difficult, if not impossible, for the defendant to disprove loss causation through an event study. Moreover, the SCK developed a principle of fairness defense that is much easier and cheaper for the defendant to use compared to an event study.

Second, I argue that the Korean presumption of damages provisions is inefficient. Because they distort the incentives of the informed traders to trade on the knowledge of misrepresentation, they make the Korean capital market less efficient. Based on this argument, I offer a practical statutory scheme to align the incentives of the informed traders through the loss causation and damages rules.

TABLE OF CONTENTS

I. INTRODUCTION

In the United States, event studies are ubiquitous in securities fraud litigations.[1] This is not so, in Korea. Unlike the United States where event studies in a securities fraud class action may even be conducted twice to show both reliance and loss causation,[2] they are far less frequently used in Korean securities litigations.[3] In Korea, transaction causation is generally defined to mean that certain misconduct induced the victim to trade.[4] The term "reliance" is often used interchangeably.[5] "Loss causation," in a Korean securities litigation context, is generally defined to mean that the misrepresentation or omission caused the loss.[6] Considering that Korean securities law distinguishes the two concepts similar to the United States,[7] one may find it strange why the practice is different.

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1 *See* Jill E. Fisch, Jonah B. Gelbach & Jonathan Klick, *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 TEX. L. REV. 553, 556 (2018) ("Use of event study methodology has become ubiquitous in securities fraud litigation."); Alon Brav & J.B. Heaton, *Event Studies in Securities Litigation: Low Power, Confounding Effects, and Bias*, 93 WASH. U. L. REV. 583, 585 (2015) ("After the Supreme Court endorsed the fraud-on-the-market doctrine in *Basic Inc. v. Levinson* in 1988, event studies became so entrenched in securities litigation that they are viewed as necessary in every case."); MICHAEL J. KAUFMAN & JOHN M. WUNDERLICH, RULE 10B-5 SECURITIES-FRAUD LITIGATION 498 (2015) ("It is no wonder that federal courts often describe expert testimony and event studies as 'indispensable' components of securities-fraud litigation.").

2 *See* Fisch, Gelbach & Klick, *supra* note 1, at 561-62 ("Practically speaking, plaintiffs in the post-Dura era need to plead price impact both at the time of the misrepresentation and on the alleged corrective disclosure. . . . Plaintiffs responded to Dura's loss causation requirement by presenting event studies showing that the stock price declined in response to an issuer's corrective disclosure.").

3 *See infra* Part III.

4 *See*, *e.g.*, JAI YUN LIM, JABONSIJANGBEOB [CAPITAL MARKET ACT] 584 (2021).

5 *Id.*

6 *Id.* at 588.

7 *See* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) ("In cases involving publicly traded securities and purchases or sales in public securities markets, the action's basic elements include: . . . (4) *reliance*, often referred to in cases involving public securities markets (fraud-on-the-market cases) as 'transaction causation,'. . . (6) '*loss causation*,' *i.e.*, a causal connection between the material misrepresentation and the loss[.]") (emphasis in original); Jill E. Fisch, *The Trouble with Basic: Price Distortion After Halliburton*, 90 WASH. U. L. REV. 895, 914 (2013) ("The Court in *Dura* . . . [held] that reliance and loss causation were two distinct components of a federal securities fraud claim and that plaintiffs could not establish economic harm simply through the price distortion reflected in *Basic*'s analysis.") (emphasis in original).

Of course, securities fraud cases themselves are filed relatively infrequently in Korea, compared to the United States. There are only four stock-price-drop-after-disclosure-of-truth fact pattern securities class actions filed in Korea since the enactment of the Korean Securities-related Class Action Act.[8] While there are some more individual or joinder securities fraud actions filed against the corporate defendants[9] and outside auditors,[10] they are still far less common than the Rule 10b-5 securities class action cases filed annually in the United States.[11]

However, also unlike the United States,[12] those cases filed in Korea very often are decided on the merits by the Korean courts.[13] Settlements are rare in Korean securities actions.[14] For this reason, even in non-class action cases, it may seem like event studies would be needed for the courts to determine whether reliance and/or loss causation elements were proven. But Korean jurisprudence on securities fraud litigation is different from the United States in that event studies

8 *See infra* Part III.

9 *See* Joon Buhm Lee, *Where is the Action?: Choosing Securities Joinder Action over Securities Class Action in Korea*, 22 HOFSTRA J. INT'L BUS. & L. 68, 69 (2023) ("Between 2010 and 2015, 55 cases that could have been filed as a securities class action were filed either as an individual action or a joinder action.").

10 *See* Joon Buhm Lee, Securities Litigation Against Outside Auditors in Korea (Aug. 10, 2022) (unpublished manuscript) (on file with author) ("I find that, between 2010 and 2015, 52 cases that could have been filed as class actions against outside auditors were filed either as individual actions or joinder actions.").

11 *See Securities Class Action Clearinghouse, Filings Database, Heat Maps & Related Filings, Years 2021*, STAN. LAW SCH., https://securities.stanford.edu/listmode.html?filter=2021 [https://perma.cc/37KZ-CBZ2] (last visited Jan. 27, 2022) (showing 211 securities class action cases filed in 2021 in the United States); *but see* Dain C. Donelson & Robert A. Prentice, *Scienter Pleading and Rule 10b-5: Empirical Analysis and Behavioral Implications*, 63 CASE W. RES. L. REV. 441, 456 (2012) ("[A]uditors are rarely named as defendants in securities fraud actions, even when their clients are accused of accounting fraud.").

12 *See* Matthew L. Mustokoff & Margaret E. Mazzeo, *Loss Causation on Trial in Rule 10B-5 Litigation a Decade After* DURA, 70 RUTGERS U. L. REV. 175, 177 n.6 (2017) ("Only fourteen securities fraud class actions have been tried to verdict since the passage of the PSLRA in 1995—less than half a percent of all cases filed.").

13 *See* Lee, *supra* note 9, at 69 (explaining that plaintiffs prevailed in over 80% of 55 securities joinder actions filed between 2010 and 2015).

14 *See* Hai Jin Park, *Class Action Scarcity: An Empirical Analysis of the Securities Class Action in Korea*, EUR. BUS. ORG. L. REV. 1, 22 (2019), https://doi.org/10.1007/s40804-019-00169-5 [https://perma.cc/S3Z6-W9SV] ("Because settlements rarely occur in securities damages suits or securities class action suits, the plaintiffs' lawyers must win and enforce in order to recover their contingent fees.").

do not determine the merits nor damages in Korean securities fraud cases, class action or not.[15] Statutes do.

Certain securities fraud statutes that Korean plaintiffs rely on do not require reliance.[16] For this reason, an event study is not needed to prove reliance.[17] Even for other securities fraud statutes that do require reliance, the Supreme Court of Korea ("SCK") adopted a presumption of reliance rule that requires the defendant to rebut the presumption.[18] Even though the SCK suggested that an event study may be a method for the defendant to rebut the presumption,[19] the hurdle set by the SCK makes it very difficult to overcome the presumption with an event study.[20]

Those securities fraud statutes that Korean plaintiffs rely on also have statutory presumptions of damages that allow the securities fraud plaintiffs to successfully sue for damages without an event study.[21] The SCK also, in this context, suggested that an event study may be a method for a defendant to rebut the presumption.[22] However, here, the hurdle that the defendant must meet is perhaps even higher, making it even more difficult, if not impossible, to overcome with an event study.[23] Moreover, because the SCK and the lower courts are willing to limit the statutory presumption citing to the principle of fairness, a defendant will not be willing to pay for a costly event study[24] that may not be effective anyway.[25]

A cause of action that does not provide a statutory presumption of damages nor court provided presumption of damages is rarely brought to court in a stock price drop context.[26] Of the few that were

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15 *See infra* Part III.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *See infra* Part III.

22 *Id.*

23 *Id.*

24 *See*, *e.g.*, Joo Young Kim, *Jeungkwonsosonge iteoseoui jeonmunga gamjeong hwalyong gijun* [*Suggested Guidelines for the Use of Court Economic Experts in Securities Litigation*], 102 JEOSEUTISEU 176, 177 (2008) (explaining that costs paid to the experts in the few Korean securities litigation where experts were hired were expensive); Jung-Sik Choi, *Jeungkwonjipdansosongjedoui hwalseonghwareul wihan jaean* [*Proposal for the Invigoration of Securities Class Action Systems*], 53 BEOBHAKYEONGU 311, 325 (2014) (noting that the expert fee in a securities class action is costly).

25 *See infra* Part III.

26 *Id.*

brought to court, the plaintiffs chose not to submit an event study.[27] This suggests that the case was without merit, regardless of loss causation.[28] For these reasons, event studies are not frequently used in Korean securities fraud actions.

Not using an event study in the Korean securities fraud litigation context may not be necessarily bad, if different. Even in the United States, the use of event studies in securities litigation context is being criticized.[29] For instance, event studies suffer from a number of methodological issues related to confounding events or leakage.[30] Also, event studies raise other statistical problems when used in securities fraud litigation focusing on a single firm and a single or small number of events.[31]

Worse, Korean judges are probably not well qualified to consider event studies.[32] They are generally not equipped with the skill sets before becoming judges.[33] And, a judge generally does not handle enough securities fraud cases to train on the job.[34]

However, in at least one respect, the use of an event study may be better than resorting to the Korean statutory presumption of damages, which is loss causation. The statutory presumption of damages turns a misrepresentation into a kind of downside insurance policy.[35] If you find a misrepresentation, then you are protected from the subsequent downside risk.[36] This may distort the incentive of informed traders whose trading is crucial for the market to be more efficient, making the Korean capital market less efficient.[37] To better align the

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27 *Id.*

28 *Id.*

29 *See* Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 851 (2009) ("Although event studies can link a stock price reaction to an information event, they cannot determine the extent to which that stock price reaction is the right measure of recoverable harm."); Fisch, *supra* note 7, at 919 ("Although event studies are used extensively, they are imperfect tools for measuring the effect of a disclosure on stock prices.").

30 *See* Fisch, *supra* note 7, at 919-20 (explaining the methodological challenges of applying event studies).

31 *See*, *e.g.*, *id.* at 920 ("[E]vent studies raise particular concerns when they are used in securities fraud litigation because they focus on a single firm and a single or small number of information events.").

32 *See infra* Part IV.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

incentives of the informed traders, the statutory scheme should be that compensation matches the actual loss to the extent possible.[38]

I conclude by offering a statutory framework to better align the incentives of the informed traders while considering the problems of proof.[39] The proposal does include using event studies in certain circumstances.[40] While this proposal may not be perfect,[41] it tries to balance the current problem of proving loss causation in civil litigation with the problem that the presumption of damages causes by distorting the incentives of Korean informed traders. Without a better empirical tool being developed, using event studies is better than blindly resorting to arbitrary Korean statutory presumption because it adds precision to damages, relatively speaking.[42] And, with statistical methods being developed to account for issues with using event studies,[43] the use of the methodology will be more defensible.[44] The proposal, by allocating the burden of proof and by discouraging strategical disclosures, further addresses concerns related to certain methodological issues for properly performing event studies.

The rest of the Article goes as follows: First, I will explain U.S. securities fraud law and the role an event study plays in U.S. securities litigation. (II). Then, I will explain how the Korean law on securities fraud litigation differs. The difference in law will be discussed to reason why event studies are rarely used in securities class actions in Korea. (III). Next, I will argue that the current Korean rule that makes event studies unnecessary and unhelpful is inefficient in the context of loss causation because it distorts the incentives of informed investors. Then, I suggest a framework where the loss causation rule will provide

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38 *See infra* Part IV.

39 *Id.*

40 *Id.*

41 *See* Fisch, *supra* note 7, at 921 ("The foregoing limitations do not mean that event studies are unreliable or should not be used, but merely that their results should be viewed with caution."); Michael J. Kaufman & John M. Wunderlich, *The Judicial Access Barriers to Remedies for Securities Fraud*, 75 LAW & CONTEMP. PROBS. 55, 87 (2012) ("Generally, event studies provide good evidence that new information has affected a stock price, but they suffer from several shortcomings that relegate the mode of analysis to good rather than conclusory evidence.").

42 *See* Fisch, *supra* note 7, at 921 ("Until better empirical tools are developed, event studies are likely to be a dominant evidentiary tool for addressing the loss causation analysis required by *Dura*.") (emphasis in original).

43 *See* Fisch, Gelbach & Klick, *supra* note 1, at 620 (proposing adjustments to address methodological considerations of using an event study in securities litigation); *see also infra* footnote 373.

44 *But see* Fisch, Gelbach & Klick, *supra* note 1, at 620 (summarizing evidentiary challenges of using event studies in securities litigation).

informed investors compensation that matches the actual loss to the extent possible. (IV). Finally, I will conclude. (V).

II. EVENT STUDIES IN THE UNITED STATES SECURITIES FRAUD CLASS ACTION

An event study is a statistical method to determine whether a certain event is associated with a statistically significant change in a company's stock price.[45] In a Rule 10b-5 securities class action in the United States, establishing reliance, materiality, loss causation, and damages requires a reliable event study or event studies.[46] A market model event study follows these steps: (1) define the event; (2) identify the date or dates on which information of the event became public; (3) measure the affected security's actual return on the said date or dates; (4) estimate the security's expected return on the said dates using historical data on the relationship of the affected security to the market as a whole; (5) calculate the abnormal return by subtracting the expected return from the actual return; and (6) assess the statistical significance of the abnormal return.[47] Following these steps, it is possible to evaluate the economic significance, if any, of the abnormal return of the event.[48]

An event study is used to show that the market relied on the alleged misrepresentation.[49] Under *Basic Inc. v. Levinson*, plaintiffs

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45 *See id.* at 557 ("[A]n event study used in securities fraud litigation typically requires evaluating the impact of individual events on a single firm's stock price."); Brav & Heaton, *supra* note 1, at 585 ("An event study is a statistical method for determining whether some event-such as the announcement of earnings or the announcement of a proposed merger-is associated with a statistically significant change in the price of a company's stock.").

46 *See* Andrew C. Baker, *Single-Firm Event Studies, Securities Fraud, and Financial Crisis: Problems of Inference*, 68 STAN. L. REV. 1207, 1226 (2016) ("[T]here are four objective areas of dispute in the prosecution of class action lawsuits under Rule 10b-5: reliance, materiality, loss causation, and damages. Each of these considerations is critically dependent on the provision of a reliable event study by a qualified expert.").

47 *See* Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-off*, 108 COLUM. L. REV. 749, 798 (2008).

48 *See id.*; Jill E. Fisch & Jonah B. Gelbach, *Power and Statistical Significance in Securities Fraud Litigation*, 11 HARV. BUS. L. REV. 55, 67-68 (2021) (explaining the steps to conduct an event study); *see also* Baker, *supra* note 46, at 1229 ("[I]t is an adequate generalization that a 'market model' event study that estimates predicted returns through the use of ordinary least square (OLS) regression is the standard adopted by most courts.").

49 *See* Michael J. Kaufman & John M. Wunderlich, *Regressing: The Troubling Dispositive Role of Event Studies in Securities Fraud Litigation*, 15 STAN. J.L. BUS.

must show some degree of market efficiency to gain the presumption of reliance.[50] One of the most frequently cited cases that set forth the test to evaluate market efficiency is *Cammer v. Bloom*.[51] *Cammer v. Bloom* provided a five-factor test: (1) the stock's average weekly trading volume; (2) the number of securities analysts that followed and reported on the stock; (3) the presence of market makers and arbitrageurs; (4) the company's eligibility to file a Form S-3 Registration Statement; and (5) a cause-and-effect relationship, over time, between unexpected corporate events or financial releases and an immediate response in stock price.[52] An event study is generally used to address the fifth factor.[53] In other words, in the United States, an event study is used to show that the market in question is efficient at the class certification stage.[54]

The Supreme Court of the United States ("SCOTUS") in *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*")[55] added another reason to use an event study by suggesting that a defendant might introduce an event study as direct evidence that could sever the link between a misrepresentation and stock price movement.[56] After

& FIN. 183, 197 (2009) ("[A]n event study can show that a misrepresentation or corrective disclosure had a statistically significant effect on the price of a stock, thereby demonstrating that the market 'relied' on the misrepresentation.").

50 *See* Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 166 (2009) ("Basic says that plaintiffs must show some degree of market efficiency in order to gain the presumption of reliance[.]" (emphasis omitted)).

51 *See* Fisch, *supra* note 7, at 911 n.106 ("One of the most frequently cited cases for the evaluation of market efficiency is Cammer v. Bloom, 711 F. Supp. 1264 (D.N.J. 1989).").

52 *See* Fisch, Gelbach & Klick, *supra* note 1, at 559.

53 *Id.* ("Economists serving as expert witnesses generally use event studies to address the fifth *Cammer* factor.").

54 Brief of Law Professors as Amicus Curiae in Support of Petitioners at 27, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 279 (2014) (No. 13-317) ("Event studies are routinely employed to show that a market is efficient at the class certification stage."); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 279, 280 (2014) ("[P]laintiffs themselves can and do introduce evidence of the existence of price impact in connection with 'event studies'-regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events."). The plaintiff in Halliburton II also submitted an event study. *Id.* ("In this case, for example, EPJ Fund submitted an event study of various episodes that might have been expected to affect the price of Halliburton's stock, in order to demonstrate that the market for that stock takes account of material, public information about the company.").

55 *Erica P. John Fund, Inc.*, 573 U.S. 279 (2014).

56 *See* Jill E. Fisch, *The Future of Price Distortion in Federal Securities Fraud Litigation*, 10 DUKE J. CONST. L. & PUB. POL'Y 87, 87 (2015) ("Specifically, the

Halliburton II, it was argued that it should be sufficient for the plaintiff to demonstrate that the security is followed by informed traders and market professionals.[57] But, *Halliburton II* likely incentivized both parties to hire expert witnesses to prove or disprove market impact.[58] This may increase the already enormous cost of litigating a securities fraud litigation.[59]

Halliburton II did not define or explain the type of economic evidence that defendants can provide.[60] First, *Halliburton II* did not specify the defendant's burden of proof in making the lack-of-price-impact argument.[61] The Federal Rules of Evidence ("FRE") 301 says that "[i]n a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption."[62] But FRE

Court suggested that defendants might introduce event studies as direct evidence that could sever the link between the misrepresentation and stock price.").

57 *See* Geoffrey Miller, *The Problem of Reliance in Securities Fraud Class Actions*, 57 ARIZ. L. REV. 61, 65 (2015) ("If the presumption of reliance derives from such a modest premise, then the concept of efficiency under the fraud-on-the-market theory should not be defined by the standards of corporate finance. . . . In light of Halliburton II, it should be sufficient for the plaintiff to demonstrate that the security is followed by informed traders and market professionals, so that material, false statements by corporate insiders are likely to distort the price.").

58 *See* A.C. Pritchard, *Halliburton II: A Loser's Story*, 10 DUKE J. CONST. L. & PUB. POL'Y 27, 46 (2015) ("Halliburton II's price impact defense will encourage defendants to put on economists to testify that the alleged misstatements did not affect the market price. Plaintiffs will respond with their own economists who will testify that it did.").

59 *See id.* ("But the [Halliburton II] decision adds a new battle of the experts—without jettisoning the old one—that will further increase the already enormous cost of litigating these cases.").

