A Fiduciary's Guide to Securities Litigation: Making the Best of a Bad Situation!

NAPPA
2015 Legal Education Conference
Austin, Texas

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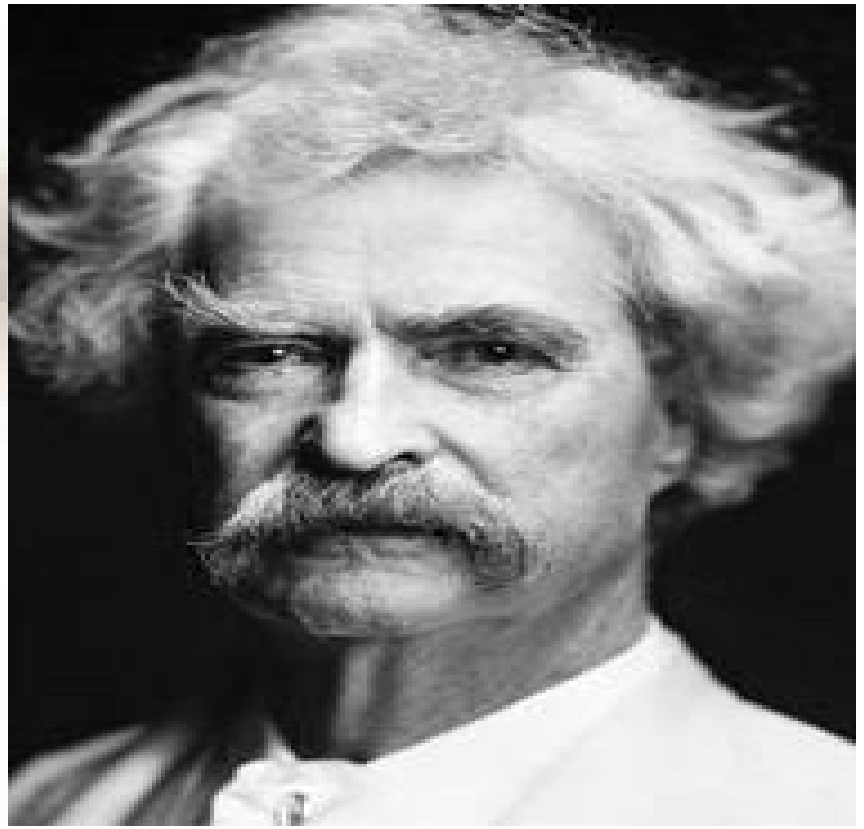
Michael Herrera
Blake Thomas
Chris Supple


Agenda!
1.
2.
3.
4.
5.
What?
Why?
How?

Caveat Emptor

"Your actual investment results may vary."



"October: This is one of the peculiarly dangerous months to speculate in stocks…

…The others are July, January, September, April, November, May, March, June, December, August and February."

- Mark Twain

Unfortunately, not everyone plays by the *rules…*

Securities Fraud Happens!

Examining the Various "Types" of Securities Actions

1. **Federal Class Actions**
   E.g., *Enron., Tyco, Worldcom, Nortel Networks, AOL/Time Warner.*

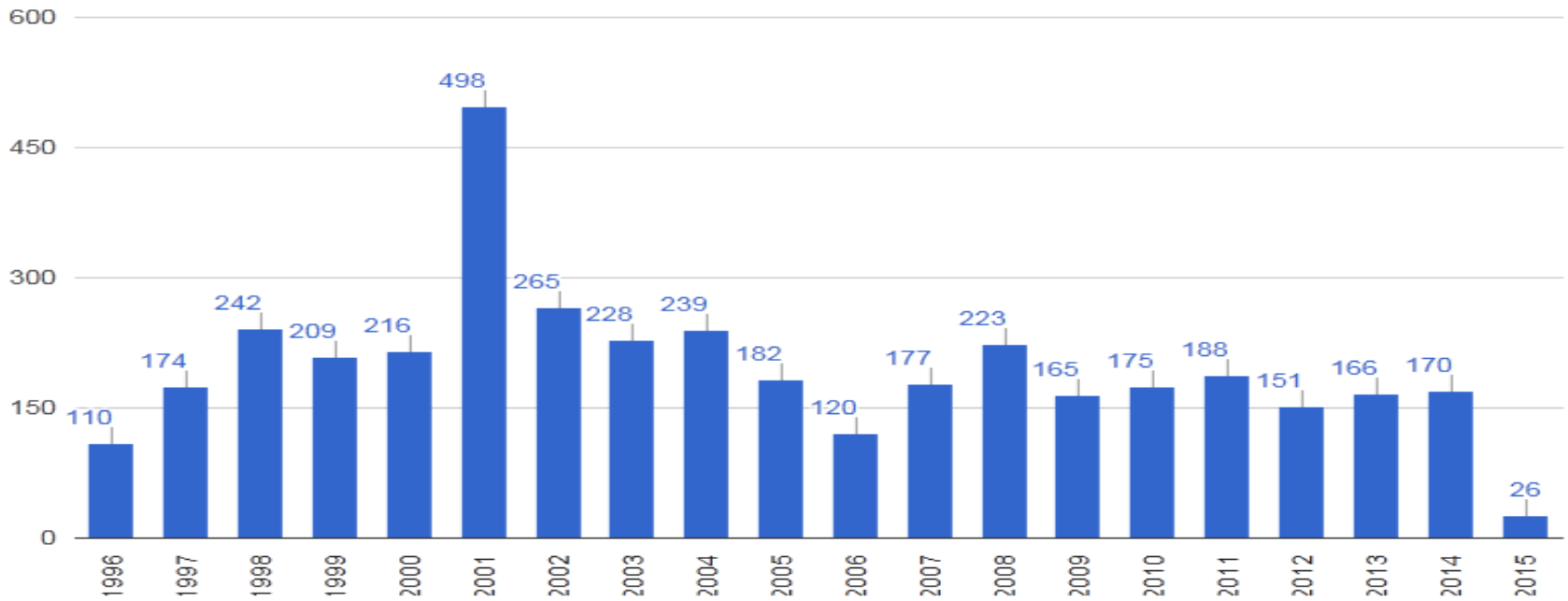
2. **Individual (Opt-Out) Actions**
   E.g., Adelphia, Worldcom, BP, Qwest Communications, Countrywide.

3. **Derivative Actions**
   E.g., News Corp., HealthSouth, Waste Management, McKesson.