60 *See* Allen Ferrell & Andrew Roper, *Price Impact, Materiality, and Halliburton II*, 93 WASH. U. L. REV. 553, 560 (2015) ("Beyond its mention of event studies, the Court did not define or circumscribe the type of economic evidence that defendants can proffer as 'direct evidence' of a lack of price impact."); Merritt B. Fox, *Halliburton II: What It's All About*, 1 J. FIN. REGUL. 135, 136 (2015) ("While the Court unanimously agrees that the 'defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock', it leaves unclear what the standard is for determining the sufficiency of the evidence presented by a defendant as to a misstatement having no impact on price.").

61 *See* Noah Weingarten, *Halliburton II at Four: Has It Changed the Outcome of Class Certification Decisions?*, 25 FORDHAM J. CORP. & FIN. L. 459, 478 (2020) ("Halliburton II did not specify a defendant's burden of proof in making the lack-of-price-impact argument.").

62 FED. R. EVID. 301.

301 "does not shift the burden of persuasion, which remains on the party who had it originally."[63]

SCOTUS recently addressed this issue in *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, and it held that the defendant has the burden of persuasion.[64] *Goldman Sachs* involved generic statements made by Goldman that were allegedly false or misleading.[65] For instance, the alleged misrepresentations included statements such as "our client's interests always come first."[66] The issues presented were: (1) whether the generic nature of a misrepresentation is irrelevant to the price impact inquiry; and (2) which party had the burden of persuasion to prove a lack of price impact.[67]

Regarding the first issue, SCOTUS held that "the generic nature of a misrepresentation often is important evidence of price impact that courts should consider at class certification."[68] SCOTUS vacated and remanded for the court of appeals to reassess the district court's price impact determination because they concluded that the Second Circuit may not have properly considered the generic nature of Goldman's alleged misrepresentations.[69]

However, SCOTUS did not stop there and went on to address the second issue. The Court held that the defendant has the burden of

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63 *Id.*

64 Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys., 141 S. Ct. 1951, 1958 (2021) ("On the second question, we agree with the Second Circuit that our precedents require defendants to bear the burden of persuasion to prove a lack of price impact by a preponderance of the evidence.").

65 *Id.* at 1957 ("Plaintiffs say that Goldman's generic statements were false or misleading in light of several undisclosed conflicts of interest, and that once the truth about Goldman's conflicts came out, Goldman's stock price dropped and shareholders suffered losses.").

66 *Id.* at 1959 ("The alleged misrepresentations are generic statements from Goldman's SEC filings and annual reports, including . . . '[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest'[,] . . . '[o]ur clients' interests always come first'[, and] . . . '[i]ntegrity and honesty are at the heart of our business.'").

67 *Id.* at 1958 ("In this Court, Goldman argues that the Second Circuit erred twice: first, by holding that the generic nature of its alleged misrepresentations is irrelevant to the price impact inquiry; and second, by assigning Goldman the burden of persuasion to prove a lack of price impact.").

68 *Id.* ("On the first question, the parties now agree, as do we, that the generic nature of a misrepresentation often is important evidence of price impact that courts should consider at class certification.").

69 *Id.* ("Because we conclude that the Second Circuit may not have properly considered the generic nature of Goldman's alleged misrepresentations, we vacate and remand for the Court of Appeals to reassess the District Court's price impact determination.").

persuasion to prove a lack of price impact by a preponderance of the evidence.[70]

The issue still not answered by SCOTUS is "what the standard is for determining the sufficiency of the evidence presented by a defendant as to a misstatement having no impact on price."[71] Although the Court suggested an event study, SCOTUS did not provide a straightforward way to conduct an event study to determine the sufficiency of the evidence presented by the defendant as to a misstatement having no impact on price at the class certification stage.[72]

SCOTUS's holding on the loss causation element is more straightforward. One may look to *Dura Pharms., Inc. v. Broudo*.[73] In *Dura*, the Court held that even if Dura Pharmaceuticals' stock price was artificially inflated because of a misrepresentation, that was insufficient to establish loss causation.[74] SCOTUS noted that the only statement in the plaintiff's complaint that can be read as describing loss causation is that "the plaintiffs 'paid artificially inflated prices for Dura's securities' and suffered 'damage[s].'"[75] SCOTUS found this to

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70 *Goldman Sachs Grp.*, 141 S. Ct. at 1958 ("On the second question, we agree with the Second Circuit that our precedents require defendants to bear the burden of persuasion to prove a lack of price impact by a preponderance of the evidence.").

71 *See* Fox, *supra* note 60, at 136 ("While the Court unanimously agrees that the 'defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock', it leaves unclear what the standard is for determining the sufficiency of the evidence presented by a defendant as to a misstatement having no impact on price.").

72 *See* Ferrell & Roper, *supra* note 60, at 582 ("While the Halliburton II Court seemed to think that event studies would be a relatively straightforward way of sorting securities class action at the class action stage, the complexities of actual practice might turn out differently."); Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 57 ARIZ. L. REV. 37, 56 (2015) ("My sense from the oral argument is that the Justices seemed to think . . . that event studies are a clean and simple way to answer the narrow and specific distortion question. Sadly, that is far from so.").

73 *Broudo*, 544 U.S. 336 (2005).

74 *See* Allen Ferrell & Atanu Saha, *The Loss Causation Requirement for Rule 10b-5 Causes of Action: The Implications of* Dura Pharmaceuticals, Inc. v. Broudo, 63 BUS. LAW. 163, 164 (2007) ("[T]he Court held that even if Dura Pharmaceuticals' stock price was artificially inflated as a result of a fraudulent statement concerning the expectation of FDA approval of Dura's asthmatic inhaler, that was nevertheless insufficient to establish loss causation.").

75 Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346-47 (2005) ("As we have pointed out, the plaintiffs' lengthy complaint contains only one statement that we can fairly read as describing the loss caused by the defendants' 'spray device' misrepresentation. That statement says that the plaintiffs 'paid artificially inflated prices for Dura's securities' and suffered 'damage[s].'").

be insufficient.[76] SCOTUS noted that "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind."[77] The Court explained that allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind may transform a securities action into a partial downside insurance policy.[78] Although *Dura* did not explicitly require one,[79] this is understood to mean that SCOTUS has indicated a need for a corrective disclosure.[80] To be actionable, the misconduct must cause an economic loss to shareholders who purchased at an inflated price.[81] Accordingly, loss causation analysis in most U.S. cases focuses on identifying an adequate corrective disclosure and providing an expert testimony tying the disclosure to a stock price drop.[82]

The lower courts generally require a plaintiff seeking to establish loss causation to introduce an expert testimony based on an event study of the corrective disclosure that meets the 95% confidence

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76 *Id.* at 348 ("[W]e find the plaintiffs' complaint legally insufficient.").

77 *Id.* at 347.

78 *Id.* at 347-48 ("[A]llowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid. . . . Such a rule would tend to transform a private securities action into a partial downside insurance policy."); *see* Fox, *supra* note 60, at 138 ("[C]ourts generally require a plaintiff seeking to establish loss causation to introduce expert testimony based on an event study of the corrective disclosure that meets the 95 per cent confidence standard. Such a study adjusts the price change observed on the day of the corrective disclosure to account for the movement that would be expected given what happened in the market as a whole that day . . . .").

79 *See* Fisch, *supra* note 29, at 825 (explaining that "*Dura* did not explicitly require a corrective disclosure") (emphasis in original).

80 *See* Ferrell & Saha, *supra* note 74, at 170 (explaining that *Dura* indicated "the need for a corrective disclosure as a prerequisite to establishing loss causation").

81 *See id.* at 166 ("In short, the Supreme Court in *Dura* emphasized that the actionable misconduct must *cause* economic loss to shareholders who purchased shares at an inflated price.") (emphasis in original).

82 *See* Fisch, *supra* note 29, at 825 ("[T]he loss causation analysis in most cases has focused on both the identification of an adequate corrective disclosure and expert testimony tying that corrective disclosure to a drop in stock price.").

standard.[83] Even though it is generally required,[84] the 95% confidence level may not have been chosen by the courts with deliberation.[85]

The standard event study used in securities litigation may show an absence of statistically significant price impact, but not necessarily an absence of price impact.[86] Certain information may affect stock price to a lesser degree than can be detected by an event study but nonetheless have an impact.[87] In this case, even though the event study failed to find statistical significance, it only means that the event study cannot determine whether the information had a price effect or not.[88] In other words, the failure of an event study to meet the 95% confidence standard does not allow one to conclude that the corrective disclosure did not have a negative effect on price.[89] In this case, it is likely

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83 *See* Merritt B. Fox, *Halliburton II: It All Depends on What Defendants Need to Show to Establish No Impact on Price*, 70 BUS. LAW. 437, 442 (2015) ("[C]ourts generally require a plaintiff seeking to establish loss causation to introduce expert testimony based on an event study of the corrective disclosure that meets the 95% confidence standard.").

84 *See*, *e.g.*, Pirnik v. Fiat Chrysler Autos., N.V., 327 F.R.D. 38, 46 (S.D.N.Y. June 26, 2018) ("Defendants note that . . . shows a price impact statistically significant at a confidence level of only 92.12%, which is below the conventional statistical measure of a 95% confidence level . . . it does not prove the absence of price impact.").

85 *See* Fisch & Gelbach, *supra* note 48, at 58 ("While courts have embraced the event study methodology, they have paid limited attention to the question of whether the social science standard of statistical significance and the requirement of the 95% confidence level are appropriate standards for legal sufficiency.").

86 *See* Fisch, *supra* note 56, at 96 ("The standard event study used in securities litigation only shows the absence of *statistically significant* price impact, not the absence of price impact.").

87 *Id.* at 97 ("[I]nformation can affect stock price to a lesser degree than will be detected by an event study."); Fox, *supra* note 82, at 446 ("[T]here may be a good chance that the corrective disclosure in fact has a negative impact on price but the accompanying market-adjusted price change does not pass the test.").

88 *See* Fisch, *supra* note 56, at 97 ("In such a case, the event study fails to find statistical significance, which means that the event study cannot determine whether the information had a price effect or not. The study does not prove that there is no price effect[.]").

89 *See* Fox, *supra* note 83, at 446 ("One cannot automatically infer from such a failure [of the event study] that it is likely that the corrective disclosure did not have a negative effect on price."); Fisch, *supra* note 56, at 96 ("Specifically, the Court erred in concluding that, in the standard event study, a finding of no statistical significance proves the absence of price distortion, thereby rebutting the Basic inc. v. Levinson presumption."); Fisch, Gelbach & Klick, *supra* note 1, at 611 ("[T]he standard event study does not show that the information did not affect stock price; it just shows that the information did not have a statistically significant effect at the 5% level."); Brav & Heaton, *supra* note 1, at 587 ("Courts err because of their mistaken premise that statistical insignificance indicates the probable absence of a price impact.").

that, with the burden of persuasion on the defendant, it is difficult for the defendant to show that there is no price impact.[90]

One study reported that, after *Halliburton II*, class certification was denied in two cases and partially denied in four cases out of thirty-one Rule 10b-5 securities class action cases where whether there was a market impact was disputed at the class certification stage.[91] The study also reported that, after *Halliburton II*, but before *Goldman Sachs*,[92] only one out of seven courts that explicitly held that the defendant has the burden of persuasion denied class certification.[93] Two courts that explicitly held that a defendant only has the burden of production, both denied class certification.[94]

There are at least two different approaches to rebut the fraud-on-the-market presumption being discussed in the United States.[95] One approach is to impose on the defendant the same statistical burden as is imposed on the plaintiff at the merits stage to establish loss causation.[96] Under this approach:

> [T]he defendant [may] be required to introduce expert testimony based on an event study in essence showing a market-adjusted price change on the day of the corrective disclosure that is sufficiently *positive* that the change is greater in magnitude than the changes on 95% of the other trading days over the last year.[97]

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90 *See* Fisch, *supra* note 56, at 98 ("If, . . ., the burden is on the defendant, . . . defendants will rarely be able to meet this burden."); Pritchard, *supra* note 58, at 46 ("With the burden of proof on defendants, many trial judges, faced with conflicting economic evidence that they are scarcely equipped to evaluate, will opt to certify a class.").

91 Weingarten, *supra* note 61, at 475.

92 Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys., 141 S. Ct. 1951(2021).

93 Weingarten, *supra* note 61, at 493-94.

94 *Id.* at 494.

95 *See* Fox, *supra* note 83, at 455-62 (discussing the pros and cons between imposing on the defendant the same statistical burden that is currently imposed on the plaintiff and requiring defendants to persuade the court that the plaintiff will not be able to show a price effect).

96 *See id.* at 448-49 ("One approach would be to impose on the defendant the same statistical burden, when it seeks to show that the corrective disclosure had no negative effect on price, as is currently imposed on the plaintiff, when, at the merits stage of the proceeding, it must show, to establish loss causation . . .").

97 *See id.* at 449 ("[T]he defendant would be required to introduce expert testimony based on an event study in essence showing a market-adjusted price change on the day of the corrective disclosure that is sufficiently positive that the change in greater in magnitude than the changes on 95% of the other trading days over the last year.").

Professor Fox explains that most cases falling under this scenario would not have been brought by the plaintiffs even before *Halliburton II*,[98] making this scenario just a probable thought experiment.

Under the second approach, the defendant can rebut the fraud-on-the-market presumption of reliance, at the class certification stage, by persuading the court that the plaintiff will not be able to meet the burden concerning price effect at the merits stage of the litigation.[99] To do so, the defendant would first "introduce expert testimony based on an event study of the corrective disclosure that shows a market-adjusted price change that is not negative enough (if it is negative at all) to meet the 95% confidence standard."[100] The plaintiffs will also introduce an expert testimony based on an event study.[101] This would lead to a battle of experts.[102]

A few U.S. courts discussing this issue seem to reject the second approach that only requires the defendant to persuade the court that the plaintiffs will not be able to show a price effect.[103] For instance, in

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98 *See id.* at 454 ("In sum, before *Halliburton II*, most cases where a reputable defendant's expert would have been able to conduct an event study satisfying the first approach's standard concerning the evidence needed to rebut the presumption of reliance would not have been brought.").

99 *See id.* ("Under this approach, the defendant, at the class certification stage, can rebut the fraud-on-the-market presumption of reliance simply by persuading the court that the plaintiff will not be able to meet the burden concerning price effect that will be imposed on it later, at the merits stage of the litigation, with respect to loss causation.").

100 *See id.*

101 *See* Fox, *supra* note 83, at 454. ("The plaintiffs would then have the opportunity to introduce their own event-study-based expert testimony.").

102 *See id.* (explaining that the presumption will be successfully rebutted if (1) "the plaintiffs' event study also fails to show a market-adjusted price change negative enough to meet the standard" or (2) "the plaintiffs' study does show a change sufficiently negative to meet the standard, but the court is not persuaded that the plaintiffs' event-study-based expert testimony was more probative than the defendant's expert testimony").

103 *In re* Allergan PLC Secs. Litig., No. 18 Civ. 12089 (CM) (GWG), 2021 U.S. Dist. LEXIS 170310, at *38 (S.D.N.Y. Sept. 8, 2021) ("Finally, numerous courts have noted that, 'The failure of an event study to find price movement does not prove lack of price impact with scientific certainty.' Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC, 310 F.R.D. 69, 95 (S.D.N.Y. 2015)."); Monroe Cty. Employees' Ret. Sys. v. Southern Co., 332 F.R.D. 370, 394 (N.D. Ga. 2019) ("[C]ourts routinely reject the argument that a non-statistically significant stock price decline proves an absence of price impact."); Pirnik v. Fiat Chrysler Autos., N.V., 327 F.R.D. 38, 46 (S.D.N.Y. June 26, 2018) ("Defendants note that [. . .] shows a price impact statistically significant at a confidence level of only 92.12%, which is below the conventional statistical measure of a 95% confidence level [. . . .] it does not prove the absence of price impact."); Li v. Aeterna Zentaris, Inc., 324 F.R.D. 331, 345 (D. N.J Feb. 28, 2018) ("[T]he crux of Defendant's argument focuses on the fact

Monroe Cty. Employees' Ret. Sys. v. Southern Co., the court held that "[c]ontrary to Defendants' argument, the existence of non-statistically-significant stock price decline does not prove the absence of price impact."[104] The court declined to find an absence of price impact simply because an opinion by the defendants' expert found the price decline to not be statistically significant.[105]

Even though the law is evolving in the United States, it is foreseeable that event studies will continue to play a central role in U.S. securities litigations.[106] As will be shown below, this is not so in South Korea.

III. EVENT STUDIES AND THE KOREAN SECURITIES LITIGATION

A. *Potential Causes of Action in a Korean Securities Litigation*

1. *The FISCMA Causes of Action*

The Financial Investment Services and Capital Markets Act ("FISCMA") gives a private plaintiff, alleging misrepresentations made by the defendant, a few explicit causes of action.

a. Article 162 of the FISCMA

Article 162 of the FISCMA ("Article 162") concerns claims for damages regarding the false description or representation of a material fact in an annual report, a half-yearly report, a quarterly report, or any material fact report under Article 159(1) of the FISCMA (hereinafter

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that the Werner report did not conclude, at the 95% confidence level, that the August 30, 2011 press release had a significant impact on the stock price. This argument fails for several reasons."); *but see* Erica P. John Fund, Inc. v. Halliburton Co., 309 F.R.D. 251, 270 (2015) ("Even without adjusting for multiple comparisons, Coffman found an intraday statistically significant price reaction on Day 1 only at a 90% confidence level, which is less than the 95% confidence level both experts require in their regression analyses and which the Court finds is necessary [. . . .] The Court agrees with Halliburton that there was no price impact on December 21, 2000, and finds that Defendants have rebutted the *Basic* presumption as to the alleged corrective disclosure made on that date.").

104 *Southern Co.*, 332 F.R.D. 370.

105 *Id.* at 394 ("[T]he Court declines to find an absence of price impact simply because Professor Gompers found the price decline to not be statistically significant.").

106 *See* Fisch & Gelbach, *supra* note 48, at 56-57 ("Although courts vary in the extent to which they require the use of an event study and the degree to which they accept other evidence with respect to these issues, a properly conducted event study is often a critical factor.").

referred to as "Business Report") or any document attached thereto (excluding an audit report prepared by an accounting auditor), or due to an omission of a description or representation of a material fact therein.[107] The basic elements are somewhat like the Rule 10b-5 cause of action: (1) a material misrepresentation or omission in a business report or a document attached thereto; (2) trade of the securities by the plaintiff; (3) lack of reasonable care; (4) loss causation; and (5) damages.[108] Article 162 does not require a plaintiff to prove reliance.[109] For this reason, there is no need for the plaintiff to rely on any presumption.[110]

Article 162 requires the defendant to prove that they were unable to know the actual truth although they exercised reasonable care to do so.[111] This is like Section 18(a) of the Securities Exchange Act.[112] In a case involving Article 162, an outside auditor defendant argued that she did not regularly work at the corporation, and she did not come to the board meetings.[113] The SCK held that such facts only show that she did not perform her duty as an outside auditor.[114] The facts are not enough to show that she was unable to know the actual truth although she exercised reasonable care to do so.[115]

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107 Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, *amended by* Act No. 14817, Apr. 18, 2017, art. 162 (S. Kor.). Article 162 is like Section 18(a) of the Securities Exchange Act ("Section 18(a)") subject to some differences explained below. *See* 15 U.S.C. § 78r(a). For instance, Section 18(a) is interpreted to require actual reliance. *See* John A. Occhipinti, *Section 18(a) of the Exchange Act of 1934: Putting the Bite Back into the Toothless Tiger*, 47 FORDHAM L. REV. 115, 116 (1978) ("Courts have held that a plaintiff asserting a cause of action under section 18(a) must prove actual rather than constructive reliance.").

108 *See* LIM, *supra* note 4, at 742-48.

109 *See* HWA-JIN KIM, JAPONSIJANGBEOB IRON [THEORETICAL FOUNDATIONS OF SECURITIES REGULATION] 49 (2d ed. 2016).

110 *See* Langevoort, *supra* note 50, at 166 ("Basic says that plaintiffs must show some degree of market efficiency in order to gain the presumption of reliance[.]").

111 Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, *amended by* Act No. 14817, Apr. 18, 2017, art. 162 (S. Kor.).

112 *See* Francis J. Higgins, *Section 18 of the Exchange Act: A New Defense Weapon in Securities Litigation*, 1980 DET. C.L. REV. 761, 787 (1980) ("[T]he burden of disproving scienter is shifted to defendants under section 18.").

113 Daebeobwon [S. Ct.], Dec. 24, 2014, 2013Da76253 (S. Kor.).

114 *Id.*

115 *Id.*

Article 162 requires loss causation.[116] However, Article 162 has a presumption of damages clause, shifting the burden of proving lack of loss causation to the defendant.[117] The damages are presumed to be the difference between the actual costs paid by the plaintiff in acquiring the security in question, and the price of such security at the close of the final court hearing (or if the security was sold before the close of the final court hearing then the price of the security at the time of such sale).[118]

The presumption of damages clause goes back to the old Securities Exchange Act. Before 1996, Korean commentators argued that there was a legal gap in the old Securities Exchange Act.[119] They argued that the old Securities Exchange Act did not properly account for civil liability regarding the duty to disclose in the secondary market.[120]

In 1996, the Korean Parliament enacted a statute that said that the liability rule of the secondary market follows the same liability rule of the primary market.[121] And, there was a presumption of damages clause in the statutory clause regarding the primary market.[122] A commentator argued that such a presumption of damages clause should be removed because this rule allows plaintiffs to be compensated for damages that are not related to the misrepresentation.[123] Another argument for why plaintiffs will not be able to prevail without such a

116 Daebeobwon [S. Ct.], Oct. 27, 2016, 2015Da218099 (S. Kor.); Hwa-Jin Kim, *Jeungkwonsosongeseoui inkwakwangyeironui jaejomyong* [*Rethinking Causation in Securities Fraud Litigation*], 144 JEOSEUTISEU 209, 227 (2014).

117 Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], *amended by* Act No. 14817, Apr. 18, 2017, art. 162 (S. Kor.).

118 *See* Kyung-Hoon Chun, *South Korea: Protection of Minority Investors in Capital Markets* 988, 1015, *in* GLOBAL SECURITIES LITIGATION AND ENFORCEMENT (eds. Perre-Henri Conac and Martin Gelter 2019) ("The amount of damages is presumed to be 'the price actually paid by the claimant to purchase the security' minus 'the market price of the security at the time of closing the proceedings of the lawsuit'. If the claimant sold the security before the closing of the proceedings, the subtracted amount is the 'sale price'.").

119 *See* Jun-Seob Yi, *Jeungkwonjipdansosongui Doipkwa Jeungkwongeoraebeobsang Sonhaebaesangckaekimchegyeui Kaeseonbangan* [*Issues on Reform of Legal Liability System in Securities Exchange Act After the Introduction of Class Action*], 4 JEUNGKWONBEOBYEONGU [KOREAN J. SEC. L.] 1, 34 (2003).

120 *See id.*

121 *See id.* at 38.

122 *See id.* at 37-38.

123 *See id.* at 39.

statutory provision[124] suggested that the statute should provide a different formula to presume damages for misrepresentation in the secondary market.[125] However, when the current FISCMA was enacted, Article 162 explicitly provided the same presumption of damages.[126]

The SCK held that the defendant has the burden to prove that the misrepresentation did not cause the loss in a non-class action Article 162 case.[127] The SCK also held that the defendant can meet this burden directly by proving the misrepresentation did not cause the loss at all or only caused the loss partially, or the defendant can meet this burden indirectly by proving that an event other than the misrepresentation caused the loss wholly or partially.[128] The SCK suggested an event study for this, but it held that a result showing uncertainty if the movement of the stock price was caused by the misrepresentation, by itself, was not enough to meet the burden of proof.[129]

There is an SCK case involving an interpretation of a similar clause in Article 15 of the old Securities Exchange Act.[130] The SCK, on the issue of proving the lack of loss causation, held that the listed company/defendant has the burden to prove the lack of loss causation.[131] The defendants in this case were Daewoo Heavy Industries

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124 *See* Hou-Sang Park, *Jeungkwongeoraebeobsang Yutonggongsiui Sonhaebaesangaeke Kwanhan Gochal* [*A Study on Damages for Disclosure Liability of Secondary Market Under the Securities Exchange Act*], 19 KIEOBBEOBYEONGU 339, 369 (2005).

125 *See id.* at 370 (suggesting that the statute presumes damages as the difference between the average stock price of one month before the corrective disclosure and the average stock price of one month after the corrective disclosure).

126 *See* Yong Jae Kim, *Yutongsijangeseoui Busilgongsie Daehan Sonhaebaesangckaekim* [*Damages Arising from Misrepresentative Disclosures in the Secondary Market*], 48 OIBEOBNONZIP 47, 51 (2016) (arguing that the previous SCK decision interpreting the old Securities Exchange Act presumption of damages provision should apply to the FISCMA interpretation because the provisions are the same).

127 Daebeobwon [S. Ct.], Jan. 29, 2015, 2014Da207283 (S. Kor.); *see* Chun, *supra* note 118, at 1015-17 ("This calculation, however, is merely a rebuttable presumption. Notwithstanding this presumption, the defendant may avoid or reduce liability by proving that all or part of the presumed damages were not caused by the material misstatements or omissions.").

128 Daebeobwon [S. Ct.], Oct. 27, 2016, 2015Da218099 (S. Kor.).

129 *Id.*

130 Seoul Godeungbeobwon [Seoul High Ct.], Apr. 16, 2008, 2004Na74400 (S. Kor.).

131 Daebeobwon [S. Ct.], Nov. 27, 2008, 2008Da31751 (S. Kor.). The FISCMA replaced the Securities Exchange Act in 2009. Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, *enacted* Feb. 4, 2009 (S. Kor.).

and the corporation's directors.[132] Defendants submitted an event study concluding that the disclosure of the financial misrepresentation did not have a statistically significant effect on the market price.[133] The lower court, however, noted that an event study using the date of a certain disclosure requires that the truth was not known to the market before the disclosure.[134] The lower court held that there was a possibility that the truth leaked gradually and was incorporated to the market price before the disclosure date.[135] Further, it held that the event study showing that the disclosure did not have a statistically significant effect on the market price is not enough, by itself, to prove the lack of loss causation.[136] The defendants appealed to the SCK.[137]

The SCK suggested that a defendant can conduct an event study to prove the lack of loss causation in this fact pattern.[138] However, the SCK agreed with the lower court on this issue and held that the event study showing that the disclosure did not have a statistically significant effect on the market price is not enough, by itself, to prove the lack of loss causation.[139] It is unclear here whether the SCK meant that an event study showing that the disclosure did not have a statistically significant effect on the market price is not enough generally, or if it meant that an event study showing that the disclosure did not have a statistically significant effect on the market price is not enough because the information might have already leaked. But, as is seen below, under the Korean statutory regime, it does not matter either way. It will be very difficult for the defendant to disprove loss causation because the plaintiff is not required to allege corrective disclosure.

In a more recent case, a corporate defendant tried a different defense but also failed. This case involved a corporate defendant who misrepresented its financial status on its business report.[140] Samsung Heavy Industries tried to buy control of the listed corporate defendant from a major shareholder,[141] and the acquisition was disclosed to the

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132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 Daebeobwon [S. Ct.], Nov. 27, 2008, 2008Da31751 (S. Kor.).

138 *Id.*

139 *Id.* However, the SCK reversed and remanded certain parts of the lower court decision on an unrelated different ground.

140 Daebeobwon [S. Ct.], Jan. 29, 2015, 2014Da207283 (S. Kor.).

141 *Id.*

public.[142] However, during due diligence, Samsung Heavy Industries found out the true financial status of the defendant and reported the misrepresentation to the Korean Exchange.[143] The deal was called off soon after.[144] In the subsequent securities fraud litigation, the defendants submitted evidence with an event study showing that the stock price rose abnormally, which was statistically significant when the acquisition was announced.[145] The defendants argued that the loss related to the price increase by the announcement of the acquisition was not caused by the misrepresentation.[146] While the exact argument made by the defendants was not made public, focusing on the fact that the acquisition was called off after the disclosure, the defendants argued that the amount of stock price increase caused by the news of the acquisition should be subtracted from the presumption of damages.[147] They reasoned that it should be so because the amount of stock price drop, that would be approximately the amount of the stock price increase, was caused by news of the call off, not by the corrective disclosure.[148] The lower court rejected the argument, and the case was appealed to the SCK.[149] The SCK held that the lower court did not err in finding that there was not enough evidence to find that the loss related to the price increase by the announcement of the acquisition was not caused by the misrepresentation.[150]

The corporate defendant, involving different plaintiffs but the same fact pattern, tried a different defense but failed. The defendant focused on the fact that its stock was suspended from trading one day before the date of the disclosure.[151] The suspension was on September 6, 2011, and the corrective disclosure by the defendant was on September 7, 2011.[152] The Korean Exchange allowed the stock to trade about a year later, on July 11, 2012.[153] After the trade resumed, the

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Feb. 13, 2014, 2012Na30457 (S. Kor.).

147 *Id.*

148 *Id.*

149 Daebeobwon [S. Ct.], Jan. 29, 2015, 2014Da207283 (S. Kor.).

150 *Id.*

151 Seoul Nambujibangbeobwon [Seoul S.D. Ct.], Feb. 7, 2014, 2012GaHap102378 (S. Kor.).

152 *Id.*

153 Seoul Godeungbeobwon [Seoul High Ct.], Apr. 24, 2015, 2014Na2008880 (S. Kor.).

stock price rose briefly and then steadily fell until July 25, 2011.[154] The defendant submitted two event studies showing that the abnormal returns were statistically significantly higher than the actual return for a certain period after the stock resumed trading.[155] The defendant, relying on the event studies, argued that the stock price drop after trade resumed was unrelated to the securities fraud.[156] Because the stock price drop was caused by panic selling or other unrelated abnormal phenomena, the defendant argued that there is no loss causation.[157] However, the lower court disagreed.[158] The lower court noted that event studies indeed showed a statistically significant increase in stock price.[159] Further, the lower court held that one cannot infer from the event studies that there was a panic sale.[160] The defendant appealed to the SCK.[161]

The defendant again argued that the price drop, because of the panic sale, was unrelated to the financial misstatement.[162] Essentially, the defendant argued that there is no loss causation.[163] However, the SCK noted that the event studies are assuming that there was an event, that is, panic selling.[164] The SCK held that the event studies do not prove that there was a panic sale.[165] Finding other circumstances not enough to show that there was a panic sale, the SCK found for the plaintiffs.[166]

Generally, plaintiffs allege that they traded after the misrepresentation in an Article 162 case.[167] But in a case alleging an Article 162 cause of action that did not reach the SCK, plaintiffs alleged that they suffered damages for stocks that they traded before the

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154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 Seoul Godeungbeobwon [Seoul High Ct.], Apr. 24, 2015, 2014Na2008880 (S. Kor.).

160 *Id.*

161 Daebeobwon [S. Ct.], Oct. 27, 2016, 2015Da218099 (S. Kor.).

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *See, e.g.*, Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Sept. 26, 2014, 2012Ga-Hap75449 (S. Kor.).

misrepresentation.[168] The court of appeals disagreed with the plaintiffs and held that the damages should be calculated for stocks that traded after the misrepresentation.[169] Under this rule, it is likely that, under Article 162, plaintiffs should have traded after the misrepresentation.

Finally, Article 162 says that the statute of limitation expires one year after the plaintiff learned about the misrepresentation or three years after the filing of the misrepresentation.[170]

b. Article 179 of the FISCMA

Article 179 states that a person who violates Article 178 of the FISCMA ("Article 178") shall be liable for damages sustained by a person who trades or makes any other transaction in financial investment instruments by relying on any violation in connection with such trading or transaction.[171] Article 178 regulates various actions to deter fraud and includes a clause stating that no one may use a device, scheme, or artifice in connection with trading (including public offering, private placement, and sale in case of securities) or other transactions of financial investment instruments.[172]

The SCK has interpreted Article 178(1) to mean any device, scheme, or artifice which is deemed socially unfair.[173] The SCK said that the test for determining what unfair means is whether the act is forbidden by law or whether the act causes other investors to make wrong decisions so that it hurts fair competition and shifts monetary harm to investors, which leads to damaging the fairness, integrity, and efficiency of the capital market.[174] To determine whether an act constitutes an unfair act prohibited under Article 178, one must consider various factors such as, but not limited to; (1) the structure of the financial investment product in question, (2) the method of the transaction, (3) the circumstances of the transaction, (4) the particularity of the market in which the financial investment product is traded, (5) the terms of the investor's rights and obligations, (6) the termination

168 Seoul Godeungbeobwon [Seoul High Ct.], Oct. 27, 2017, 2017Na2018550 (S. Kor.).

169 *Id.*

170 Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], *amended by* Act No. 14817, Apr. 18, 2017, art. 162 (S. Kor.).

171 *Id.*

172 *Id.* art. 178.

173 Daebeobwon [S. Ct.], Jan. 16, 2014, 2013Do4064 (S. Kor.).

174 *Id.*

period of the rights and obligations, (7) the relationship between the actor and the investor, and (8) the circumstances around the time of the action.[175] Arbitrary as it may be, Article 179 is supposed to work as a catch-all provision intended to deter unfair conduct in the securities market.[176]

The basic elements of Article 179 are somewhat like the Rule 10b-5 cause of action: (1) a material misrepresentation or omission in a business report or a document attached thereto, or other such representation; (2) scienter; (3) trade of securities by the plaintiff; (4) loss causation; and (5) damages.[177]

There was a debate about whether Article 179 required the plaintiff to show reliance.[178] The SCK visited this issue in a case that did not involve a stock price drop fact pattern. In this case, plaintiffs bought from Hanwha Securities certain equity-linked securities, that is a financial investment product with a structure in which the exercise of rights or fulfillment of conditions is determined or money is settled according to the price of the underlying asset at a specific point in time or a numerical value related thereto.[179] Specifically, with some simplification, at the maturity date of redemption, or April 22, 2009, if the common stock of SK Inc., a company listed in the Korean stock exchange (hereinafter "SK common stock") traded at or above 75% of 159,500 Korean Won, then the redemption price of the equity-linked securities will be the total of the principal and annual 22% interest rate. But if the SK common stock traded below 75% of 159,500 Korean Won at the redemption date, then the redemption price becomes below the principal amount. Hanwha Securities entered into a swap contract with the defendant, Royal Bank of Canada, to hedge the risk of the SK common stock trading at or above 75% of 159,500 Korean Won on the maturity date of redemption.[180] On April 22, 2009, the SK common stock was trading above 75% of 159,500 Korean Won.[181] The plaintiffs argued that the defendant's massive sale of SK common

175 Daebeobwon [S. Ct.], Apr. 9, 2015, 2013Ma1052 & 1053 (consol.) (S. Kor.).

176 *See* JAI YUN LIM, JABONSIJANGKWA BULGONGJEONGKEORAE [CAPITAL MARKETS AND UNFAIR TRANSACTIONE] 426 (2021).

177 LIM, *supra* note 4, at 1124-28.

178 *Compare* Kim, *supra* note 126, at 56 (arguing that Article 179 requires transaction causation), *with* Kun Young Chang, *Sijangsagiironkwa Georaeinkwagwangyuiui Jaepyongka* [*Revisiting the Fraud-on-the-Market Theory and the Transaction Causation*], 23 BIGYOSABEOB 751, 786-87 (2016) (arguing that Article 179 does not require transaction causation).

179 Daebeobwon [S. Ct.], Apr. 9, 2015, 2013Ma1052 & 1053 (consol.) (S. Kor.).

180 *Id.*

181 *Id.*

stock on the maturity date of redemption before the market closed artificially lowered the stock price of the underlying asset and prevented the fulfillment of the redemption conditions for the equity-linked securities.[182] According to the allegation, the violation, the massive sale by the defendant, happened after the plaintiffs purchased the securities. The plaintiffs chose to allege Article 179 cause of action and brought this case as a class action.[183]

The lower court held that the allegation failed to state an Article 179 cause of action because the plaintiffs did not trade the securities relying on the defendant's massive sale.[184] The lower court said that the plaintiffs only held on to the securities passively.[185]

However, the SCK held that if an investor suffers losses due to a change in the details of the rights and obligations of the investor of the financial investment product or the amount to be settled due to the alleged violation, the investor may allege an Article 179 cause of action against the violator;[186] and the SCK reversed and remanded the case.[187] The class was certified on remand.[188] The defendant appealed the class certification to the SCK, but the SCK did not reverse the certification.[189] The case was then settled.[190]

There were some investor plaintiffs that chose to allege an Article 179 cause of action as a joinder action.[191] Of course, this case did not require class certification, and this case was also appealed to the SCK.[192] The SCK reaffirmed that if an investor suffers losses due to a change in the details of the rights and obligations of the investor of the financial investment product or the amount to be settled due to the alleged violation, the investor may allege an Article 179 cause of action against the violator.[193] Moreover, the SCK held that, given the

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182 *Id.*

183 *Id.*

184 Seoul Godeungbeobwon [Seoul High Ct.], May 31, 2013, 2012Ra764 & 765 (consol.) (S. Kor.).

185 *Id.*

186 Daebeobwon [S. Ct.], Apr. 9, 2015, 2013Ma1052 & 1053 (consol.) (S. Kor.).

187 *Id.*

188 Seoul Godeungbeobwon [Seoul High Ct.], Nov. 16, 2015, 2015Ra656 & 657 (consol.) (S. Kor.).

189 Daebeobwon [S. Ct.], Mar. 28, 2016, 2015Ma2056& 2057 (consol.) (S. Kor.).

190 Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Feb. 15, 2017, 2010Ga-Hap1604 (S. Kor.).

191 *See, e.g.*, Seoul Godeungbeobwon [Seoul High Ct.], Dec. 14, 2012, 2012Na12360 (S. Kor.).