4. **Foreign Actions**
   E.g., Vivendi, Parmalat, RBS, Olympus, Porsche, Royal Imtech.

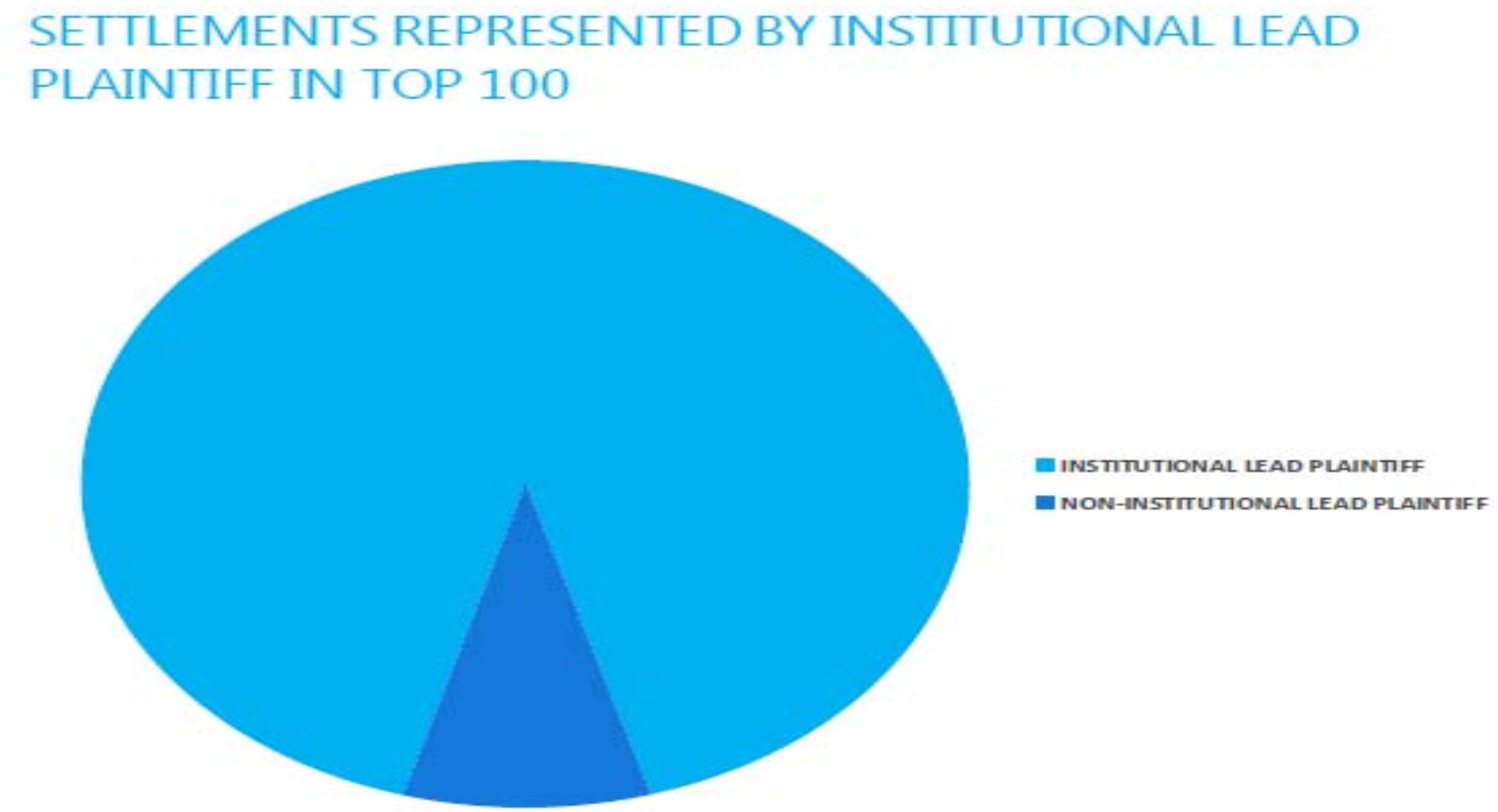
Exercising Your Rights and Options

Federal Securities Class Actions



Source: Stanford Law School Securities Class Action Clearinghouse (March 2015).
Over 3,900 cases filed since 1996.

Public Pension Funds Making a Difference!



Source: ISS “Top 100 for 2H 2014”, March 11, 2015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Fiduciary Duty 101

Duty of Loyalty

"The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries ..."

California Constitution (Art. XVI, § 17)
California Govt. Code § 31595

Fiduciary Duty 101

Duty of Prudence

"retirement board … shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and aims."

California Constitution, Art. XVI, § 17.
California Govt. Code § 31595

Fiduciary Duty 101

ERISA (§ 404(a)(1))

"a fiduciary shall discharge his [or her] duties with respect to a plan ... with the care, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

29 U.S.C. § 1104(a)(1).

THE PSLRA (Private Securities Litigation Reform Act of 1995

Designed to limit frivolous securities suits, curb race to the courthouse, and lessen use of so-called professional plaintiffs.

Lead plaintiff provisions designed to encourage greater institutional investor participation (60-day notice, court–appointed lead plaintiff, lead plaintiff selects counsel)

Heightened pleading standard (specificity, particularity & strong inference of scienter).

Fiduciary Duty 101

No duty to serve as lead plaintiff! However…

"not only is a fiduciary not prohibited from serving as lead plaintiff, the Secretary believes that a fiduciary has an affirmative duty to determine whether it would be in the interest of the plan participants to do so."

"it may not only be prudent to initiate litigation, but also a breach of a fiduciary's duty to not pursue a valid claim."

Source: Secretary of Labor's Memorandum of Law as Amicus Curiae in Support of the Florida State Board of Administration's Appointment as lead plaintiff in In re Telxon Corp. Securities Litigation, 67 F.Supp.2d 803 (N.D. Ohio, 1999).