192 Daebeobwon [S. Ct.], Mar. 24, 2016, 2013Da2740 (S. Kor.).

193 *Id.*

facts found by the lower court, the defendant is liable to the plaintiffs for the violation.[194]

Citing the above SCK cases, commentators are of the opinion that the SCK is interpreting Article 179 as not requiring a plaintiff to allege and prove reliance.[195] It is likely that this interpretation will carry over to an Article 179 cause of action in a stock price drop context. Moreover, under the logic of the above SCK case, it is possible that there is a situation where an Article 179 cause of action can be pursued when a plaintiff traded before, not after, the misrepresentation by the defendant. However, there is no case that can be found discussing this issue in a stock price drop fact pattern.

Article 179 does not have a statutory presumption of damages.[196] For this reason, a plaintiff should allege and prove loss causation and damages in an Article 179 case.

c. Article 170 of the FISCMA

The relevant cause of action against an outside auditor is Article 170 of the FISCMA ("Article 170").[197] Article 170 concerns claims for damages against an outside auditor who made a material misrepresentation or an omission of a material fact in the audit report for a corporation with securities trading in the secondary market.[198]

The elements of Article 170 cause of action are: (1) material misrepresentation or omission on the audit report; (2) the breach of its duty by the outside auditor; and (3) an investor who, relying on the audit report, used the report and incurred damages.[199] Because the

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194 *Id.*

195 I believe that Article 179, read plainly, requires the plaintiff to allege and prove reliance. However, it is beyond the scope of this Article because the reasoning will be lost in translation.

196 *See* Financial Investment Services and Capital Markets Act art. 179, *amended by* Act No. 17219, July 8, 2020, (S. Kor.).

197 Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], *amended by* Act No. 17219, July 8, 2020, art. 170 (S. Kor.).

198 *See* Jung Eun Kim, *Busilgamsae daehan oibugamsainui chaekimchegyewa gaeseonbangan* [*A Study on External Auditor's Liability System for Audit Failure and Improvement*], 31 BEOBHAKYEONGU [CHUNGNAM L. REV.] 275, 286-87 (2020).

199 *See* Hyunji Sim, *Gamsabogoseosang geojidgijaewa gamsainui sonhaebaesangchaekim* [*Misrepresentations on the Audit Report and the Liability of the Outside Auditors*], 82 BUS. FIN. L. 56, 58 (2017). Another commentator explains that the elements are: (1) an investor without knowledge; (2) reliance on the audit report prepared by an outside auditor; (3) damages; and (4) causation. *See* Soojin Han, Hoigyegamsainui sonhaebaesangchaekim [Auditor's Liability for

language of the statute does not explicitly require that the investor traded, it may be possible that an investor who relied on the misrepresentation and did not trade, who would have traded but for the material misrepresentation or omission on the audit report, has a cause of action for damages under Article 170 if the subsequent reveal caused the price to drop.[200] But, so far, cases made public in Korea involve fact patterns in which the plaintiffs traded relying on the audit report.

Courts generally hold that, where financial reports have material violations of the accounting standards, an unqualified opinion given on an audit report is a material statement for the purpose of Article 170.[201] Because there is a statutory presumption, a defendant has the burden to prove that it met its duty.[202] However because this presumption is not available to certain sophisticated investors, such as commercial banks, these investors have the burden to prove the breach of duty by an outside auditor.[203]

Article 170 requires reliance.[204] But, courts held that an investor who traded on the exchange is entitled to a presumption of reliance.[205] This means, that in an Article 170 case, an outside auditor defendant generally must file a motion to appoint an expert witness to conduct an event study.[206]

Damages] 47 (Feb. 2016) (M.S.L. thesis, Seoul National University) (on file with Seoul National University Law School).

200 Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], *amended by* Act No. 17219, July 8, 2020, art. 170 (S. Kor.).

201 *See* Sim, *supra* note 199, at 59.

202 *See* Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], *amended by* Act No. 17219, July 8, 2020, art. 170 ¶ 1 (S. Kor.); Jusikhoisaui oibugamsae kwanhan beobryul [Act on External Audit of Stock Companies], *amended by* Act No. 15514, Nov. 1, 2018, art. 31 para. 7 (S. Kor.); Sim, *supra* note 199, at 60.

203 *See* Jusikhoisaui oibugamsae kwanhan beobryul [Act on External Audit of Stock Companies], *amended by* Act No. 15514, Nov. 1, 2018, art. 31 para. 7 (S. Kor.); Kim, *supra* note 198, at 289.

204 Kim, *supra* note 116, at 236.

205 *See* Sim*, supra* note 199, at 62; *but see* Seung-Jae Baek, *Gamsabogoseosang geojidgijaewa gamsainui sonhaebaesangchaekim* [*Study on Gatekeeper Liability in Relation to the Enactment of the Capital Market and Financial Investment Service Act*], 11 JEUNGKWONBEOBYEONGU [KOREAN J. SEC. L.] 111, 140 (2011) (arguing that the statutory language requires actual reliance).

206 *See*, *e.g.*, Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Sept. 26, 2014, 2012Ga-Hap75449 (S. Kor.) (noting that the defendants submitted the expert report with the event study). In the United States, event studies are generally used in securities fraud litigations. *See* Fisch, Gelbach & Klick, *supra* note 1, at 556 ("Use of event study methodology has become ubiquitous in securities fraud litigation."); Jonah B. Gelbach, Eric Helland & Jonathan Klick, *Valid Inference in Single-Firm,*

Article 170 also contains a statutory presumption of damages.[207] The history of the presumption of damages provision against an outside auditor goes back further. In 1973, a provision was added to the original Securities Exchange Act that said that a certified public accountant who approved a financial document filed under the statute that had a material misrepresentation or omission may be liable.[208] This provision followed the presumption of damages clause that was in the provisions for civil liability in the primary market.[209] Even though the original Securities Exchange Act was revised many times, the provision survived until it was replaced by the FISCMA.[210] As seen above, the FISCMA also has the presumption of damages provision against an outside auditor.[211]

An outside auditor defendant has the burden to prove the lack of loss causation.[212] The SCK held that an outside auditor defendant may prove the lack of causation by using an event study.[213] The SCK held, also in Article 170 context, that the defendant can meet this burden directly by proving that the misrepresentation did not cause the loss at all or only caused the loss partially, or the defendant can meet this burden indirectly by proving that an event other than the misrepresentation caused the loss wholly or partially.[214]

However, the SCK held that an expert report saying that it is uncertain if the movement of the stock price was caused by the correction of misrepresentation, by itself, is not enough to meet the burden of

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Single-Event Studies, 15 AM. L. ECON. REV. 495, 496 (2013) ("[S]ingle-firm event studies, which are especially important in the context of securities litigation.").

207 *See* Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], *amended by* Act No. 17219, July 8, 2020, art. 170 para. 2 (S. Kor.); Sim, *supra* note 199, at 64.

208 Jeungkwongeoraebeob [Securities Exchange Act], *amended by* Act No. 2481, Feb. 6, 1973, art. 126 ¶. 7 subpara. 1 (S. Kor.).

209 Jeungkwongeoraebeob [Securities Exchange Act], *amended by* Act No. 2481, Feb. 6, 1973, art. 126-7(2) (S. Kor.); Jeungkwongeoraebeob [Securities Exchange Act], *amended by* Act No. 1334, Apr. 27, 1973, art. 8 para. 3 (S. Kor.).

210 Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], *amended by* Act. No. 17219, July 8, 2020, art. 170 (S. Kor.).

211 *Id.*

212 *See id.* ¶ 3; Daebeobwon [S. Ct.], Dec. 15, 2016, 2015Da241228 (S. Kor.) (holding that the outside auditor has the burden to prove that there is no causal relationship between the misrepresentation and the loss); Sim, *supra* note 199, at 65.

213 Daebeobwon [S. Ct.], Oct. 25, 2007, 2005Da60246 (S. Kor.).

214 Daebeobwon [S. Ct.], Oct. 27, 2016, 2015Da218099 (S. Kor.).

proof.[215] This rule will likely include a situation where the defendant can only submit an expert report using an event study reporting that certain disclosure did not show a statistically significant price impact.

There is an SCK case involving an interpretation of a similar clause in Article 15 of the old Securities Exchange Act.[216] The SCK, discussing the issue of proving the lack of loss causation, held that an outside auditor has the burden to prove the lack of loss causation.[217] This case involved a misrepresentation about the financial condition of Daewoo Electronics, a listed company.[218] One of the named defendants in this case was an outside auditor.[219] The defendants submitted an event study showing that there was no cumulative excess return that met the 95% confidence level during the event window.[220]

The SCK suggested that an outside auditor defendant can submit an event study to prove the lack of loss causation in this fact pattern.[221] The SCK noted that the defendants submitted an event study showing that a disclosure did not have a statistical effect on the market price of Daewoo Industries' stock.[222] However, the SCK noted that there was a possibility that there was a gradual leak of the relevant information to the market that could have been the reason why there was no abnormal price impact at the date of the disclosure.[223] Also, the SCK noted, that there was a possibility that: (1) the disclosure may not have been a full disclosure, and (2) the disclosure may have been information that the market already expected.[224] For these reasons, the SCK held that the event study and the stock price change in the relevant period were not enough to prove the lack of loss causation.[225]

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215 Daebeobwon [S. Ct.], Dec. 15, 2016, 2015Da241228 (S. Kor.); Yongjae Kim, *Yutongsijangeseoui busilgongsie daehan sonhaebaesangchaekim* [*Damages Arising from Misrepresentative Disclosure in the Secondary Market – The Supreme Court of Korea 2015. 1. 29. Holding 2016Da207283*], 40 OIBEOBNONJIP 47, 59 (2016).

216 Daebeobwon [S. Ct.], Oct. 25, 2007, 2006Da16758 (S. Kor.).

217 *Id.* (The FISCMA replaced the Securities Exchange Act in 2009.). Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, (S. Kor.).

218 Daebeobwon [S. Ct.], Oct. 25, 2007, 2006Da16758 (S. Kor.).

219 *Id.*

220 Seoul Godeungbeobwon [Seoul High Ct.], Jan. 18, 2006, 2005Na22673 (S. Kor.).

221 Daebeobwon [S. Ct.], Oct. 25, 2007, 2006Da16758 (S. Kor.).

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

This case was an interpretation of a similar clause in Article 15 of the old Securities Exchange Act, but it is being indirectly cited in cases discussing the loss causation rule in Article 170 cases.[226] For instance, 2015Da60597, which is a case involving the loss causation rule of Article 170, reaffirms that an expert report saying that it is uncertain if the movement of stock price was caused by the correction of misrepresentation, by itself, is not enough to meet the burden of proof, cites 2014Da207283,[227] which was a case involving the loss causation rule of Article 162.[228] 2014Da207283,[229] in turn, cites 2008Da92336,[230] which was a case involving the loss causation rule of the old Securities Exchange Act. And 2008Da92336,[231] holding that an event study showing a statistically insignificant change in stock price is not enough to show that there is no loss causation, cites 2006Da16758.[232]

For this reason, it is likely that the SCK will hold that it is not enough for an outside auditor defendant to rebut the presumption of damages by only submitting an expert report using an event study reporting that certain disclosures did not show a statistically significant price impact. This is a high burden to meet. There is no reported Article 170 case where a defendant succeeded in proving lack of loss causation by such a method.[233]

Finally, a cause of action under Article 170 has a statute of limitation that expires one year after the plaintiff learned about the misrepresentation or eight years after the filing of the misrepresentation.[234]

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226 *See*, *e.g.*, Daebeobwon [S. Ct.], Dec. 15, 2016, 2015Da60597 (S. Kor.).

227 Daebeobwon [S. Ct.], Jan. 29, 2015, 2014Da207283 (S. Kor.).

228 Daebeobwon [S. Ct.], Dec. 15, 2016, 2015Da60597 (S. Kor.).

229 *Id.*

230 Daebeobwon [S. Ct.], Aug. 19, 2010, 2008Da92336 (S. Kor.).

231 *Id.*

232 Daebeobwon [S. Ct.], Oct. 25, 2007, 2006Da16758 (S. Kor.).

233 *See* Sim, *supra* note 199, at 65; *cf.* Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Apr. 3, 2015, 2012Ga-Hap48690 & 68441(consol.) (S. Kor.) (adopting an expert report using an event study, submitted by the defendants, to calculate damages against a corporate defendant and director defendants).

234 *See* Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], *amended by* Act No. 17219, July 8, 2020, art. 170 (S. Kor.).

2. *Non-FISCMA Cause of Action*

Article 750 of the Civil Act ("Article 750") may also be a cause of action in a securities fraud.[235] Under Article 750, a plaintiff generally must allege and prove: (1) an intention or negligence, (2) a wrongful act, (3) causation, and (4) damages.[236] Article 750 may also be a cause of action against an outside auditor.[237] The SCK repeatedly held that Article 750 may be a cause of action in a securities litigation context when an investor traded securities relying on the negligent audit of the outside auditor.[238] Because the statutory language of Article 750 is very broad, one may argue that an investor who relied on the misrepresentation and did not trade, who would have traded but for the misrepresentation, has a cause of action for damages under Article 750 if the subsequent reveal caused the price to drop. But, so far, such a fact pattern has not been actively litigated in Korea.

The SCK held, even in the context of Article 750, that a plaintiff is entitled to a rebuttable presumption of reliance.[239] The leading case involved an Article 750 cause of action.[240] The SCK noted that when trading a stock of a company, the financial position of the company is one of the most important factors that determines the stock price.[241] The SCK went on to say that an audit report prepared through an outside auditor's audit of the company's financial statements is the most objective data that reveals the exact financial status of the company.[242] The SCK stated that the audit report that is provided and announced to the general public has a decisive effect on the formation of the stock price.[243] The SCK held that, for this reason, it should be viewed that an investor who invests in stocks of a company relied on the stock price that was formed on the basis of the audit report made public that

235 *See* Minbeob [Civil Act], *amended by* Act No. 14965, Feb. 1, 2018, art. 750 (S. Kor.); Kim, *supra* note 198, at 289.

236 *See* Kim, *supra* note 198, at 289.

237 *See* Minbeob [Civil Act], *amended by* Act No. 14965, Feb. 1, 2018, art. 750 (S. Kor.); Kim, *supra* note 198, at 289.

238 Daebeobwon [S. Ct.], Apr. 29, 2020, 2014Da11895 (S. Kor.).

239 *See* Daebeobwon [S. Ct.], Sept. 12, 1997, 96Da41991 (S. Kor.).

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.*

was duly prepared.[244] Some commentators commented that the SCK adopted a version of the fraud-on-the-market theory in this case.[245]

The SCK, more recently, confirmed the holding in a different case involving an Article 750 cause of action.[246] The SCK held that an investor who invests in stocks should be regarded as trading the stock of a company believing that the audit report indicating the financial condition of the company has been duly prepared and made public, and also should be regarded as trading the stock thinking that the stock price must have been formed based on the audit report.[247]

In a different case, the SCK, citing 96Da41991 above, went on and held that the lower court did not err when the lower court found that it may be factually presumed that there is a transactional causation between the plaintiffs' stock purchase and the misrepresentation in the audit report prepared by the outside auditor defendant.[248]

In a case involving Article 750, the SCK also visited the issue of proving loss causation and damages.[249] The plaintiffs who traded stock sued for damages caused by the misrepresentation of the defendants under Article 750.[250] The SCK held that to calculate damages, an expert appraisal comparing the difference of the stock price trend during the period (event period) affected by the illegal act and the stock price trend that would have occurred if the illegal act had not occurred may be used.[251] The SCK held that if there is a statistically significant difference, then a court may find that the stock price difference was caused by the violation.[252] For this, the SCK held that a regression analysis using the most appropriate indicators among publicly available indicators, such as the comprehensive stock index, industry index,

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244 *Id.*

245 *See* Sung Jai Choi, *Hyoyuljeok Sijanggaseolui Gyubeom Poseob* [*Fraud on the Market Theory & Efficient Market Hypothesis*], 12 JEUNGKWONBEOBYEONGU [KOREAN J. SEC. L.] 73, 106 (2011) (explaining that the SCK adopted the fraud-on-the-market theory to compensate plaintiffs who were victims of financial misrepresentation); Goang-Gyun Yun, *Jabonsijangbeobsang Minsachaekimyogeonuiroseoui Sonhaewa Inkwagwangye* [*Damages and Causation in Civil Action Under Capital Market Act*], 446 INKWONGWA JEONGUI 26, 38 (2014) (explaining that the SCK, without explicitly mentioning the fraud-on-the-market theory, relied on the theory to find transaction causation).

246 Daebeobwon [S. Ct.], Apr. 29, 2020, 2014Da11895 (S. Kor.).

247 *Id.*

248 Daebeobwon [S. Ct.], Dec. 15, 2016, 2015Da243163 (S. Kor.).

249 Daebeobwon [S. Ct.], May 14, 2015, 2013Da11621 (S. Kor.).

250 *Id.*

251 *Id.*

252 *Id.*

or stock prices of similar companies for a certain period before or after the event period, may be conducted to calculate the normal rate of return for the event period.[253] The SCK, while not mentioning an event study, allowed an event study to be used.

As to which event to use to calculate damages, the SCK held that, absent special circumstances, the damages should be the difference between the stock price before and after the corrective disclosure.[254] The SCK did, in at least one case, hold that the damages should be calculated by the difference between the stock price that reflects the misrepresentation and the stock price that would have been the price but for the misrepresentation.[255] But, the SCK did not distinguish nor explain why, in this case, the misrepresentation should be used.

The SCK was willing to allow a different method of accounting for loss causation and damages when the stock trade was suspended. In one case, the trade of the stock of a corporation was suspended because of accounting fraud.[256] The trade was suspended on September 19, 2011, Monday at 7:20 AM.[257] The stock price before the suspension was 1,340 Korean Won.[258] The trade resumed on October 5, 2011.[259] The stock price dropped on October 5, 2011, to 78 Korean Won.[260] The price rose a little bit to 82 Korean Won on October 6, 2011.[261] The plaintiff sold some of the stock at 80 Korean Won on October 7, 2011.[262]

In this case, the court of appeals held that the plaintiff is entitled to a rebuttable presumption of reliance and went on to calculate damages.[263] The court of appeals held that damages are the difference between the stock price of the date before the suspension, in this case being the end price on September 16, 2011, and the stock price that formed subsequent to the continuous price drop after trade resumed,

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253 *Id.*

254 *See*, *e.g.*, Daebeobwon [S. Ct.], Apr. 29, 2020, 2014Da11895 (S. Kor.).

255 Daebeobwon [S. Ct.], May 14, 2015, 2013Da11621 (S. Kor.).

256 Daebeobwon [S. Ct.], Apr. 29, 2020, 2014Da11895 (S. Kor.).

257 *Geumyunggamdokwon* [*Financial Supervisory Service*], DART, (Sept. 9, 2011), https://dart.fss.or.kr/dsaf001/main.do?rcpNo=20110919800008 [https://perma.cc/M6R4-NSU3] (last visited July 7, 2022).