Harris v. Koenig

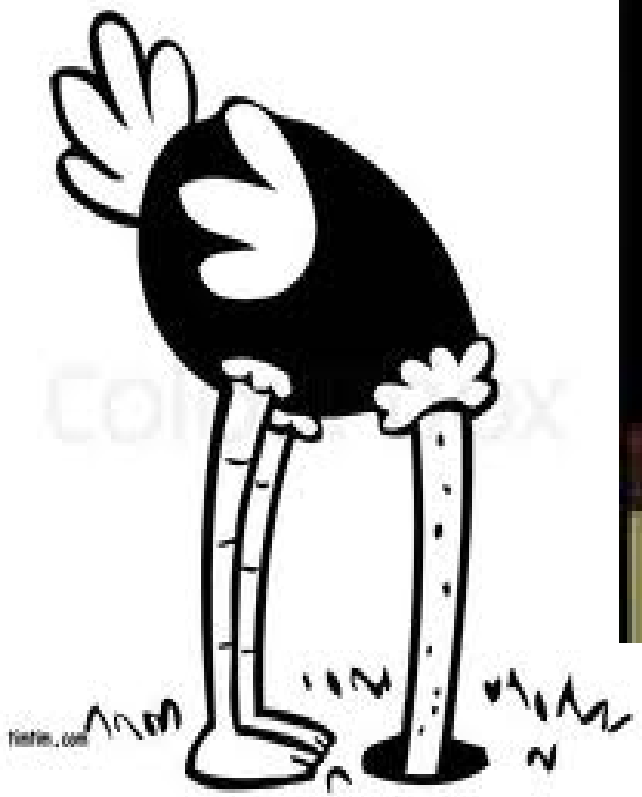
815 F.Supp.2d 26 (2011)

ERISA trustee sued for not opting out of a securities class action! Held: trustee did not breach duty by simply submitting a claim.

"When [ERISA fiduciary] has potential claims against a third party, the 'trustees have a duty to investigate the relevant facts, to explore alternative courses of action and, if in the best interests of the plan participants, to bring suit....'" Id. at 31.

"so long as the 'prudent person' standard is met, ERISA does not impose a 'duty to take any particular course of action if another approach seems preferable.' Id. at 32.

Are we doing too little?



or too much?

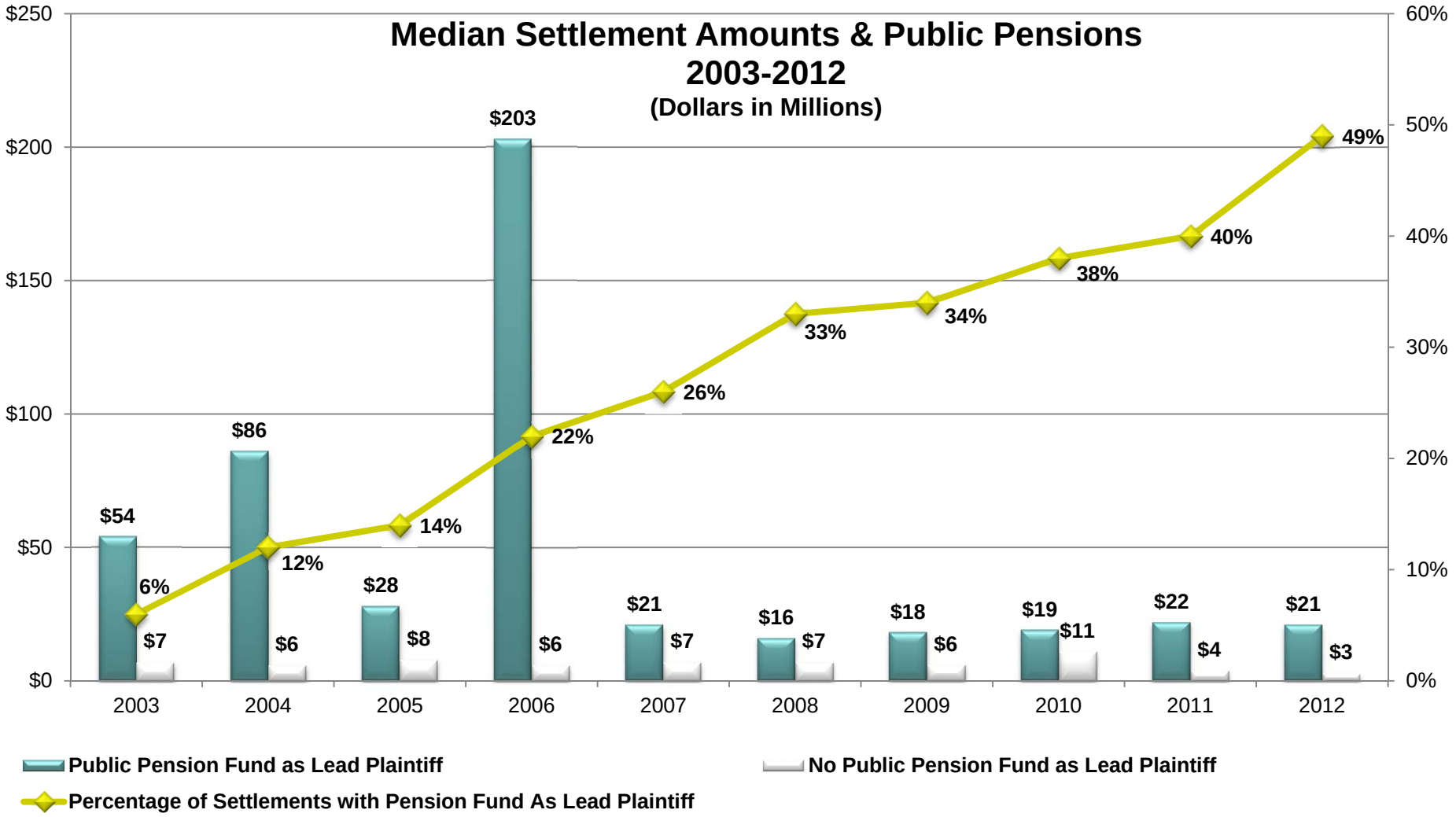
Public Pension Funds Making a Difference!

Largest Securities Class Action Recoveries

	Company	Settlement	Lead Plaintiff(s)
1.	Enron Corp.	$7.2 b	UC Regents
2.	Worldcom, Inc.	$6.1 b	NY State Common Ret. Fund
3.	Cendant Corp.	$3.3 b	NY City Funds; NY State Common Ret. Fund; CALPERS
4.	Tyco International Ltd.	$3.2 b	Louisiana State Employees, Louisiana Teachers, etc.
5.	AOL Time Warner, Inc.	$2.5 b	Minnesota State Board of Inv.
6.	Household Int'l, Inc.	$2.4 b	Int'l Union of Operating Engineers Local 132 Pension Plan; etc.
7.	BofA (2009, Equity Securities)	$2.4 b	Ohio PERS; Ohio Teachers, Texas Teachers, etc.
8.	Nortel Networks	$1.14 b	Ontario Public Service Employees
9.	Royal Ahold, N.V.	$1.1 b	Colorado PERA, etc.
10.	AIG	$1.0 b	Ohio PERS; Ohio Teachers

Source: ISS "Top 100 for 2H 2014", March 11, 2015

Public Pension Funds Making a Difference!