258 Seoul Godeungbeobwon [Seoul High Ct.], Jan. 16, 2014, 2013Na52358 (S. Kor.).

259 *Id.*

260 *Id.*

261 *Id.*

262 *Id.*

263 *Id.*

in this case being the end price on October 5, 2011.[264] The court of appeals calculated damages as the difference to be 1,262 Korean Won (= 1,340 Korean Won – 78 Korean Won) for each stock that the plaintiff did not sell and 1,260 Korean Won (= 1,340 Korean Won – 80 Korean Won) for each stock that the plaintiff did sell on October 7, 2011.[265] That is, the court of appeals did not require an event study to calculate damages. But the court of appeals, citing the principle of fairness, limited the award to 40% of the damages calculated.[266] The defendant appealed.[267]

It took about six years for the SCK to affirm the decision by the court of appeals.[268] In this case, the SCK held, without mentioning an event study, that the damages are, absent special circumstances, the difference between the stock price before the suspension and the stock price that formed subsequent to the continuous price drop after trade resumed (or if the stock was sold after trader resumed but before the price formed and the sale price was higher than the price formed, then the difference between the stock price before the suspension and the sale price).[269] The SCK held that the court of appeals did not err in its decision.[270] In this scenario, the SCK was willing to allow courts to forgo event studies and limit awards under the principle of fairness.

There are two other causes of action that a defrauded investor may consider against an outside auditor under Korean law.[271] Article 31(2) of the Outside Auditor Act ("Article 31(2)") is a clause making an outside auditor liable for any material misrepresentation or any omission of a material fact in an audit report for a certain corporation required to be audited by an outside auditor regardless of it being listed.[272] The Outside Auditor Act also provides that an outside auditor

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264 Seoul Godeungbeobwon [Seoul High Ct.], Jan. 16, 2014, 2013Na52358 (S. Kor.).

265 *Id.*

266 *Id.*

267 Daebeobwon [S. Ct.], Apr. 29, 2020, 2014Da11895 (S. Kor.).

268 *Id.*

269 *Id.*

270 *Id.* However, the court of appeals found that the stock price formed at the end of October 5, 2011, but used the stock price on October 7, 2011, which is after, not before, to calculate the damages for the stock that the plaintiff sold. It is unclear why the SCK failed to distinguish and rule on this point. Daebeobwon [S. Ct.], Apr. 29, 2020, 2014Da11895 (S. Kor.).

271 *See* Kim, *supra* note 198, at 285-90.

272 Jusikhoisaui oibugamsae kwanhan beobryul [Act on External Audit of Stock Companies], *amended by* Act No. 15514, Nov. 1, 2018, art. 31 para. 2 (S. Kor.). The

prove that it did its due diligence to escape liability.[273] Like Article 170, this presumption is not available to certain sophisticated investors, such as commercial banks.[274] But, there is no presumption of damages for an Article 31(2) cause of action.[275] Reliance is an element under Article 31(2).[276] Lastly, Article 760 of the Civil Act provides for aiding and abetting liability.[277] This provision may potentially be used against an outside auditor.[278]

The following Table I shows whether: (1) each statute provision requires a plaintiff to prove reliance and (2) whether each statute provision provides a presumption of damages.

Table I – Statutory Provision on Reliance and Loss Causation (Damages Presumption)

Statutes	Requires Transaction Causation (Reliance)	Statutory Presumption of Damages
Article 162	No	Yes
Article 179	No	No
Article 170	Yes	Yes
Article 750	Yes	No
Article 760	Yes	No
Article 31(2)	Yes	No

As discussed above, Article 162 and Article 179 do not require a plaintiff to allege and prove reliance. Moreover, the SCK ruled that a plaintiff alleging securities fraud gets a presumption of reliance for

provision was renumbered from Article 17 to Article 31 with minor amendments in 2018. *Id.*

273 Jusikhoisaui oibugamsae kwanhan beobryul [Act on External Audit of Stock Companies], *amended by* Act No. 15514, Nov. 1, 2018, art. 31 ¶ 7 (S. Kor.).

274 *See id.*; Kim, *supra* note 198, at 288-89.

275 *See* Sim, *supra* note 199, at 65.

276 *See* Chun, *supra* note 118, at 1009 (noting that "reliance" is one of the elements of the third party's claim); Sim, *supra* note 199, at 63 (arguing that it is unclear if a plaintiff gets a presumption of reliance when the plaintiff did not trade on the exchange). *See also* Seoul Godeungbeobwon [Seoul High Ct.], Nov. 27, 2015, 2015Na2012701 (S. Kor.) (holding that there is no evidence that the plaintiff directly relied on the audit report when making a deposit).

277 *See* Minbeob [Civil Act], *amended by* Act No. 14965, Feb. 1, 2018, art. 760 (S. Kor.).

278 *See* Kwang-Sun Choi, *Gamsainui sonhaebaesang chaekime daehan bipanjeok geomto* [*Critical Assessment of External Auditor's Liability*], 149 JEOSEUTISEU 59, 68 (2015).

some causes of action.[279] Because of the court-provided presumption of reliance, the plaintiff need only allege and rely on the presumption for certain causes of action. Table II shows: whether a plaintiff needs to allege or prove reliance in each statute provision discussed above.

Table II – Plaintiff's Requirement to Allege or Prove Reliance

Statutes	Allege Reliance	Prove Reliance
Article 162	No	No
Article 179	No	No
Article 170	Yes	No because of presumption
Article 750	Yes	No because of presumption
Article 760	Probably Yes	Unclear
Article 31(2)	Probably Yes	Unclear

As discussed above, because of the statutory scheme and the SCK decisions, the burden to prove loss causation may lie on a different party for each statute provision discussed. Table III shows: who has the burden to prove loss causation.

Table III – Who has the Burden to Prove Loss Causation

Statutes	Burden to Prove Loss Causation
Article 162	Defendant
Article 179	Plaintiff
Article 170	Defendant
Article 750	Plaintiff
Article 760	Plaintiff
Article 31(2)	Plaintiff

B. *Event Study is not Frequently used at the Merit Stage in a Korean Securities Fraud Action*

Because many securities fraud joinder actions and individual actions are decided on the merits in Korea,[280] it may be expected that event studies will do some work at the merit stage. However, they do not.

279 *See supra* Part III.1.a.(1) and (3).

280 *See* Park, *supra* note 14, at 22 ("Because settlements rarely occur in securities damages suits or securities class action suits, the plaintiffs' lawyers must win and enforce in order to recover their contingent fees.").

Before starting the discussion, it will be useful to remind ourselves about who has the burden of proof regarding transaction causation and loss causation. This section focuses on transaction causation and loss causation because, in many securities litigations, event studies will be directed to these elements.[281] Table IV summarizes if a showing is required and, if so, which party has the burden to prove or disprove the elements.

Table IV – Burden to Prove or Disprove Transaction Causation and Loss Causation

	Transaction Causation	Loss Causation/Damages
Article 162	N/A	Defendant
Article 179	N/A	Plaintiff
Article 170	Defendant	Defendant
Article 750	Defendant	Plaintiff
Article 760	Unclear	Plaintiff
Article 31(2)	Unclear	Plaintiff

Among causes of action under FISCMA, only Article 170 requires both transaction causation and loss causation. This makes a case where Article 170 is alleged a more likely case where an event study may be submitted compared to a case where Article 162 or Article 179 is alleged. This Article collected fifty-two cases where plaintiffs filed a securities fraud case alleging an Article 170 cause of action against an outside auditor from 2010 to 2015. Table V shows how many cases had an expert report with an event study discussed in the decisions by the courts of the first instance. Event studies were discussed in fifteen out of fifty-two decisions, which is approximately 29% of the decisions in the dataset. However, the fifteen decisions were related to only two different securities fraud allegations. This suggests that a few expert reports with event studies are being submitted again and again in cases involving different plaintiffs.

281 *See* Fisch & Gelbach, *supra* note 48, at 91 n.107 ("We note that use of event studies is primarily in the context of private litigation as, to date, most event studies have been directed to the elements of reliance and loss causation.").

Table V – Event Studies in Securities Fraud Actions Against Outside Auditors

	Event Study Results Discussed in the Decisions by the Courts of the First Instance	Event Study Results Not Discussed in the Decisions by the Courts of the First Instance	Sum
Number of Cases Filed From 2010 to 2015	15	37	52

Since 2015, the SCK began to make public civil case decisions by all courts from its website subject to redactions of certain private information.[282] The research behind this Article used "event study" and "capital market" in Korean as keywords to search the database for the period from 2015 to 2021. There were only nine more cases where the courts of the first instance discussed an event study. Table VI shows how many decisions by the courts of the first instance discussed an event study.[283] The four cases decided in 2015 are already counted in Table V.[284] One case decided in 2017 is also counted in Table V.[285] Two cases decided in 2017 also involved the same defendant where an event study was discussed Table V.[286]

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282 *pangyeolseo inteones yeollam jedolan?* [*What is the Internet Reading System for Judgment Documents?*] SUP. CT. S. KOR., https://www.scourt.go.kr/portal/information/finalruling/guide/index.html [https://perma.cc/5JKU-5JXK] (last visited Jan. 28, 2022).

283 Because the keyword search captures cases that were filed before 2015 but decided after 2015, some cases in Table V are counted in Table VI. Also, this method does not capture cases that were decided but were not yet subject to redaction.

284 Changwon Jibangbeobwon [Changwon Dist. Ct.], Nov. 26, 2015, 2012Ga-Hap32799 (S. Kor.); Changwon Jibangbeobwon [Changwon Dist. Ct.], Nov. 26, 2015, 2012Ga-Hap31826 (S. Kor.); Changwon Jibangbeobwon [Changwon Dist. Ct.], Nov. 26, 2015, 2012Ga-Hap31826(S. Kor.); Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Apr. 3, 2015, 2012Ga-Hap48690 & 68441 (consol.) (S. Kor.).

285 Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Feb. 17, 2017, 2013Ga-Hap72256 (S. Kor.).

286 Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Feb. 16, 2017, 2015Ga-Hap541282 (S. Kor.); Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Feb. 9, 2017, 2015Ga-Dan217748 (S. Kor.).

One case decided in 2018,[287] involved Article 125 of the FISCMA, which is a statute about a public offering. Article 125 is analogous to Section 11 of the Securities Act in the United States. In this another rare securities fraud class action case, the expert report by the court appointed expert stated that the use of event study is questionable in this case.[288] Even the defendant, who made the application for the expert evidence, argued that the report should not be considered when determining loss causation.[289] This case, while interesting, involves a different statute, not discussed in this Article. Finally, the case decided in 2020 only mentions an event study while discussing the law.[290] The case makes no mention of any event study being filed as evidence in the case.[291]

Table VI – Event Studies in Securities Fraud Actions Decided Between 2015 and 2021

Decided Year	Number of Decisions Discussing Event Study Method
2015	4
2016	0
2017	3
2018	1
2019	0
2020	1
2021	0
Sum	9

As noted above, the SCK database search will not pick up cases that were not redacted and made public. For this reason, a commercial database was also searched using the keyword "event study" for the last three years.[292] While the database is much smaller than the SCK database,[293] because the database allows the lawyers to add the cases they litigated to the database, it may sometimes have cases that are not

287 Seoul Nambujibangbeobwon [Seoul S.D. Ct.], July 13, 2018, 2011Ga-Hap19387(S. Kor.).

288 *Id.*

289 *Id.*

290 Seoul Hoisaeng Ct. [Seoul Bankr. Ct.], Dec. 23, 2020, 2019Ga-Hap100078 (S. Kor.).

291 *Id.*

292 LBOX, https://lbox.kr/ [https://perma.cc/KWR5-NRV8] (last visited Feb. 20, 2022).

293 The database has about 546,000 cases in total. *See id.*

uploaded to the SCK database. The result added four more cases involving the same corporate defendant and/or the same outside auditor with different plaintiffs.[294]

These cases also involved Article 162 causes of action against the corporate defendant and Article 170 causes of action against the outside auditor.[295] The corporate defendant was a listed corporation in the shipbuilding business, among others.[296] In these cases, the courts found that there were financial misrepresentations made between 2013 and 2015 leading to Article 162 and Article 170 violations.[297] Also, the courts found that the corrective disclosure was made on July 15, 2015.[298] The defendants argued that the stock price drop between the date(s) of the acquisition by the plaintiffs and July 14, 2015, the date before the corrective disclosure, should not be included in the loss.[299] The defendants submitted an expert report with an event study where the expert, a professor, opined, also considering the press coverage and the defendant's stock price movement, that there was no leak before July 15, 2015, the date of the corrective disclosure.[300] However, the courts found that the expert report is not enough to show that there was no leakage.[301] The cases were appealed.

At the appellate court, the defendants added an argument that was successful. The defendants argued that considering the facts of the case, there was no leakage before May 4, 2015.[302] This date was probably chosen because the courts in the first instance noted in their decisions that there was news reporting that the corporate defendant will suffer a loss in the first quarter of 2015 since May 4, 2015.[303] The

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294 Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Nov. 12, 2020, 2016Ga-Hap512809, 543810 & 524113 (consol.) (S. Kor.); Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Feb. 4, 2021, 2016Ga-Hap505450 (S. Kor.); Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Feb. 4, 2021, 2016Ga-Hap541982 (S. Kor.); Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], June 11, 2020, 2016Ga-Hap516528 (S. Kor.).

295 *Id.*

296 *Id.*

297 *Id.*

298 *Id.*

299 *Id.*

300 *Id.*

301 *Id.*

302 *See*, *e.g.*, Seoul Godeungbeobwon [Seoul High Ct.], July 22, 2021, 2020Na2021136 (S. Kor.).

303 *See*, *e.g.*, Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], June 11, 2020, 2016Ga-Hap516528 (S. Kor.).

courts agreed.[304] The appellate courts said that, given the facts of the case, there was no leakage before May 4, 2015.[305] However, the courts still rejected the expert opinion opining that there was no leakage before July 15, 2015.[306] These cases were appealed to the SCK and are currently pending.[307]

As can be seen above, event studies are relatively infrequently used in Korean securities fraud actions. There are only a few expert reports using event studies that are being submitted again and again in cases involving different plaintiffs. This is very much different from the United States where the role of an event study is important in private securities litigation.[308] This leads to the question, why?

1. *Transaction Causation*

As seen above, Article 162 does not require reliance. For this reason, neither party will try to use an event study to prove transaction causation in an Article 162 case.

And, as seen above, under the SCK jurisprudence, Article 179 does not require transaction causation either. For this reason, a plaintiff will argue that an event study is not required in an Article 179 case to prove or disprove transaction causation in a stock price drop fact pattern. However, defendants may argue that the SCK decision that does not require transaction causation should be limited to the fact pattern in that case. Even if the defendants succeed in such an argument, it is likely that they will have to submit an event study considering that the SCK has adopted a special kind of fraud-on-the-market presumption. The defendants will have to show that the stock price statistically significantly moved in a different direction from what the plaintiff has alleged.[309] This will be very difficult for the defendants to accomplish.

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304 *See*, *e.g.*, Seoul Godeungbeobwon [Seoul High Ct.], July 22, 2021, 2020Na2021136 (S. Kor.).

305 *Id.*

306 *Id.*

307 Daebeobwon [S. Ct.] 2021Da269227 (S. Kor.); Daebeobwon [S. Ct.] 2021Da269234 (S. Kor.); Daebeobwon [S. Ct.] 2021Da298799 (S. Kor.); Daebeobwon [S. Ct.] 2021Da265454 (S. Kor.).

308 In the United States, event studies are ubiquitous in securities fraud litigation. *See* Fisch & Gelbach, *supra* note 48, at 111 ("Event studies are a virtual necessity in securities litigation.").

309 *See* Daebeobwon [S. Ct.], Oct. 27, 2016, 2015Da218099 (S. Kor.); *see also* Fox, *supra* note 83, at 449 ("[T]he defendant would be required to introduce expert testimony based on an event study in essence showing a market-adjusted price change on the day of the corrective disclosure that is sufficiently positive that the

As seen above, Article 170 does require plaintiffs to prove transaction causation. However, as seen above, plaintiffs will not need to conduct an event study because, again, the SCK has adopted a special kind of fraud-on-the-market presumption. The defendants in Article 170 cases will also have to show that the stock price moved in a statistically significant different direction from what the plaintiff has alleged.[310]

For these reasons, in the transaction causation context, defendants will rarely produce an event study considering that an event study will seldom be useful.

2. *Loss Causation*

As seen above, Article 162 has a statutorily provided presumption of damages. Article 170 does too. This presumption is far more difficult to rebut because the plaintiff will not be alleging the exact corrective disclosure. This can be understood better by comparing the Korean law on loss causation with *Dura*.

In *Dura*, as seen above, SCOTUS held that even if Dura Pharmaceuticals' stock price was artificially inflated because of a misrepresentation, that was insufficient to establish loss causation.[311] SCOTUS noted that the only statement in the plaintiff's complaint that can be read as describing loss causation is that "the plaintiffs 'paid artificially inflated prices for Dura's securities' and suffered 'damage[s].'"[312] SCOTUS found this to be insufficient.[313] The Court noted that "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind."[314] As seen above, the misconduct must cause an economic loss to shareholders who

change in greater in magnitude than the changes on 95% of the other trading days over the last year.").

310 Daebeobwon [S. Ct.], Dec. 15, 2016, 2015Da241228 (S. Kor.); *see also* Kim, *supra* note 215, at 59.

311 *See* Ferrell & Saha, *supra* note 74, at 164 ("[T]he Court held that even if Dura Pharmaceuticals' stock price was artificially inflated as a result of a fraudulent statement concerning the expectation of FDA approval of Dura's asthmatic inhaler, that was nevertheless insufficient to establish loss causation.").

312 Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346-47 (2005) ("As we have pointed out, the plaintiffs' lengthy complaint contains only one statement that we can fairly read as describing the loss caused by the defendants' 'spray device' misrepresentation. That statement says that the plaintiffs 'paid artificially inflated prices for Dura's securities' and suffered 'damage[s].'").

313 *Id.* at 348 ("[W]e find the plaintiffs' complaint legally insufficient.").

314 *Id.* at 347.

purchased shares at an inflated price.[315] Following *Dura*, loss causation analysis in most U.S. cases, focuses on identifying an adequate corrective disclosure and providing an expert testimony tying the disclosure to a stock price drop.[316] In effect, in the United States, the plaintiff must allege the corrective disclosure date.[317]

Not so, when one has a statute presuming damages. As seen above, the damages are presumed to be the difference between the actual costs paid by a plaintiff in acquiring the security in question and the price of such security at the close of the final court hearing (or if the security was sold before the close of the final court hearing, then the price of the security at the time of such sale).[318] When relying on the presumption, the relevant allegation regarding damages is the actual costs paid by the plaintiff in acquiring the security in question and either: (1) the price of such security at the close of the final court hearing, or (2) if the security was sold before the close of the final court hearing, then the price of the security at the time of such sale.[319] The corrective disclosure and the subsequent stock price movements are

315 *See* Ferrell & Saha, *supra* note 74, at 166 ("In short, the Supreme Court in *Dura* emphasized that the actionable misconduct must *cause* economic loss to shareholders who purchased shares at an inflated price.") (emphasis in original).

316 *See* Fisch, *supra* note 29, at 825 ("[T]he loss causation analysis in most cases has focused on both the identification of an adequate corrective disclosure and expert testimony tying that corrective disclosure to a drop in stock price.").

317 *See* Fisch, Gelbach & Klick, *supra* note 1, at 570 ("In the post-Dura state of affairs, plaintiffs must identify both alleged misrepresentation and corrective disclosure dates to adequately plead loss causation.").

318 *See* Chun, *supra* note 118, at 1015 ("The amount of damages is presumed to be 'the price actually paid by the claimant to purchase the security' minus 'the market price of the security at the time of closing the proceedings of the lawsuit'. If the claimant sold the security before the closing of the proceedings, the subtracted amount is the 'sale price'.").