Headline Risk?

STANFORD SHOWS WHO'S NO. 1

San Jose Mercury News

Four arrests in Los Gatos killing

Conspiracy alleged in slaying of former owner of two popular nightspots; buyer held in jail

GIANTS OPENING DAY | 2008

It was a great opener ...

... then came Barry Zito's fourth pitch

Giants' hope vanishes right from the start

'Hydrogen highway' hits a roadblock

Shrinking stocks mean more valley belt-tightening


STANFORD SHOWS WHO'S NO. 1

San Jose Mercury News

Four arrests in Los Gatos killing

Conspiracy alleged in slaying of former owner of two popular nightspots; buyer held in jail

California to recover $300 million for pension funds in Bank of America settlement

Bay City News Service Posted: 08/23/2014 08:06:03 AM PDT

California will recover $300 million in damages from Bank of America as part of a $16.65 billion settlement over the bank's handling of mortgage-backed securities prior to 2009, officials said Friday. **The money will reimburse the state's pension funds** for money it lost investing in mortgage-backed securities through Bank of America and its affiliates, according to California Attorney General Kamala Harris' office. The settlement comes as a result of claims made by the U.S. Department of Justice and state partners, Harris' office said. California residents will also get at least $500 million in consumer relief credits, such as loan forgiveness for homeowners who are underwater on their mortgages and financing of affordable rental housing, according to Harris' office.

"Bank of America profited by misleading investors about the risky nature of the mortgage-backed securities it sold," Harris said. **"This settlement makes our pension funds whole for the financial losses caused by these misrepresentations and brings help to hard-pressed homeowners and communities in California."**

The settlement does not absolve Bank of America or its employees from facing criminal charges, Harris' office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Protecting Fund Assets. Decisions, decisions…

1. **Federal Class Action**
   E.g., *Enron., Tyco, Worldcom, Nortel Networks, AOL/Time Warner.*

2. **Individual (opt out) Action**
   E.g., Adelphia, Worldcom, BP, Qwest Communications, Countrywide.

3. **Derivative Action**
   E.g., News Corp., HealthSouth, Waste Management, McKesson.

4. **Foreign Action**
   E.g., Vivendi, Parmalat, RBS, Olympus, Porsche, Royal Imtech.

Getting (and staying) ahead of the game.

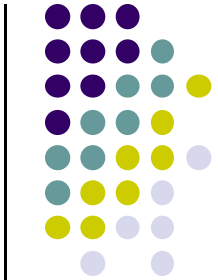
- **Education & Involvement (at all necessary levels).**
- **Policy, Process & Procedure.**
- **Shop around.**
- **Awareness and utilization of all available (free & pay) resources.**
- **Do what works (for you)!**

Getting (and staying) ahead of the game.

- Phone a friend - #caniborrowthat #whatareyoudoing
- Claims filing (know your options!)
- Self evaluation (Are we getting it right?)
- Document efforts and successes.

Securities litigation developments

Legislation limiting contingent fee litigation



- North Carolina Transparency in Private Attorney Contracts Act (TIPAC), N.C. Gen. Stat. § 114-9.2 *et seq.*
  - Before any State agency enters into a contingent fee contract with a private attorney:
    - Attorney General must issue RFP
    - Attorney General must make written determination that contingent fee representation is cost-effective and in public interest
  - Contingent fee limits (see next slide)

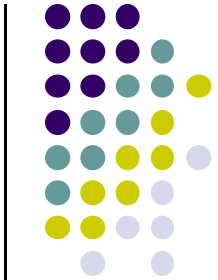
North Carolina Transparency in Private Attorney Contracts Act (TIPAC)

- Contingent fee limits (N.C. Gen. Stat. § 114-9.5)

The Attorney General has no power to approve private attorney's contingent fee contract if:

> "… aggregate contingency fee, exclusive of reasonable costs and expenses, in excess of:
>
> (1) **Twenty-five percent (25%)** of any damages **up to ten million dollars** ($10,000,000); plus
>
> (2) **Twenty percent (20%)** of any portion of such damages between ten million dollars ($10,000,000) and fifteen million dollars ($15,000,000); plus
>
> (3) **Fifteen percent (15%)** of any portion of such damages between fifteen million dollars ($15,000,000) and twenty million dollars ($20,000,000); plus
>
> (4) **Ten percent (10%)** of any portion of such damages between twenty million dollars ($20,000,000) and twenty-five million dollars ($25,000,000); plus
>
> (5) **Five percent (5%)** of any portion of such damages **exceeding twenty-five million dollars ($25,000,000)**.
>
> (b) **In no event shall the aggregate contingency fee exceed fifty million dollars** ($50,000,000), exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery."

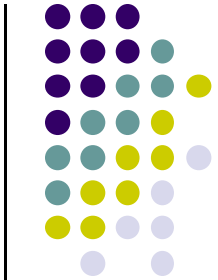
North Carolina Transparency in Private Attorney Contracts Act (TIPAC)



- How does the standard TIPAC contingent fee limit work in practice?

Damages	Maximum fee allowed under TIPAC
$ 10 million	$ 2.5 million (25%)
$ 20 million	$ 4.3 million (21%)
$ 35 million	$ 5.3 million (15%)
$ 50 million	$ 6.0 million (12%)
$ 70 million	$ 7.0 million (10%)
$ 100 million	$ 8.5 million (9%)
$ 500 million	$ 28.5 million (6%)
$1 billion	$ 50.0 million (5%)

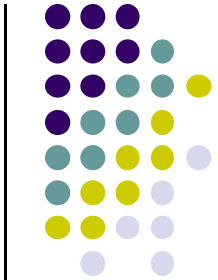
North Carolina Transparency in Private Attorney Contracts Act (TIPAC)



- Significant barrier to lead plaintiff status
  - Ambiguity over whether $50 million fee limit applies to lead plaintiff's damages or to aggregate damages of the class
    - If applies to aggregate class damages, limit is below market standard
  - Even for direct actions, contingent fee limits may be too low for hard cases with big damages