319 *See id.* ("The amount of damages is presumed to be 'the price actually paid by the claimant to purchase the security' minus 'the market price of the security at the time of closing the proceedings of the lawsuit'. If the claimant sold the security before the closing of the proceedings, the subtracted amount is the 'sale price'."). This measure of damages is similar to Section 11 of the Securities Act. 15 U.S.C. § 77k(e) ("The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought."). This is because, as seen above, at least in Article 162 context, the Korean Parliament followed the same liability rule as the primary market. *See supra* notes 119-126 and accompanying texts.

not for the plaintiff to allege. That is, Korean plaintiffs will only be alleging that the statement was false, not how or when the truth became known.

And, as seen above, an event study does not show what caused the abnormal return. It only may show that there was one.[320] For this reason, a defendant will have to allege and prove that there was a corrective disclosure connected to the statistically significant event. Moreover, the defendant will have to show that there was no leakage. This will be very difficult, if not impossible, for the defendant to manage because it means that the defendant, a listed huge company with potentially thousands of employees, will have to prove a negative, that is no one leaked the information.

Moreover, the court allowed an easier and cheaper way out for the defendants. Korean courts, when relying on the presumption of damages, are willing to limit the presumption of damages citing the principle of fairness.[321] While it may be costly to pay for an expert to conduct an event study, it is much cheaper to provide the court with cases where other courts limited damages citing the principle of fairness. Why would defendants pay for more if they can achieve similar results for less? This rule is another reason why a defendant will not bother disproving loss causation when damages are presumed.

It is different with Article 179. As seen above, Article 179 requires a plaintiff to prove loss causation.[322] However, there is no reported Article 179 stock price drop fact pattern case that can be found discussing an event study. The SCK decision database has been searched with the keywords "event study" in Korean and "179." Between 2015 and 2021, out of eighteen cases consisting of both decisions by the courts of the first instance and the courts of appeal, none were about Article 179.

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320 *See* Fisch, Gelbach, & Klick, *supra* note 1, at 556 ("[E]vent studies can do no more than demonstrate highly unusual price changes. Event studies do not speak of the rationality of those price changes.").

321 *See*, *e.g.*, Daebeobwon [S. Ct.], May 15, 2008, 2007Da37721 (S. Kor.); Seong Woo Lee*, Biryechaekimjedo doibgwa jabonsijang tujaja bohoe kwanhan yeongu* [*The Research on the Relation of the Proportionate Liability and the Protection for the Capital Market Investors*], 41 GANGWONBEOBHAK [KANGWON L. REV.] 825, 839 (2014); *See also* Taeil Han, *Bulbeobhaengui sonhaebaesan wonchikui sojeongeuroseo chaekimjaehangwa biryechaekimui bigyo* [*A Comparison Between Liability Limitation and Proportionate Liability Based on the Restated Principle of Tort-related Compensation for Damages*], 29 BEOBHAKNONCHONG [KOOKMIN L. REV.] 223, 234 (2016) (arguing that the limitation of damages is a court-made law that is unusual to a civil law country).

322 *See* footnote 196 and accompanying text.

The reason why there is no event study being discussed in an Article 179 case may be because there are not many Article 179 cases involving a stock price drop fact pattern being filed. The SCK decision database has been searched with the keywords "capital market" in Korean and "179." Out of about 200 cases, only a handful involved a stock price drop fact pattern.[323]

In a case where plaintiffs alleged Article 179 cause of action against one of the defendants, the court held, without mentioning an event study method, that the plaintiffs failed to prove damages.[324] The plaintiffs in this case alleged that the defendants failed to disclose that a criminal complaint was filed against the CEO to the investigative agency.[325] The plaintiffs bought the corporate defendant's stock after the defendants learned about the filing but before the disclosure.[326] The allegation was that the late disclosure was an Article 179 violation.[327] However, the court held that the fact that a criminal complaint was filed against the CEO to the investigative agency was not enough, without more, for the duty to disclose to trigger.[328] The court went on and held that there was no proof of loss.[329]

In another case where plaintiffs alleged an Article 179 cause of action against one of the defendants, the court also held, without mentioning an event study method, that the plaintiffs failed to prove damages.[330] In this case, the plaintiffs alleged that the corporate defendant made a misrepresentation about the cause of the CEO's death.[331] The plaintiffs alleged that some of the defendants were liable because they knew that the CEO committed suicide.[332] The court held that there was not enough proof to find that one of the defendants knew about the cause of the CEO's death at the time of the misrepresentation.[333] The court also held that there was not enough proof to find that the other

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323 Many were involved in a big commercial paper scandal in Korea. *See, e.g.*, Seoul Godeungbeobwon [Seoul High Ct.], Dec. 23, 2016, 2016Ka-Hap2065092 (S. Kor.).

324 Seoul Dongbujibangbeobwon [Seoul E.D. Ct.], June 11, 2021, 2021Ka-Dan106443 (S. Kor.).

325 *Id.*

326 *Id.*

327 *Id.*

328 *Id.*

329 *Id.*

330 Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Nov. 5, 2015, 2013Ka-Hap552349 (S. Kor.).

331 *Id.*

332 *Id.*

333 *Id.*

defendant, although she knew the cause of death, was involved with the misrepresentation.[334] Moreover, the court held that there was no proof of loss.[335]

Yet, in a different case, the court held that there was not enough evidence to find that certain representations about the sale of certain assets were false.[336] There was no mention of damages nor an event study in this case.[337]

Considering the above, it is likely that there are no event studies in Article 179 cases because there are not many Article 179 cases to begin with, and because, in the handful of Article 179 cases, the plaintiffs are deciding to not submit an event study as the cases already lack merit for other reasons.

IV. REFORMING THE STATUTORY PRESUMPTION OF LOSS CAUSATION AND DAMAGES IN KOREA

A. *The Problem With the Statutory Presumption of Loss Causation and Damages*

As seen above, event studies play almost no role in Korean securities litigations. They are not necessary for, therefore not used by, plaintiffs to prove reliance. Article 162 explicitly got rid of the reliance requirement. And under the SCK's interpretation, Article 179 does not require reliance either. Article 170 requires reliance, but the SCK built into it the rebuttable presumption of reliance. Because Article 162 and Article 179 do not require reliance, and because Article 170 is interpreted by the SCK to have the rebuttable presumption of reliance, event studies are not required at the class certification stage in Korea.[338]

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334 *Id.*

335 *Id.*

336 Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], July 8, 2016, 2013Ka-Hap75781 (S. Kor.).

337 *Id.*

338 *See* Joon Buhm Lee, *Jeungkwonjipdansosong sageon jung jipdansosongheogajeolchae kwanhan hangukkwa miguk beobli bibyoyeongu* [*A Comparative Study of Securities Class Action Certification Procedure Between Korea and the United States*], 26 MINSASOSONG 321, 324 (2022); Fisch, *supra* note 7, at 928 ("In the absence of a reliance requirement, securities fraud litigation does not present individualized factual or legal questions that threaten the commonality necessary to certify a class."). The SCK went a step in the right direction by considering the allegation of materiality as being common among class members as one factor for finding commonality requirements met for class certification purposes. *See* Daebeobwon [S. Ct.], Nov. 4, 2016, 2015Ma4027 (S. Kor.); Daebeobwon [S. Ct.],

And among them, especially Article 162 and Article 179 as currently interpreted by the SCK, is consistent market-based harm because they do not require reliance.[339] Because each statutory scheme differs from the other, the focus will be on Article 162 from here on. However, the reasoning will be similar for Article 179 under the current interpretation by the SCK.[340]

Under Article 162, the harm the statute protects the investors from is the distortion of the market price.[341] And, under Article 162, the recovery should be limited to the amount by which the price is distorted.[342] Because the plaintiff was not deceived into purchasing,

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June 10, 2016, 2016Ma253 (S. Kor.). But, the SCK stopped short of going further and analyzing whether the statement was material. *See* Fisch, *supra* note 56, at 98 ("If, however, the Court was correct in identifying price distortion as critically important to fraud on the market, how should it evaluate the existence of price distortion for purposes of class certification? This essay suggests that the first step should be an analysis of materiality.").

339 *See* Fisch, *supra* note 7, at 929 ("[T]he reliance requirement is illogical in the context of a cause of action that is focused on market-based harm."); Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securitie*s, 38 BUS. LAW. 1, 11 (1982) ("The logic of the fraud on the market theory dictates that the reliance requirement as conventionally interpreted be discarded altogether.").

340 Because Article 170 requires reliance, the policy consideration may differ. *See* Fisch, *supra* note 29, at 861 ("By eliminating the requirement that plaintiffs prove reliance on misrepresentations, *Basic* destroys the component of the transaction that would establish causation under common law fraud principles."). However, if we consider the presumption of reliance as having the practical effect of eliminating the reliance requirement, then the following reasoning may also apply to Article 170. *See id.* ("The *Basic* presumption has the practical effect of eliminating the requirement of a causal relationship—at the purchasing stage—between the defendant's conduct and any subsequent harm. . . . *Basic* replaces reliance on the misrepresentations with reliance on the market price.") (emphasis in original). In this case, the Korean Parliament, by enacting Article 170, and the SCK, by interpreting Article 170 to have a rebuttable presumption of reliance, may have engaged in a law making partnership. *See* Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 WASH. U.L. REV. 453, 469-74 (2015) (discussing the lawmaking partnership between the U.S. Congress and SCOTUS in the securities litigation context). The lawmaking partnership between the Korean Parliament and the SCK may have evolved Article 170 to also focus on market-based harm.

341 *See* Fisch, *supra* note 29, at 862 ("The damage that the defendant causes in an FOTM scenario is not the disruption of investment decisions or the sacrifice of investor confidence in the accuracy of financial documents—it is a distortion of the market price.").

342 *See id.* at 863 (explaining that the "recovery should be limited to the amount by which the price is distorted" in a FOTM scenario).

there is no causal link between the fraud and subsequent stock price drops that are due to market or other forces.[343]

However, Article 162 has a presumption of damages clause.[344] And, as seen above, Korean plaintiffs rely on the presumption rather than attempting to prove loss causation and damages. The SCK's interpretation of the statute makes it almost impossible to rebut the presumptions. And unlike the United States, where actual calculation by the judiciary is rare,[345] Korean judges mainly rely on the presumption of damages to calculate damages in many securities-fraud cases. But, is this a good scheme?

The rule does serve a purpose, it helps Korean judges determine damages. Generally, Korean judges are not knowledgeable about statistical methods.[346] Traditionally, Korean judges were recruited from the Judicial Research and Training Institute, which trains lawyers who passed the bar exam.[347] And many, if not most, judges were undergraduates in the department of law.[348] More recently, Korea adopted a law school system similar to the United States.[349] However, Korean

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343 *See id.* ("Because the plaintiff was not deceived into purchasing, *Basic* breaks the causal link between the fraud and subsequent stock price drops that are dues to market and other forces.").

344 *See supra* note 117 and accompanying text.

345 *See* Fisch & Gelbach, *supra* note 48, at 61 ("Although securities fraud cases rarely go to trial and, as a result, judicial efforts to calculate damages are virtually non-existent, litigants also proffer event studies with respect to damages on motions for summary judgment as well as at the motion for class certification in response to Rule 23's requirement that damages can be calculated on a class-wide basis.").

346 This is also the case in the United States. *See* Fisch & Gelbach, *supra* note 48, at 93 ("[J]udges are not trained empiricists.").

347 *See* Dai-Kwon Choi, *A Legal Profession in Transformation: The Korean Experience*, *in* REORGANIZATION AND RESISTANCE: LEGAL PROFESSIONS CONFRONT A CHANGING WORLD 171, 174 (William L.F. Felstiner ed., 2005) ("[T]hose who complete their training achieving the top grades at the [Judicial Research and Training Institute] alone are recruited . . . to be judges[.]"); Woo-Young Rhee, *Judicial Appointment in the Republic of Korea from Democracy Perspectives*, 9 J. KOREAN L. 53, 69 (2009) ("[J]udges are typically appointed among those who have passed the national bar examinations and have subsequently finished the two-year training period at the government institution of Judicial Training and Research Institute established under the Supreme Court[.]").

348 *See, e.g.*, Chan Hee Lee, *[Life Column] Need to Reorganize the Law School Curriculum*, Gyoyukgwajeong Jaejeongbihaeya (Mar. 9, 2023, 11:21 AM), http://news.heraldcorp.com/view.php?ud=20230309000424 [https://perma.cc/XR66-R3LC] (noting that many judges, and most judges in the high courts, graduated from Seoul National University Department of Law before Korea adopted the U.S.-style law school system).

349 *See* Rhee, *supra* note 347, at 56 n.2 (explaining that graduate-level professional law schools are in operation as of 2009).

law schools generally do not teach scientific evidence.[350] Also, there are not many cases discussing event studies, suggesting that Korean judges will not be able to learn on the job. These facts show that Korean judges are generally not prepared to decide damages by statistical methods.

Moreover, Korean evidence law does not encourage Korean judges to learn statistical methods. As seen above, a party who needs to submit expert evidence will generally make a request to the court, and the court will appoint an expert.[351] And, the evidence will generally carry more weight compared to an expert report submitted by the parties.[352] This rule allows the judge to adopt the result provided by the expert appointed by the court over the evidence provided by the party's expert. Without the statutory presumption of damages, the judges may, in many cases, simply rely on the court chosen expert without deliberation.

But, the rule makes the relevant representation into an insurance policy running for the relevant statutes of limitations.[353] Article 162 presumes that the damages are the difference between the actual costs paid by the plaintiff in acquiring the security in question and the price of such security at the close of the final court hearing (or if the security was sold before the close of the hearing, then the price of the security at the time of such sale).[354] And, as seen above, because Article 162 says that the statute of limitations expires one year after the plaintiff learned about the misrepresentation or three years after the filing of the misrepresentation, the statutory "insurance" lasts for at least one

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350 This generally seems to be the case also in the United States. *See* Ryan D. Enos, Anthony Fowler & Christopher S. Havasy, *The Negative Effect Fallacy: A Case Study of Incorrect Statistical Reasoning by Federal Courts*, 14 J. EMPIRICAL LEGAL STUD. 618, 619 (2017) (noting that "a standard legal education does not include rigorous training in statistics or the evaluation of scientific evidence").

351 *See* Park, *supra* note 124, at 342.

352 *See* HONG-YUP KIM, MINSASOSONGBEOB [CIVIL PROCEDURE] 666-67 (10th ed. 2021).

353 *See* John C. Coffee, Jr., *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse Broudo*, 60 BUS. LAW. 533, 535 (2005) ("Eliminating loss causation (or replacing it with a presumption) forces the corporate defendant to act as an insurer who must compensate shareholders who traded within the class period for losses that may have only a tenuous relationship with any misrepresentation it made.").

354 *See* Chun, *supra* note 118, at 1015 ("The amount of damages is presumed to be 'the price actually paid by the claimant to purchase the security' minus 'the market price of the security at the time of closing the proceedings of the lawsuit'. If the claimant sold the security before the closing of the proceedings, the subtracted amount is the 'sale price'.").

year after the plaintiff learned about the misrepresentation or three years after the filing of the misrepresentation. If the plaintiff filed a civil action, then the policy may last even longer, until the close of the final court hearing.[355]

The presumption does not remove market-based losses.[356] A plaintiff who bought stocks needs to only find a material misrepresentation by the corporate defendant or the outside auditor made before the acquisition, but disclosed after the acquisition, and the plaintiff will be covered for the downside until the close of the final court hearing, but for the statutes of limitation. There is no need to connect the misrepresentation to the loss. For instance, a plaintiff who bought stocks that subsequently lost value only needs to find one material misrepresentation and be content that they will be covered for at least one year after the finding, until three or eight years after the misrepresentation. These statutory insurance policies do not provide any real benefit for diversified shareholders.[357]

And Korean courts, understanding that it is difficult to isolate the loss caused by the fraud from other losses, routinely reduce the presumed damages awards citing the principle of fairness.[358] The courts held that Article 162 and Article 170 causes of action are no different from the tort cause of action in the sense that the principle of fairness—the principle that the loss should be distributed fairly—applies.[359] And, although the specific language differs from court to court, courts generally hold that if it is difficult to isolate the loss

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355 It is similar with Article 170. Article 170 also presumes that the damages are the difference between the actual costs paid by the plaintiff in acquiring the security in question and the price of such security at the close of the final court hearing (or if the security was sold before the close of the hearing, then the price of the security at the time of such sale). Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, *amended by* Act No. 17219, July 8, 2020, art. 170 (S. Kor.). As seen above, an Article 170 cause of action also has a statute of limitation that expires one year after the plaintiff learned about the misrepresentation or eight years after the filing of the misrepresentation. *See id.* Again, if the plaintiff filed a civil action, then the policy may last even longer, until the close of the final court hearing.

356 *See* Fisch, *supra* note 29, at 868 ("In order to prevent Rule 10b-5 from turning into an insurance system for market-based losses, those losses must be removed from the calculation of the plaintiff's damages.").

357 *See* Coffee, Jr., *supra* note 353, at 535 ("[Such an insurance] provides no real benefit for diversified shareholders . . . and wind up effectively transferring wealth from one pocket to another (minus considerable legal costs).").

358 *See*, *e.g.*, Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Sept. 26, 2014, 2012Ga-Hap75609 (S. Kor.).

359 *See*, *e.g.*, Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Jan. 29, 2015, 2012Ga-Hap98220 (S. Kor.).

caused by the fraud from other losses, the court should reduce the damage awards.[360] While courts try to give their reasons for choosing certain percentages of reduction, the choices seem somewhat arbitrary considering that the reduced percentages are the same for all the plaintiffs joined together[361] and that the extent of the reduction varies from court to court.[362]

The presumption of damages is more problematic because it is inefficient. The reason is that the presumption of damages distorts the incentives of informed traders. Private civil liability provides incentives to engage in informed trading.[363] Informed trading is what improves the efficiency of the markets and enables the markets to discipline managers.[364]

But, this scheme works when the informed traders are only compensated for fraud-based losses. An informed investor who seeks out and relies on the information injects the economic significance of that information into the capital markets.[365] For securities regulation to improve corporate governance by increasing issuer transparency, the disclosure should ex ante be incorporated into the securities markets.[366]

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360 *Id.*

361 *See*, *e.g.*, Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Sept. 26, 2014, 2012Ga-Hap75616 (S. Kor.) (reducing the presumed damages that should be paid by the corporate defendant to 70% against all five plaintiffs); Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Jan. 29, 2015, 2012Ga-Hap98220 (S. Kor.) (reducing the presumed damages that should be paid, jointly and severally, by the corporate defendant and three individual defendants to 30% against all 14 plaintiffs).

362 *Compare id.* (finding that, jointly and severally, the corporate defendant and certain individual defendants are liable for 70%, another individual defendant and outside auditor are liable for 50%, another individual defendant is liable for 30%, and yet another individual defendant is liable for 10% of the damages in a joinder action), *with* Seoul Jungangjibangbeobwon [Seoul C.D. Ct.], Dec. 19, 2013, 2012Ga-Hap68540 (S. Kor.) (finding that, jointly and severally, the corporate defendant is liable for 50%, the individual defendants are liable for 30%, of the damages).

363 *See* Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2009 WIS. L. REV. 333, 335 (2009) ("By compensating traders for fraud-based losses, private civil liability increases the incentive to engage in informed trading.").

364 *See id.* ("Informed investing improves the efficiency of the markets and enables them to discipline managers.").

365 *See id.* ("Investors who seek out information, use that information to price securities, and then rely on that information in their trading decisions inject the economic significance of that information into the capital markets.").

366 *See id.* at 345 ("If securities regulation is about increasing issuer transparency to improve corporate governance, then effective securities regulation requires not just ex post enforcement of disclosure violations, but ex ante incorporation of mandated disclosure into the securities markets.").

This incorporation occurs through informed secondary trading.[367] As Professor Fisch points out: "[i]nformed traders must research and analyze firm-specific information, use that information to adjust their expectations about firm value, and act on that information by trading."[368]

But with the Korean statutory presumption of damages, an informed investor who finds a material misrepresentation has less incentive to trade, that is to sell the stock, because the investor knows that they will be covered for any other stock price loss caused by any other adverse information until the statute of limitation runs out. That is, an informed trader who bought the stock after researching and analyzing firm-specific information thereby finding the fraud, may decide that there is no reason to trade because of the statutory insurance policy. Even worse, the informed trader may decide that they no longer need to research and analyze firm-specific information as rigorously as they used to because the statutory insurance policy covers the downside. This makes the capital market less efficient.

Moreover, it is possible that the Korean statutory presumption may incentivize certain investors to start looking for misrepresentations to take advantage of the insurance effect.[369] Assume a material misrepresentation, if disclosed, will drop the stock price by ten dollars per share. Further assume that an investor, who happened to not own the company's share, learned about the misrepresentation. Without the insurance effect, one strategy for the investor would be to bet that the share price will fall by going short and waiting for the price to move accordingly. If the investor is not willing to wait, then the investor may disclose the information to the market themselves. This strategy not only gives the investor a profit but also makes the market more efficient by making the stock price more accurate.

However, with the presumption of damages, the investor may, instead of shorting the stock, buy shares knowing that it is likely that any loss may be covered eventually. The investor will be compensated

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367 *See id.* at 345-46 ("For shareholders and directors to use the disclosed information to monitor, it must be incorporated into equity prices. For securities that are traded in efficient markets, this incorporation occurs through informed secondary trading.").

368 *Id.* at 345-46.

369 *See* Joon Buhm Lee, *Jeungkwonjipdansosongui So Jaekiwa Gioep Gachi Saiui Kwangyee Kwanhan Yeongu* [*A Study on the Relationship between the Filing of the First Korean Securities Class Action Suit and the Value of the Firms*], 44 OIBEOBNONZIP 85, 101 (2020) (arguing that the statutory presumption of damages may distort the incentives of informed traders).

not only for the loss by the misrepresentation but also for any other loss that is unrelated to the misrepresentation. This may not be the case if an informed investor knows that the discovery process will bring the truth to light in a securities fraud litigation. But Korea does not have U.S.-style discovery,[370] making the investor feel safe that their prior knowledge of the misrepresentation will be difficult to uncover. Such practice makes the Korean capital market less efficient because it makes the price less accurate.[371] The unrevealed frauds, with the insurance effect, give people an incentive to buy and cause the stock price to go up when it should go down.

Even if such an extreme situation is not assumed, there are other instances where an informed investor's trading decision may be distorted by the presumption of damages. Assume a material misrepresentation, if disclosed, that will drop the stock price by ten dollars per share. Also, assume that an investor learned about other subsequent information that shows a 50% chance of the stock price going up by one hundred dollars and a 50% chance of the stock price going down by one hundred dollars in the near future. The investor would not have traded on the second information because the expected value of the new information is zero. But, given the knowledge of the misrepresentation, the informed investor may trade on the subsequent information because the informed investor knows that the presumption of damages will cover the downside loss if the loss materializes. That is, due to the material misrepresentation, the second information's expected value, to the informed investor, becomes fifty dollars because the downside is covered. Knowing this, the informed investor may, instead of disclosing the fraud or refraining from buying the stock at the price incorporating the misrepresentation, trade on it. Again, because Korea does not have U.S.-style discovery, it may be difficult for the defendant to uncover the prior knowledge of the investor. And the investor, knowing this, may be willing to trade on the knowledge of the misrepresentation. In effect, the insurance covers the risk associated with

370 *See* Youngjoon Kwon, *Litigating in Korea: A General Overview of Korean Civil Procedure*, *in* LITIGATION IN KOREA 1, 18 (Kuk Cho ed. 2010) ("One of the different features of [Korean civil] process in comparison with the U.S. civil procedure law is the absence of discovery.").

371 *See* Merritt B. Fox, *After* Dura*: Causation in Fraud-on-the-Market Actions*, 31 J. CORP. L. 829, 862-63 (2006) ("More accurate share prices, i.e., prices that are closer to their fundamental values, enhance the efficient functioning of our economy by being better signals of where scarce capital should flow and aiding in the mechanisms that provide appropriate discipline and incentives to management.").

operational decisions unrelated to the fraud and encourages excessive risk-taking by investors.

B. *Addressing the Misaligned Incentives*

For these reasons discussed above, the law should try to only compensate the loss that was caused by the misrepresentation as accurately as possible.[372] To this end, this Article proposes the following statutory scheme involving the use of event studies where needed. While event studies have their own evidentiary issues,[373] this Article argues that their use will be a relative improvement in terms of calculating damages, compared to the current presumption of damages coupled with inconsistent and somewhat arbitrary reduction by the courts citing to the fairness of damages.[374]

The statutory scheme proposed below also takes note of the fact that the failure to show a statistically significant price movement does not necessarily disprove loss causation.[375] The proposal also considers that Article 162, Article 179, and Article 170 take the market-based approach making the plaintiff's only damage a price adjustment.[376] As seen above, Article 162 and Article 179 do not require reliance at all, and Article 170 presumes reliance.[377]

First, a Korean plaintiff should be required to prove loss causation at the time of the alleged misrepresentation. The claimed loss would be that the plaintiff paid too much.[378] Damages are the full amount of the price inflation at the time of the fraud, unless the plaintiff sells

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372 *See* Lee, *supra* note 369, at 102.

373 *See* Fisch, *supra* note 7, at 919-20 (explaining the methodological challenges of applying event studies).

374 *See* footnotes 342-346 and accompanying texts; *see* Fisch, *supra* note 7, at 921 ("Until better empirical tools are developed, event studies are likely to be a dominant evidentiary tool for addressing the loss causation analysis required by *Dura*.").

375 *See* Fisch, *supra* note 7, at 920 ("[A]n event study seeks to identify a statistically significant correlation between an event and stock price; the study's failure to identify such a correlation does not necessarily mean there is no relationship.").

376 *See id.* at 916 ("Under a market-based approach, plaintiffs are only deceived to the extent that their trades occur at a price different from what it would have been in the absence of fraud. . . . A market-based approach also affects the proper calculation of damages. . . . Plaintiff's only damage, . . . is a price adjustment.").

377 *See id.* at 932 ("Rejecting reliance removes the complex analysis of price distortion from the class certification analysis and is consistent with the modern realities of the public securities markets.").

378 *See* Merritt B. Fox, *Demystifying Causation in Fraud-on-the-Market Actions*, 60 BUS. LAW. 507, 515 (2005) ("The claimed loss—that plaintiff paid too much—flows *directly* from the misstatement.") (emphasis in original).

prior to the market completely realizing the truth.[379] The plaintiff may prove the amount of price inflation using an event study[380] or other statistical methods.[381] Here, in theory, damages paid to the plaintiff will not provide any insurance for any other kind of risk.[382]

However, if a plaintiff sells before the market completely realizes the truth, then the plaintiff would receive a benefit arising from the same wrong.[383] The recovery by the sale prior to the corrective

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379 *See id.* at 520 ("Her damages should be the full amount of the price inflation at the time of purchase, unless . . . the plaintiff sells prior to the market completely realizing the true situation."); Fisch, *supra* note 29, at 844 ("The difference between the price that the plaintiff paid and what the securities were really worth may be the most natural description of the plaintiff's harm from securities fraud."); Langevoort, *supra* note 72, at 55 ("In theory, plaintiffs should only recover the amount the price was distorted by at the time of the fraud (the conventional out-of-pocket measure), so long as the truth was revealed before a plaintiff unwound its position.").

380 *See* Fisch, Gelbach & Klick, *supra* note 1, at 555 ("The challenge is how to determine whether fraudulent statements have affected stock price. This task is not trivial—stock prices fluctuate continuously in response to a variety of issuer and market developments as well as 'noise' trading. To address the question, litigants use event studies."); Fisch & Gelbach, *supra* note 48, at 56 ("In securities fraud cases, event studies are used in several ways, including… computing the amount of damages."). Because, in event studies used in securities fraud litigation, price must move in a specific direction to support the plaintiff's case, a one-sided test should be used. *See* Fisch, Gelbach & Klick, *supra* note 1, at 590 ("In event studies used in securities fraud litigation, . . . price move in a specific direction to support the plaintiff's case. . . . Thus, tests of statistical significance based on event study results should be conducted in a 'one-sided' way[.]"). An event study must also account for the fact that excess stock returns may not be actually normally distributed. *See* Fisch, Gelbach & Klick, *supra* note 1, at 599 (proposing a test named the SQ test to account for the non-normality in excess returns); Gelbach, Helland & Klick, *supra* note 206, at 517-20 (explaining the SQ test); Taylor Dove, Davidson Heath, J.B. Heaton, *Bias-Corrected Estimation of Price Impact in Securities Litigation*, 21 AM. L. & ECON. REV. 184, 196 (2019) ("[T]he SQ test is both more accurate *and* reduces the statistical bias when measuring price impact.") (italics in original). Finally, an event study needs to account for dynamic changes in standard deviation. *See* Fisch, Gelbach & Klick, *supra* note 1, at 607-12 (discussing how to adjust event studies to deal with the problem of dynamic changes in standard deviation).

381 *See* Allen Ferrell & Atanu Saha, *Forward-Casting 10b-5 Damages: A Comparison of Other Methods*, 37 J. CORP. L. 365, 366 (2012) ("[T]he forward-casting method incorporates market expectations in determining what the stock price would have been absent the alleged fraud[.]"); Fisch, *supra* note 29, at 845 ("Under the pre-Dura approach, expert economists reconstructed the stock's value at the time of purchase based on various methods of modeling the amount of fraud-induced price inflation.").

382 *See* Fox, *supra* note 378, at 515 ("If proved true, the resulting damages paid to the plaintiff compensate the plaintiff for that loss and nothing more. No insurance for any other kind of risk would be provided.").

383 *See id.* at 522 ("If [an investor] sells before the market has any realization of the truth . . . [a]lthough [the investor] was injured at the time of his purchase by the

disclosure, if any, should not be double counted.[384] But because it is often difficult to prove when the market partially or completely realized the true situation, the question of who has the burden of allegation and proof is important.[385]

One can think of three options. The first option is to place the burden on the plaintiff to allege and prove that the sale happened after the market realization. This means that the plaintiff should both allege and prove that there was a price increase at the time of the misrepresentation, and that, for those who sold, there was a price decrease at the time of the market realization before the sale. The second option is to require that the defendant allege and prove that there was no market realization before the sale.[386] The third option is to require that the defendant allege and prove that there was a market realization after the sale. This Article argues that the third option, requiring the defendant to defend by proving that the corrective disclosure did not happen until after the plaintiff sold, should be the rule, for the following reasons.

First, this rule incentivizes the defendant, who has more information, to disclose the information in a civil action. The defendant will have the incentive to allege and prove that the market realization happened because it could be an affirmative defense. And because Korean civil procedure does not have U.S.-style discovery,[387] allocating the burden of proof to the party with more information is an effective strategy to bring the truth to light in a civil action.[388] Without this rule, the

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wrongful false statement, at the time of sale he receives a benefit arising from the same wrong equal in an amount to the injury he suffered earlier.").

384 *See* Merritt B. Fox, *Understanding Dura*, 60 BUS. LAW. 1547, 1550 (2005) ("The other main concern involves how to prevent damages from being paid to the subset of investors who suffer injury by purchasing shares at a price inflated by the misstatement but who recoup this injury by reselling sufficiently quickly that the price at the time of sale is still equally inflated.").

385 *See* Fox, *supra* note 378, at 523 ("Because it will often not be obvious as to when the market realizes the true situation, the question of who should have the burden on the matter, both at the pleading stage and at trial, is an important policy question.").

386 While the allegation part may be easy, it will be almost impossible to prove negative for the defendant considering that the market realization may take many forms. *See* Fisch, *supra* note 29, at 843 ("[T]he fraud is revealed—either directly through a corrective disclosure or indirectly through the occurrence of events that are inconsistent with the original lies.").

387 *See* SIYOON LEE, SINMINSASOSONGBEOB 547-48 (15th ed. 2021) (arguing that adopting U.S.-style discovery should be considered for certain cases where only corporate defendants generally have access to evidence).

388 *See* KIM, *supra* note 352, at 753 (discussing that in cases involving pollution or product liability, it is difficult for the alleged victims to prove their cases because the defendants have evidence that plaintiffs do not have access to).

defendant will only have the incentive to defend by denying any misrepresentation.

Second, it may be difficult for the plaintiff to prove that, before the sale, there was a price decrease at the time of the market realization. The plaintiff may not be able to prove statistically significant loss at the time of the alleged disclosure because (1) there were leaks of information,[389] and/or (2) the defendant disclosed positive information as a bundle with the negative disclosure.[390] In this situation, where the plaintiff already proved that there was a statistically significant market impact at the time of the alleged misrepresentation, the plaintiff should not be required to do more.

Third, this rule conforms to the general burden of allegation and proof in Korean civil procedure regarding the set off of benefits. Under Korean law, the defendant generally has the burden to allege and prove that the plaintiff earned benefits because of the tort as an affirmative defense.[391] Unless there is a policy reason to change the default, following the current procedural scheme will help the statutory scheme be implemented more easily.

However, in many instances, the misrepresentation will not be followed by an immediate significant price increase because the misrepresentation is made to avoid disappointing expectations rather than to increase expectations.[392] In such a situation, the misrepresentation may prevent a stock price drop that would have occurred had the truth been told.[393] In this case, the plaintiff should be allowed to prove loss

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389 *See* Madge S. Thorsen, Richard A. Kaplan & Scott Hakala, *Rediscovering the Economics of Loss Causation*, 6 J. BUS. & SEC. L. 93, 103 (2006) ("Dissipation often occurs as the market reacts to recurrent, partial revelations of [misrepresentation]. This is known as leakage. Whispers, gossip, rumor, blogs, tips, etc.; any of these may be sources of leaked information, all in advance of the ultimate disclosure of the whole truth.").

390 *See* Fisch, Gelbach & Klick, *supra* note 1, at 556 ("[I]n cases involving multiple 'bundled' disclosures, event studies have limited capacity to identify the particular contribution of each piece of information or the degree to which the effects of multiple disclosures may offset each other.").

391 *See, e.g.*, WONLIM JI, MINBEOBGANGUI [LECTURE ON CIVIL ACT] 1125-27 (17th ed. 2020).

392 *See* Fox, *supra* note 371, at 852 ("The problem, however, is that of all the misstatements that do in fact inflate the purchase prices of issuers' shares, probably most are made to avoid disappointing expectations rather than to increase expectations, which means they are not followed by an immediate significant price increase.").

393 *See* Lucian A. Bebchuk & Allen Ferrell, *Rethinking Basic*, 69 BUS. LAW. 671, 692 (2014) ("[T]he confirmatory lie might prevent a stock price drop that would have occurred had the truth been told.").

causation at the time of the alleged disclosure[394] because there will often be a visible market reaction to the revelation of the fraud.[395] Focusing on the ex post stock price distortion may have its own complicated evidentiary issues.[396] And, there may be no systematic relationship between ex ante price distortion and ex post price distortion.[397] For instance, the price impact of a corrective disclosure also reflects the burden of the anticipated litigation.[398] But absent a price distortion at the time of the misrepresentation, ex post price distortion may be the only approximation provided.[399] In this case, the plaintiff may also try to prove loss causation by an event study or other statistical method.[400]

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394 *See* Lee, *supra* note 369, at 102; Byung-Do Lee, *Jeungkwonosijangeseoui jeongbowaegokhaengwie ddareun sonhaeui naeyong* [*Defining Economic Losses in Securities Fraud Action*], 68 BEOBJO 156, 180 (2019) (arguing that damages should be calculated at the time of the misrepresentation unless there is a special circumstance to calculate at the time of corrective disclosure).

395 *See* James C. Spindler, *Why Shareholders Want Their CEOs to Lie More After* Dura Pharmaceuticals, 95 GEO. L.J. 653, 663 (2007) ("Taking the *ex post* approach may often be easier, because a visible market reaction is likely to exist upon the revelation of fraud.").

396 *See* Fisch, *supra* note 29, at 849 (discussing the evidentiary issues involved in measuring value in an ex post analysis).

397 *See* Fisch, *supra* note 7, at 922 (discussing reasons why there is no systematic relationship between ex ante and ex post price distortion); Donald C. Langevoort, *Compared to What? Econometric Evidence and the Counterfactual Difficulty*, 35 J. CORP. L. 183, 184 (2009) ("Corrective disclosure often reveals either too much (information beyond that known or knowable at the time of the fraud, or extraneous information bundled together with the correction) or too little (excluding information already impounded into the market price through leakage or other informal mechanisms) to be a particularly precise baseline.").

398 *See* Dove, Heath & Heaton, *supra* note 380, at 204 ("The price impact of corrective disclosure, in an efficient market, includes a component that reflects the burden of the anticipated litigation that corrective disclosure will generate."); Fisch, *supra* note 29, at 849 ("The market reaction to this revelation may reflect concerns about issues such as management integrity and the anticipated likelihood of future litigation.").

399 *See* James D. Cox*, Understanding Causation in Private Securities Lawsuits: Building on* Amgen*,* 66 VAND. L. REV. 1719, 1730 n.40 (2013) (arguing that, in a pure omission case or a misstatement case that confirms investor expectations, "the observation should shift from the moment of the false utterance to when the corrective disclosure is made"). *But see* Ferrell & Saha, *supra* note 381, at 366 (proposing a forward-casting method for calculating 10b-5 damages).

400 *See* Lee, *supra* note 369, at 102; Michael J. Kaufman, *At a Loss: Congress, the Supreme Court and Causation Under the Federal Securities Law*, 2 N.Y.U. J.L. & BUS. 1, 33 (2005) ("The goal of an event study usually is to determine what the plaintiff would have paid for a given security had the alleged misrepresentations or omissions not been made. The study, of course, often begins with the event of corrective disclosure."); Fisch, *supra* note 7, at 921 ("Until better empirical tools are

But, even here, the plaintiff may not be able to prove a statistically significant loss at the time of the alleged disclosure because of the following reasons: (1) there was a leak of information,[401] (2) the defendant disclosed positive information as a bundle with the negative disclosure,[402] or (3) none of the above.[403] These situations should be considered because a defendant is often able to control the timing of the disclosure attempting to manipulate the extent of the stock price reaction.[404] Each is discussed in turn.