- Significant barrier to participation in foreign securities litigation
  - RFP process may not be feasible
  - Contingent fee limit is incompatible with market-standard fees in "loser pays" jurisdictions
  - In some jurisdictions, ambiguity about what is the "contingency fee"

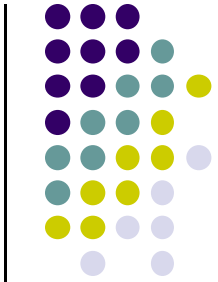
Legislation limiting contingent fee litigation



- Transparency in Private Attorney Contracts Act (TIPAC)
  - Top legislative priority of Chamber of Commerce
  - Strongly supported by American Tort Reform Association
  - Similar bills have been supported by former Florida Attorney General Bill McCollum in a variety of states
- Present in
  - Alabama (Ala. Code § 41-16-72(f))
  - Arizona (Ariz. Rev. Stat. § 41-4801 *et seq.*)
  - Florida (Fla. Stat. § 16.0155 *et seq.*)
  - Iowa (Iowa Code § 23B.1 *et seq.*)
  - Louisiana (2014 HB 799)

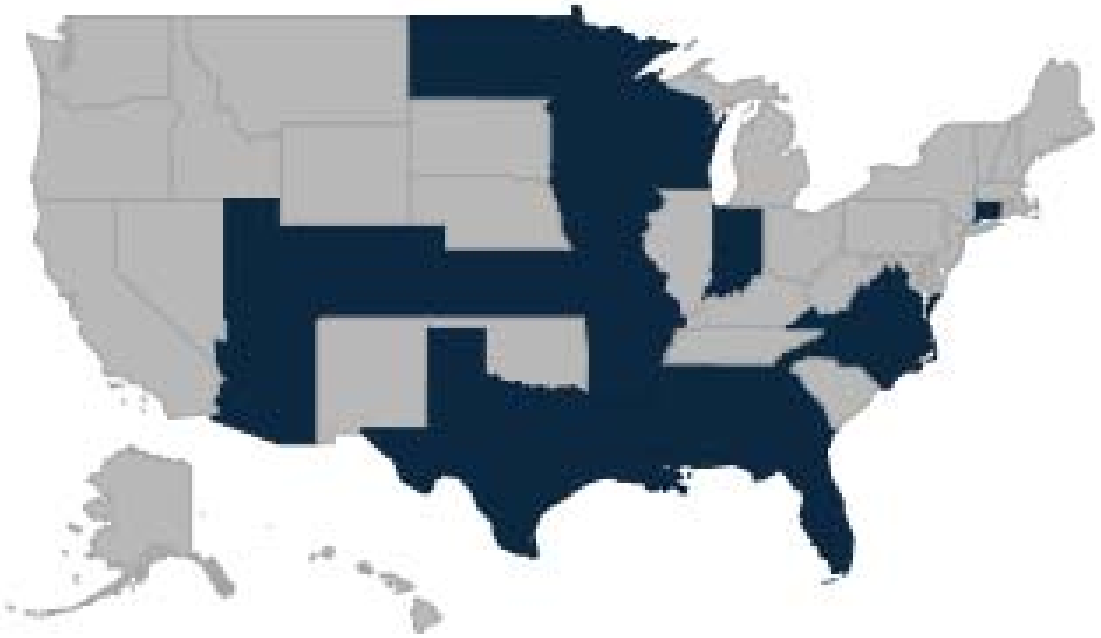
(continued on next slide)

Legislation limiting contingent fee litigation



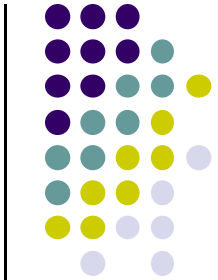
- Transparency in Private Attorney Contracts Act (TIPAC)
- Present in (continued)
  - Mississippi (Miss. Code Ann. § 7-5-8)
  - North Carolina (N.C. Gen. Stat. § 114-9.2 *et seq.*)
  - Ohio (2015 Senate Bill 38, enacting Ohio Rev. Code § 9.49 *et seq.*)
  - Utah (2015 S.B. 233, enacting Utah Code § 67-5-33)
  - Wisconsin (Wis. Stat. § § 14.11(2)(b), 20.9305)
  - …and other jurisdictions

Legislation limiting contingent fee litigation



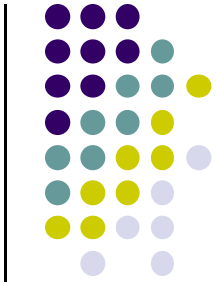
Map of states with statutes or policies restricting contingent fee litigation by state government entities, taken from www.AGSunshine.com

Legislation limiting contingent fee litigation



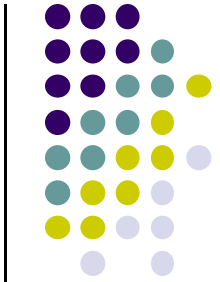
- Notable state-by-state amendments to TIPAC
  - Making clear fee limit applies to the State's damages, not the damages of the entire class
    - N.C. (*requested, not yet in law*): "In no event shall the aggregate contingency fee upon the State's damages exceed fifty million dollars ($50,000,000)…"
    - Ohio: similar, but more detailed provision -- § 9.492(D) in materials
  - Allowing waiver
    - Iowa: "The attorney general may request a waiver from the executive council of the aggregate contingency fee limits in paragraphs "a" and "b" if the attorney general provides a thirty-day notice of the attorney general's intent to request a waiver. The executive council, upon unanimous consent, may grant such a waiver." Iowa Code § 23B.3(3)(c).

Legislation limiting contingent fee litigation



- Notable state-by-state amendments to TIPAC
  - Different fee schedules
    - Alabama's schedule is higher. *See* Ala. Code § 41-16-72(f)(3).
    - Wisconsin's schedule is generally lower. *See* Wis. Code § 20.9305(2)(c).
    - No 5% tier in Utah. *See* Utah Code § 67-5-33(5).
  - Contract posted online during the case
    - Wisconsin. *See* Wis. Code § 20.9305(2)(e).

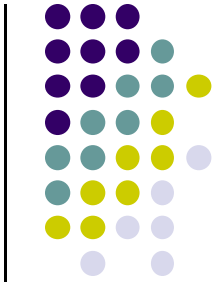
Legislation limiting contingent fee litigation



- Private Attorney Retention Sunshine Act (PARSA)
  - Source: American Legislative Exchange Council (ALEC)
  - More limiting than TIPAC.