A leakage may occur as the market reacts to the recurrent, partial revelation of the misrepresentation.[405] A leak may have been caused either by the defendant or not.[406] If the plaintiff alleges and proves a leak but fails to hold the defendant accountable for the leak, then damages may be presumed to be the statistically significant loss after the misrepresentation but before the disclosure.[407] This loss may be calculated through an event study or other statistical methods. In effect, this presumption is presuming that any statistically significant loss after the misrepresentation is caused by the leak. Here, the event study is not being used to prove a negative or disprove loss causation.

However, the defendant may rebut the presumption by showing that there was different information disclosed to the market that may have caused the statistically significant price drop.[408] Here, the defendant is not disproving loss causation through an event study. Instead, the defendant is proving the existence of different

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developed, event studies are likely to be a dominant evidentiary tool for addressing the loss causation analysis required by *Dura*"); Dove, Heath & Heaton, *supra* note 380, at 205 ("We are aware of no reported case that adjusts for this [anticipated litigation] bias and scholarship on securities fraud price impact and damages calculations largely ignores it.").

401 *See* Thorsen, Kaplan & Hakala, *supra* note 389.

402 *See* Fisch, Gelbach & Klick, *supra* note 1, at 556 ("[I]n cases involving multiple 'bundled' disclosures, event studies have limited capacity to identify the particular contribution of each piece of information or the degree to which the effects of multiple disclosures may offset each other.").

403 *See* Lee, *supra* note 369, at 102-03.

404 *See* Fisch, *supra* note 29, at 852 ("[C]orporate decisionmakers are often able to control the timing of their disclosures, enabling them to manipulate the extent to which the company's stock price reacts to a corrective disclosure.").

405 *See* Thorsen, Kaplan & Hakala, *supra* note 389.

406 *See* Lee, *supra* note 369, at 102-03.

407 *See* Mustokoff & Mazzeo, *supra* note 12, 207-08 ("In cases where there is evidence of such leakage, the leakage theory, as applied to the calculation of inflation, may support the inclusion of damages derived from statistically significant stock price declines that are unaccompanied by discernable corrective disclosure.").

408 *See* Lee, *supra* note 369, at 102.

information.[409] Whether the information is material or relevant to the stock price change will be a question for the judge to decide.[410]

Also, if the plaintiff, even after proving that there was a leak, fails to find any statistically significant drop after the misrepresentation but before the disclosure, then the plaintiff fails to prove loss causation and damages.[411]

If the plaintiff alleges and proves that: (1) there was a leak and (2) it was caused by the defendant, then the plaintiff may resort to the current presumption of damages.[412] While it will be very difficult, or almost impossible to disprove loss causation, this rule is designed to discourage the defendant from leaking the information.[413]

For example, a plaintiff may allege and prove that there was a misrepresentation at T0, a leak at T2, and a corrective disclosure at T3. If the plaintiff fails to find any statistically significant drop after the misrepresentation but before the disclosure and succeeds in proving that the leak at T2 was caused by the defendant, then the plaintiff may resort to the current presumption of damages.

The defendant may rebut this presumption by showing that there was a statistically significant loss at the time of the leak alleged by the plaintiff.[414] This would amount to the leak, in fact, being a partial corrective disclosure.[415] This is because a corrective disclosure can take many forms.[416] Again, this loss may be calculated through an event study or other statistical methods. Here, again, the event study is not being used to prove a negative or disprove loss causation.

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409 This is similar to the approach taken by the Seventh Circuit in Glickenhaus & Co. v. Household Int'l Inc., 787 F.3d 408, 422 (7th Cir. 2015) ("If the plaintiffs' expert testifies that no firm-specific, nonfraud related information contributed to the decline in stock price during the relevant time period and explains in nonconclusory terms the basis for this opinion, then it's reasonable to expect the defendants to shoulder the burden of identifying some significant, firm-specific, nonfraud related information that could have affected the stock price.").

410 *See id.* ("If they can't, then the leakage model can go the jury.").

411 *See* Lee, *supra* note 369, at 103.

412 *See id.*

413 *See* Fisch, *supra* note 29, at 852 (arguing that the "control over market information offers a substantial policy justification for limiting the role of other causal factors in reducing defendants' responsibility").

414 *See* Lee, *supra* note 369, at 103.

415 *See id.*

416 *See* Mustokoff & Mazzeo, *supra* note 12, at 197 ("Courts have recognized all kinds of information, news, and events as corrective disclosures in a wide variety of cases where there are not mirror-image relationships between the misrepresentation and the disclosure that causes the loss[.]").

Using the above example, if the plaintiff succeeds in alleging and proving that the leak at T2 was caused by the defendant, but if the defendant succeeds in proving that there was a statistically significant loss at T2, then the damages would be not the statutorily presumed damages but rather the damages calculated by the defendant. The defendant has an incentive to do this because the statutorily presumed damages will be in many cases more than the damages calculated by the defendant.

However, if the plaintiff alleges and proves that there was another leak caused by the defendant before the statistically significant loss, then the presumption of damages is not rebutted. The defendant may again rebut this presumption by showing that there was a statistically significant loss at the time of the second leak alleged by the plaintiff. This rule, in effect, makes the defendant allege and prove loss causation, not disprove loss causation.[417]

Again, using the above example, if the plaintiff succeeds in alleging and proving that there was another leak at T1, prior to T2, that was also caused by the defendant, but if the defendant succeeds in proving that there was a statistically significant loss at T1, then the damages would be not the statutorily presumed damages but rather the damages calculated by the defendant both at T1 and T2.[418]

This rule is designed to discourage the defendant from leaking the information but at the same time gives the defendant the opportunity to rebut the statutory presumption of damages. By allowing the defendant to rebut the statutory presumption, the rule is trying to compensate the loss that was caused by the misrepresentation as much as possible.

The second reason why there is no statistically significant loss at the time of corrective disclosure may be because the defendant bundled the corrective disclosure with other information.[419] When information is bundled, then the market test to calculate damages becomes

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417 *See* Lee, *supra* note 369, at 103.

418 In this case, event study methodology needs adjustment for requiring a showing of multiple events having statistical significance *See* Fisch, Gelbach & Klick, *supra* note 1, at 605-07 (discussing adjustments).

419 *Id.* at 556 ("[I]n cases involving multiple 'bundled' disclosures, event studies have limited capacity to identify the particular contribution of each piece of information or the degree to which the effects of multiple disclosures may offset each other."); *id.* at 616 ("When multiple sources of news are released at exactly the same time, however, no event study can by itself separate out the effects of the different news.").

problematic.[420] Content analysis may be helpful, but it has limits.[421] And, it is unlikely that the managers will voluntarily refrain from bundling because of the potential personal liability.[422]

In this case, this Article proposes that, because the defendant chose to disclose the information as a bundle, the current presumption of damages should apply.[423] This rule would prevent a defendant from trying to obscure the market signal by bundling and using it as a defense[424] because the rule would discourage the defendant from providing corrective disclosure with any other information hoping to prevent the plaintiff from proving loss causation.[425] For the plaintiff to resort to the presumption of damages in this case, the plaintiff is required to allege and prove that the defendant chose to bundle the corrective disclosure with other favorable or unfavorable material information.[426]

Lastly, the plaintiff may not be able to find statistically significant loss even though there is no alleged leakage nor bundled information

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420 *See* Spindler, *supra* note 395, at 687 ("As soon as information or projects are bundled, a court can no longer rely on a market test to calculate damages, because a negative price decline may well reflect other events.").

421 *See* Esther Bruegger & Frederick C. Dunbar, *Estimating Financial Fraud Damages with Response Coefficient*, 35 J. CORP. L. 11, 25 (2009) ("'[C]ontent analysis' is now part of the tool kit for determining which among a number of simultaneous news events had effects on the stock price. Content analysis, however, cannot always isolate the price impact of a significant piece of news if it was in the same announcement as other, significant news.").

422 *See* Charles R. Korsmo, *Information Bundling, Disclosure Timing, and Judicial Deference to Market Valuation*, 62 B.C.L. REV. 571, 601 (2021) ("[T]he possibility of avoiding securities fraud liability—which typically entails direct, personal liability for the managers—will almost always significantly outweigh any indirect, theoretical benefits from maintaining a credible commitment to unbundled disclosures.").

423 *See* Lee, *supra* note 369, at 103; *see also* Barbara A. Bliss, Frank Partnoy & Michael Furchtgott, *Information Bundling and Securities Litigation*, 65 J. ACCT. & ECON. 61, 79 (2018) ("Courts and policy makers arguably should consider the prevalence and effectiveness of information bundling. For example, courts might consider relaxing the Dura loss causation requirements if multiple pieces of firm-specific news are disclosed simultaneously.").

424 *See* Korsmo, *supra* note 422, at 577 ("At a minimum, defendants who have obscured market signals via disclosure bundling or timing should not be permitted by courts to rely on those market signals (or lack thereof) as a defense.").

425 *See id.* at 608 ("In order to avoid creating these incentives [to engage in strategic bundling behavior], the approach must turn on the defendant-managers' behavior.").

426 *See* Lee, *supra* note 369, at 103; Korsmo, *supra* note 422, at 608 ("Where the bundling was unintentional or unavoidable, trading off deterrence for reliability and ease of administration is likely appropriate.").

by the defendant.[427] This does not show that there is no price impact by the disclosure.[428] Legally speaking, this result does not prevent the plaintiff from submitting other nonstatistical expert evidence[429] under Korean law.[430] But because loss causation and damages question, unlike reliance or related class certification questions in the United States,[431] requires calculation, the court may be reluctant to use an expert opinion that does not attempt to measure price distortion.[432] In this case, the court may find that the plaintiff failed to prove loss causation.[433]

The scheme above is intended to make the loss causation rule compensate an informed trader for the loss caused by the misrepresentation as much as possible. The presumption of damages works mainly to discourage the defendant from making loss causation difficult to prove.[434] By matching the compensation to the actual loss as much as

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427 *See* Lee, *supra* note 369, at 103. In a case where multiple pieces of information were announced on the same day, if the plaintiff failed to prove that the defendant chose to do so, then the plaintiff may try to use intraday price changes to parse the separate impacts of the events. *See* Fisch, Gelbach & Klick, *supra* note 1, at 615-16 ("[I]f the two pieces of information were announced at different times on the same day, one might be able to use intraday price changes to parse the separate impacts of the two events.").

428 *See* Brav & Heaton, *supra* note 1, at 593 ("Lack of statistical significance does not tell us that it is more probable than *not* that there was no price impact.").

429 *See* Fisch, Gelbach & Klick, *supra* note 1, at 619 ("[W]hen event study evidence fails to find a significant price impact, that evidence has limited probative value, so the value of general, nonstatistical expert opinions will be comparatively greater in such cases than in those cases in which event study evidence does find a significant price impact.").

430 Under Korean law, evidence, including expert reports, can be submitted for consideration by the court in principle subject to very few exceptions. *See, e.g.*, KIM, *supra* note 352, at 633. *Cf.* Fisch, Gelbach & Klick, *supra* note 1, at 575 (noting that, under Daubert, a 5% significance level may be required in an event study); *but see* Fisch & Gelbach, *supra* note 48, at 59 ("[W]e propose that the SEC decide the appropriate level of statistical significance to be used in securities litigation event studies.").

431 *See* Fisch, *supra* note 56, at 102 ("Regardless of the outcome of the damage question, however, the *Basic* presumption requires only the existence of price distortion, not a precise methodology for quantifying the amount of that distortion.") (emphasis in original).

432 *See id.* at 103 ("Nonetheless, because price distortion is, under fraud on the market, the true measure of the plaintiffs' economic harm, a further consideration of the policy considerations that underlie the calculation of plaintiffs' damages is warranted.").

433 *See* Lee, *supra* note 369, at 103-04.

434 *See* Korsmo, *supra* note 422, at 603 ("The guiding principle is straight forward: if market evidence is to be determinative at trial, measures should be taken to ensure that the market evidence is as clear and reliable as possible.").

possible, informed traders will be encouraged to perform the role that they are supposed to, engaging in information-based trading.

C. *Enter Actual Reliance*

As seen above, the focus on market distortion may be more appropriate for the market-based approach. But the market-based approach, as opposed to the transaction-based approach, may create poor incentives by ignoring investor behavior.[435] As a policy matter, a private right of action should be construed to increase market efficiency by creating an incentive for investors to read and rely on the disclosed information when making decisions to trade.[436] A cause of action that does not require reliance, literally read, as an element does not create such incentives. Moreover, by allowing recovery, the cause of action may create incentives not to read.

However, because proving actual reliance is very difficult, even more so in Korea without a U.S. style discovery, getting rid of the reliance element may be a compromise to allow at least some recovery for investors, including informed investors. In Korea, with a cause of action requiring actual reliance, informed investors are often not able to prove reliance. And without being able to prove reliance, private litigation will probably wither. That may also create market inefficiency of its own. Some investors may decide not to trade.[437] Some may decide to systemically discount the information to account for potential fraud.[438] The legislative decision to enact causes of action without the reliance element may be looking for a middle ground.

But, as seen above, Articles 162, 170, and 179 are not the only causes of action against securities fraud. Article 750 is also used. The rules under Article 750 may be modified to complement Articles 162,

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435 *See* Fisch, *supra* note 7, at 918 ("The [market-based] approach may be more consistent with the realities of securities market trading than the transaction-based approach, but, by ignoring investor behavior, it may create poor incentives."); *id.* at 930 ("[A] market-based approach sacrifices investor autonomy and reduces incentives for investors to engage in informed trading.").

436 *See* Fisch, *supra* note 29, at 860 ("A private right of action increases market efficiency by creating an incentive for investors to read federally mandated disclosures and by imposing liability on defendants who do not prepare those disclosures carefully.").

437 *See* Frank B. Cross & Robert A. Prentice, *The Economic Value of Securities Regulation*, 28 CARDOZO L. REV. 333, 338-39 (2006) ("Absent a solution [to investor risk including fraud], many investors will choose not to play the game at all[.]").

438 *See id.* at 339 (noting that absent a solution to investor risk including fraud, some will "discount the securities they purchase to take into account the increased risk of loss").

170, and 179 by addressing the incentives of informed investors. Currently, as seen above, the SCK built in a presumption of reliance on Article 750 in the securities litigation context.[439] However, as some commentators argue,[440] the SCK may get rid of the presumption and require the plaintiff to prove actual reliance. And, if the plaintiff succeeds, then the SCK may award damages in an amount more than the price distorted by the fraud.

Korean tort law requires some form of foreseeability to be compensated for damages.[441] But, in the securities fraud context, the occurrence of fluctuation in stock price unrelated to the fraud is probably foreseeable.[442] And, as seen above, involving a case where the trade of the securities was suspended because of accounting fraud, the SCK held, without mentioning an event study, that the damages are, absent special circumstances, the difference between the stock price before the suspension and the stock price that formed subsequent to the continuous price drop after trade resumed (or, if the stock was sold after trader resumed but before the price formed and the sale price was higher than the price formed, the difference between the stock price before the suspension and the sale price).[443] Although the SCK, citing to the principle of fairness, allowed limiting the damages by 40%,[444] the SCK is already willing to do away with event studies and find damages to include portions not directly linked to the fraud.

Likewise, under Article 750, the SCK may consider changing its rule and allow courts to award damages amounting to the difference between the purchase price and the sale price, or if the plaintiff has not sold at the time of the corrective disclosure, then the full amount of the price drop after the corrective disclosure, if the plaintiff proves actual reliance. Such a cause of action may, in theory, compensate informed investors with a less adverse impact on their incentives compared to a cause of action without a reliance element.

However, such a change would suffer from similar incentive distortion as above, if a plaintiff is both informed about the fact that a representation was made and the fact that the representation is false. In this case, again, the plaintiff may be willing to rely on the insurance

439 *See* footnotes 239-245 and accompanying texts.

440 Some commentators criticize the presumption being extended to Article 750. *See* Kim, *supra* note 198, at 296.

441 *See* JOONHO KIM, MINBEOBGANGUI [LECTURE ON CIVIL ACT] 1297 (2021).

442 *See* Fisch, *supra* note 29, at 851 (arguing that the occurrence of market forces and firm-specific developments that impact firm value is virtually assured).

443 Daebeobwon [S. Ct.], Apr. 29, 2020, 2014Da11895 (S. Kor.).

444 *Id.*

effect. But, this is a different policy tradeoff between incentivizing investors to be informed when making their trading decisions and guarding against investment decision distortion. If the Korean Parliament decides that guarding against investment decision distortion is more important, then it may legislate a rule similar to the one proposed above.

In practice, it is unlikely that Article 750, if it requires actual reliance, will actually have any teeth. A plaintiff is unlikely to succeed, without a statutory or court provided presumption of reliance, at proving reliance in a typical securities litigation. And without being able to prove actual reliance, most informed investors will likely need to resort to Articles 162, 179, or 170.[445]

An informed investor with a potentially high enough stake might be able to set up a certain process where evidence to prove actual reliance is reliably collected.[446] Considering that the damages in Article 750 cases will probably be higher than damages in Article 162, 179, or 170 cases, the informed investor may, instead of resorting to class action procedure, prefer to file individually. With enough successful cases, private individual litigation by itself may provide enough deterrence in most circumstances.[447] Whether this is possible will depend on what extent actual reliance can be proved.

V. CONCLUSION

Even though the SCK allows an event study, like the United States, in a securities fraud context, the difference in other parts of the law including the securities law, evidence law, and civil procedure made the actual practice very different. An event study that is an integral part of the U.S. securities fraud action does not have a meaningful role in Korean securities fraud actions.

One of the reasons for the absence of event studies is the presumptions of both loss causation and damages. These presumptions harm the capital markets, however, by distorting the incentives of the crucial informed investors. Accordingly, this Article proposes a rule that is intended to make the loss causation rule compensate an

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445 *See* Fisch, *supra* note 7, at 929 (noting that the market-based approach "eliminates the unreliable inquiry into the extent to which particular information factored into individual trading decisions").

446 *See* Fisch, *supra* note 29, at 870 ("Institutional investors may not need the Basic presumption if they can prove reliance directly[.]").

447 *See id.* ("If large investors can bring suit and recover substantial damages in strong cases of fraud, class actions are not necessary to assure accountability.").

informed trader for the loss caused by the misrepresentation as much as possible.

First, the plaintiff should be required to prove loss causation at the time of the alleged misrepresentation. Second, in certain situations, such as when the misrepresentation is not followed by an immediate significant price increase because the misrepresentation is made to avoid disappointing expectations rather than to increase expectations, the plaintiff should be allowed to prove loss causation at the time of the alleged disclosure. Third, if the plaintiff proves that there was a leak before the corrective disclosure, then the damages may be presumed to be the statistically significant loss after the misrepresentation but before the disclosure. These rules do not resort to the current presumption of damages.

Next, if the plaintiff alleges and proves that there was a leak and it was caused by the defendant, then the plaintiff may resort to the current presumption of damages. Also, if the plaintiff alleges and proves that the defendant chose to disclose the information as a bundle, then the current presumption of damages should apply. These rules are designed to discourage the defendant from such actions. By discouraging the defendant from these strategic actions, plaintiffs will ex ante rely on the loss causation rule that does not significantly distort the incentives of informed traders.