- General ban on contingent fee litigation for the state
  - N.D. Cent. Code § 54-12-08.1

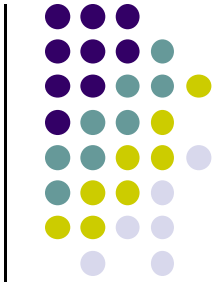
IndyMac and the statute of repose



- In general, the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class. *American Pipe*, 414 U.S. 538 (1974).

- But what about the statute of repose in § 13 of the Securities Act of 1933?
  - "…In no event shall any such action be brought to enforce a liability created under section 77k or 77l (a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l (a)(2) of this title more than three years after the sale."

IndyMac and the statute of repose



- *Police & Fire Ret. Sys. of City of Detroit et al. v. IndyMac MBS, Inc. et al.*, 721 F.3d 95 (2nd Cir. June 27, 2013):
  - The *American Pipe* tolling rule "does not apply to the three-year statute of repose in Section 13."
  - "The proposed intervenors, through minimal diligence, could have avoided the operation of the Section 13 statute of repose simply by making timely motions to intervene in the action as named plaintiffs, or by filing their own timely actions and, if prudent, seeking to join their claims under Federal Rule of Civil Procedure 20 (joinder)."

- *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000):
  - *American Pipe* tolling role does apply to Section 13 statute of repose.

IndyMac and the statute of repose

- Sept. 22, 2014: Plaintiffs notify court they have reached a settlement with many defendants
- Sept. 29, 2014: U.S. Supreme Court dismisses writ of certiorari as improvidently granted
- Circuit split remains.

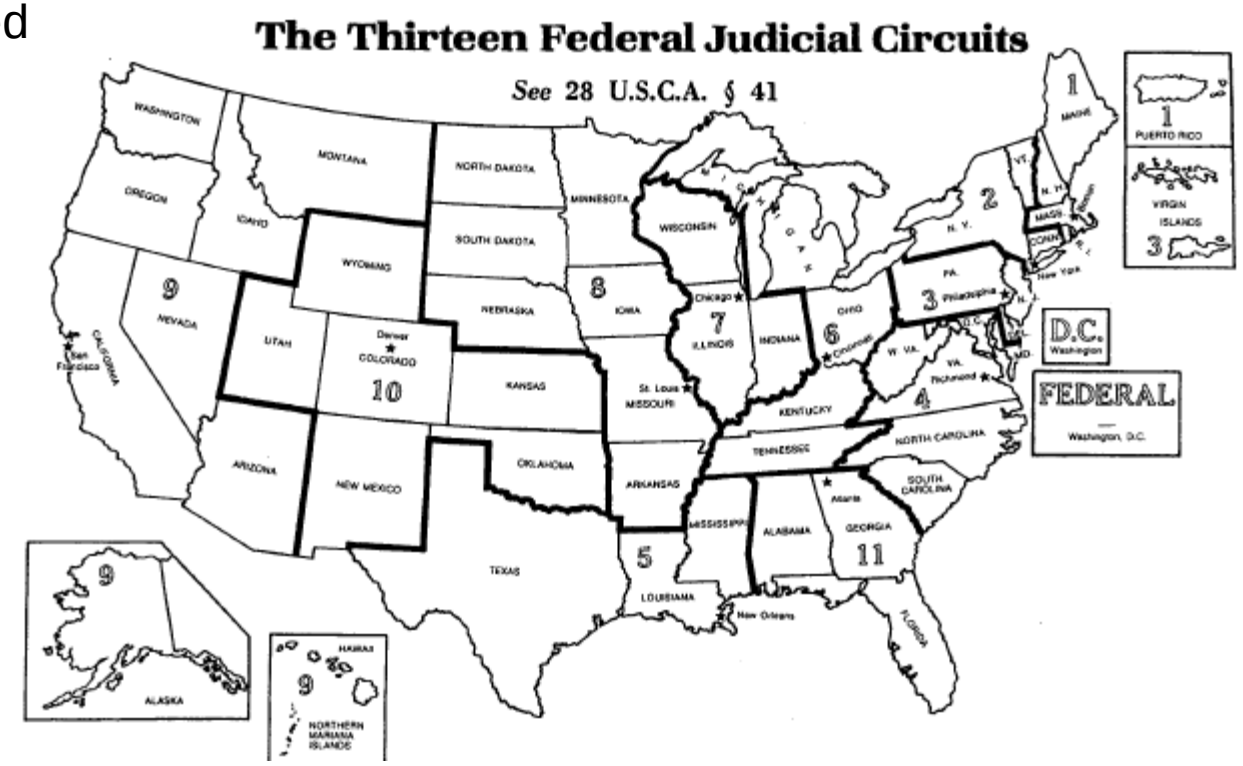
(ORDER LIST: 573 U.S.)

MONDAY, SEPTEMBER 29, 2014

CERTIORARI – SUMMARY DISPOSITION

13-640 PUBLIC EMPLOYEES' RETIREMENT SYS. V. INDYMAC MBS, INC., ET AL.

The writ of certiorari is dismissed as improvidently granted.



After *IndyMac*: Now What?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: PETROBRAS SECURITIES LITIGATION

Case No. 14-cv-9662 (JSR)

DEMAND FOR JURY TRIAL

CONSOLIDATED AMENDED COMPLAINT

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1. February 6, 2012 Note Offerings 133
2. May 15, 2013 Note Offerings 134
3. March 11, 2014 Note Offerings 135

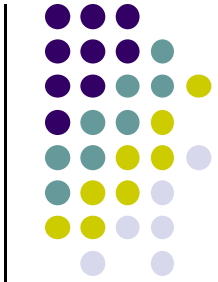
G. False and Misleading Statements 146
1. 2010 20-F 146
2. 11/22/11 6-K 148
3. 2011 20-F 148
4. 8/10/12 6-K 150
5. 2012 20-F 151
6. 4/30/13 6-K 152
7. 2/26/14 6-K 153
8. 3/7/14 6-K 153
9. 3/11/14 6-K 154

Petrobras consolidated class action: 1:14-cv-09662 (S.D.N.Y.)

Corporate bylaws changing the rules for litigation

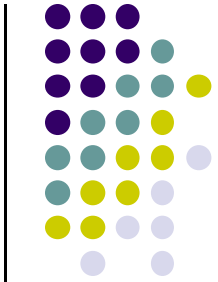
- *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. May 8, 2014):
  - Concerned a fee-shifting provision in bylaws of a Delaware non-stock corporation
    - Shifted attorneys' fees and costs to unsuccessful plaintiff in any litigation by member against corporation, against its directors, or derivatively on behalf of corporation.
  - Held: bylaw provision was enforceable, regardless whether adopted before or after the member became a member of the corporation.
- By Summer 2014, more than 30 companies had adopted fee shifting bylaws.

Corporate bylaws changing the rules for litigation



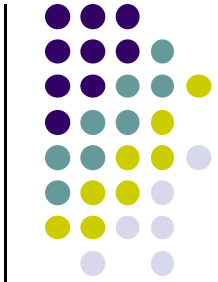
- Proposals by Council of Corporation Law Section of Delaware Bar Association
  - 2014 Senate Bill 236 –did not pass
  - New proposal in 2015
    - Note proposed legislation applies only to intra-corporate litigation. Securities litigation left out?
    - Opposed by U.S. Chamber of Commerce

- Letters from institutional investors sent to Delaware officials and to proxy advisory firms, November 2014
  - Found in materials



Some Comments on Traditional Domestic Securities Class Action Litigation and the PSLRA (Private Securities Litigation Reform Act) of 1995, Pub. L. 104-67, 109 Stat. 737 (codified in various sections of 15 U.S.C.)

Happy Birthday Morrison



- 5 years old yesterday (June 24, 2010)

Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010)

Monitoring Your Portfolio For Potentially Actionable Investment Losses And Assuring Maximum Recovery

- reactive, proactive or both?

- Is your claims filing service/custodian determining recognized loss and reconciling against it to assure maximum recoveries?

Why Would an Investor Want to be Lead Plaintiff?

- an effective lead plaintiff can add significant value
- but there are costs and risks
- see ATP Tour, Inc. v. Deutscher Tennis Bund

No. 534, 2013 (Del. May 8, 2014)

If Losses/Damages are Significant, Seek Lead Plaintiff Status, or "Opt-Out"?

- see Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), cert. granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc., 134 S. Ct. 1515 (2014) and cert. dismissed as improvidently granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc., 135 S. Ct. 42 (2014)

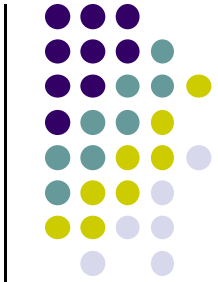
Criteria that U.S. Investors Consider in Determining Whether to Pursue Non-Domestic Securities Litigation Post-Morrison

- Losses/Damages and % Recovery
- Strength of the case on the merits ("SWAT" analysis)
- Loser Pays Liability? (and if so, Indemnification and/or Insurance?)
- Extent of Fund Resources Required (Discovery etc.
- Foreign Counsel; U.S. Counsel
- Funders
- Co-Plaintiffs; Governance Mechanism
- Attorneys Fee Agreement
- Shifting deadlines
- So-called "headline risk"

Issues that Arise in Negotiating Terms of Engagement with Funders/Counsel for Non-Domestic Securities Litigation Post-Morrison

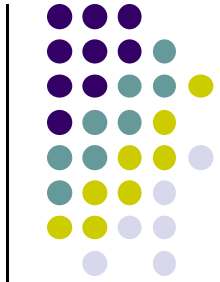
- Fee
- MFN?
- communications from the foreign counsel to U.S. client re status, strategy, decision-- making
- governance, decision-making
- rights on withdrawal
- fiduciary status of counsel and funders
- disclosure of all individuals/entities that are funding?
- role of U.S. counsel
- combine with other co-plaintiff peers to negotiate as a group?

When Will Investors Make Significant Litigation Recoveries on Foreign Losses Post-Morrison?



- Olympus; $92 million settlement approved by Olympus BoD in Nov 2011, signed in March 2015; checks likely to be cut in Q3 2015

Other Domestic Plaintiff "Opt-in" Class Action Litigation

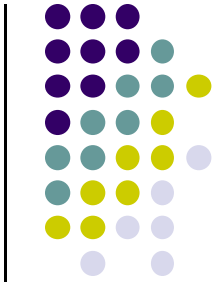


- Starr International Co., Inc. v. United States, Case No. 11-CV-00779 U.S. Court of Federal Claims (Wash., DC)

- Attorneys David Boies and Skadden Arps together representing lead-plaintiff/AIG-shareholder Starr Int'l and class of 275,000 "opt-in" AIG shareholders alleging that 2008 $85 billion Federal Reserve bailout (credit facility) of AIG in exchange for 80% equity stake constituted an unlawful taking of property without just compensation, resulting in $25 billion loss to the plaintiff class

- bench trial Sept-Nov 2014; closing arguments April 2015, judge said he would rule in the "relatively near future"

Report Card



- On the 5 year anniversary of the Morrison decision, how are we -- as U.S. Institutional Investors/Public Pension Funds -- progressing in our approach to recovering our losses in non-domestic securities?
- Has our experience in in foreign litigation taught us anything about how we approach domestic litigation?

Questions?

NAPPA
2015 Legal Education Conference
Austin, Texas

Michael D. Herrera
Blake Thomas
Chris Supple
Moderated by Adam Franklin

`

Top 100 for 2H 2014

Securities Class Action Services, LLC

Published: March 11, 2015

Executive Summary

Previously in the ISS Securities Class Action Services Top 100 for 1H 2014, two new settlements were identified as making the Top 100 list, Massey Energy Company, and the Ernst & Young LLP settlement in the Lehman Brothers Holdings, Inc. (Equity/Debt Securities) Action. These two settlements were filed in Federal Court and alleged as violating Rule 10b-5 of the Securities and Exchange Act of 1934 (Employment of Manipulative and Deceptive Practices). The two settlements amount to $359 million in settlement funds.

For the second half of 2014, two out of 61 new settlements were placed in the ISS Securities Class Action Services Top 100 for 2H 2014, J.P. Morgan Acceptance Corp and HarborView Mortgage Loan Trust. Filed in Federal Court in the midst of the financial credit crisis, both settlements relate to mortgage offerings and were alleged violations of the Securities Act of 1933 (Civil Liabilities on Account of False Registration Statement). The volume of settlements added in the report is 78 percent lower compared with the same period in 2013, when ISS Securities Class Action Services tracked 61 agreements. The two settlements involve approximatly 1700 security identifiers.

Securities Class Action settlements volume for 2014 declined to four from 13 over the previous year with an aggregate settlement fund amounting to $914 million. Of 110 agreements followed by ISS Securities Class Action Services in 2014, only four ranked in the Securities Class Action Top 100 list. From the top 100, 87 were alleged violating Rule 10b-5, while 45 were alleged violating Securities Act of 1933. In addition, eight resulted from alleged breaches of fiduciary duty in the wake of a merger or acquisition. 74 of 100 were alleged violations of Generally Accepted Accounting Principles (GAAP), and 19 were identified as resulting from insider trading. The Securities Class Action Services Tentative Settlement Pipeline stands at $17.5 billion as of December 2014.

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The Securities Class Action Services "Top 100 Settlements Semi-Annual Report" identifies the largest securities class action settlements filed after the passage of the Private Securities Litigation Reform Act of 1995, ranked by the total value of the settlement fund.

The Top 100 Settlements Semi-Annual Report provides a wealth of information, including the settlement date, filing court, settlement fund, and identifies the key players for each settlement.

The report, which is updated and circulated semi-annually, is broken down into following categories:

Securities Class Action Services Top 100 Settlements Semi-Annual Report

The Executive Summary provides the complete list of the Top 100 Securities Class Action Settlements, ranked according to the Total Settlement Amount, and provides information on the filing court, settlement year and settlement fund. The SCAS Top 100 does not include non-US cases and the SEC disgorgements. Cases with the same settlement amount are given the same ranking.

For cases with multiple partial settlements, the amount indicated in the Total Settlement Amount is computed by combining all partial settlements. The settlement year reflects the year the most recent settlement received final approval from the Court. Cases in the Top 100 settlements are limited to those that have been filed on or after January 1, 1996. Only Court approved settlements are included. Data on SEC settlements are not included, but rather compiled in a separate list, the Top 30 SEC Disgorgements.

No. of Settlements Added to Securities Class Action Services Top 100 (1996-2014)

The Top 100 Settlements from 1996-2014 section provides a chart of the cases in the Top 100 Settlements Semi-Annual Report, categorized by Settlement Year. The Settlement Year corresponds to the year the settlement, or the most recent partial settlement, received final approval from the Court.

Institutional Lead Plaintiff Participation

The Institutional Lead Plaintiff section displays the number of cases in the Top 100 involving Institutional Lead Plaintiffs and also identifies the institutional investors serving as Institutional Lead Plaintiff.

Lead Counsel Participation

The Lead Counsel Participation section lists the law firms that served as lead or co-lead counsel for each litigation in the Top 100 settlements and identifies the most frequent lead or co-lead counsel appearing in the Top 100. Counsels with the same participation are given the same ranking. In addition, includes participation in cases where they represent their old name

Claims Administration Participation

The Claims Administration section lists the claims administrators who handled the Top 100 settlements and identifies the most frequent claims administrators in the Top 100. It includes settlements administered from old entities.

Restatements

The Restatements section identifies the cases in the Top 100 involving accounting restatements and shows the number of restatement cases versus non-restatement cases.

Top 30 SEC Disgorgements

The Top 30 SEC Disgorgements section provides a list of the largest SEC settlements, ranked according to the Total Settlement Amount. The Total Settlement Amount reflects the sum of disgorgement and civil penalties in settlements reached with the Securities and Exchange Commission. The Top 30 SEC Disgorgements includes only those where the distribution plan has received final approval from the SEC. Cases with the same settlement amount are given the same ranking.

TOP 100 SETTLEMENTS REPORT AS OF DECEMBER 2014

RANK	CASE NAME	SETTLEMENT YEAR	COURT	TOTAL SETTLEMENT AMOUNT
1	Enron Corp. (2001)	2010	S.D. Tex.	$7,242,000,000
2	WorldCom, Inc. (2002)	2012	S.D.N.Y.	$6,194,100,714
3	Cendant Corp.	2000	D. N.J.	$3,319,350,000
4	Tyco International, Ltd. (2002)	2007	D. N.H.	$3,200,000,000
5	AOL Time Warner, Inc. (S.D.N.Y.)	2006	S.D.N.Y.	$2,500,000,000
6	Household International, Inc. (N.D. Ill.)[1]	2013	N.D. Ill.	$2,464,399,616
7	Bank of America Corporation (2009) (S.D.N.Y.) (Equity Securities)	2013	S.D.N.Y.	$2,425,000,000
8	Nortel Networks Corp. (2001) (I)	2006	S.D.N.Y.	$1,142,775,308
9	Royal Ahold, N.V.	2006	D. Md.	$1,100,000,000
10	Nortel Networks Corp. (2004) (II)	2006	S.D.N.Y.	$1,074,265,298
11	McKesson HBOC Inc.	2013	N.D. Cal.	$1,052,000,000
12	American International Group, Inc. (2004)	2013	S.D.N.Y.	$1,009,500,000
13	UnitedHealth Group, Inc.	2009	D. Minn.	$925,500,000
14	HealthSouth Corp. (2004)	2010	N.D. Ala.	$804,500,000
15	Xerox Corp. (2000)	2009	D. Conn.	$750,000,000
16	Lehman Brothers Holdings, Inc. (S.D.N.Y.) (Equity/Debt Securities)	2014	S.D.N.Y.	$735,218,000
17	Citigroup Bonds	2013	S.D.N.Y.	$730,000,000
18	Lucent Technologies, Inc.	2003	D. N.J.	$667,000,000
19	Wachovia Preferred Securities and Bond/Notes	2011	S.D.N.Y.	$627,000,000
20	Countrywide Financial Corp. (2007) (C.D. Cal.)	2011	C.D. Cal.	$624,000,000
21	Cardinal Health, Inc.	2007	S.D. Ohio	$600,000,000
22	Citigroup, Inc. (2007)	2013	S.D.N.Y.	$590,000,000
23	IPO Securities Litigation (Master Case)	2012	S.D.N.Y.	$585,999,996
24	Countrywide Financial Corp. (2010) (C.D. Cal.)	2013	C.D. Cal.	$500,000,000
25	BankAmerica Corp. (1999)	2004	E.D. Mo.	$490,000,000
26	Adelphia Communications Corp.	2013	S.D.N.Y.	$478,725,000
27	Merrill Lynch & Co., Inc. (2007)	2009	S.D.N.Y.	$475,000,000

[1] Passed Court Judgment

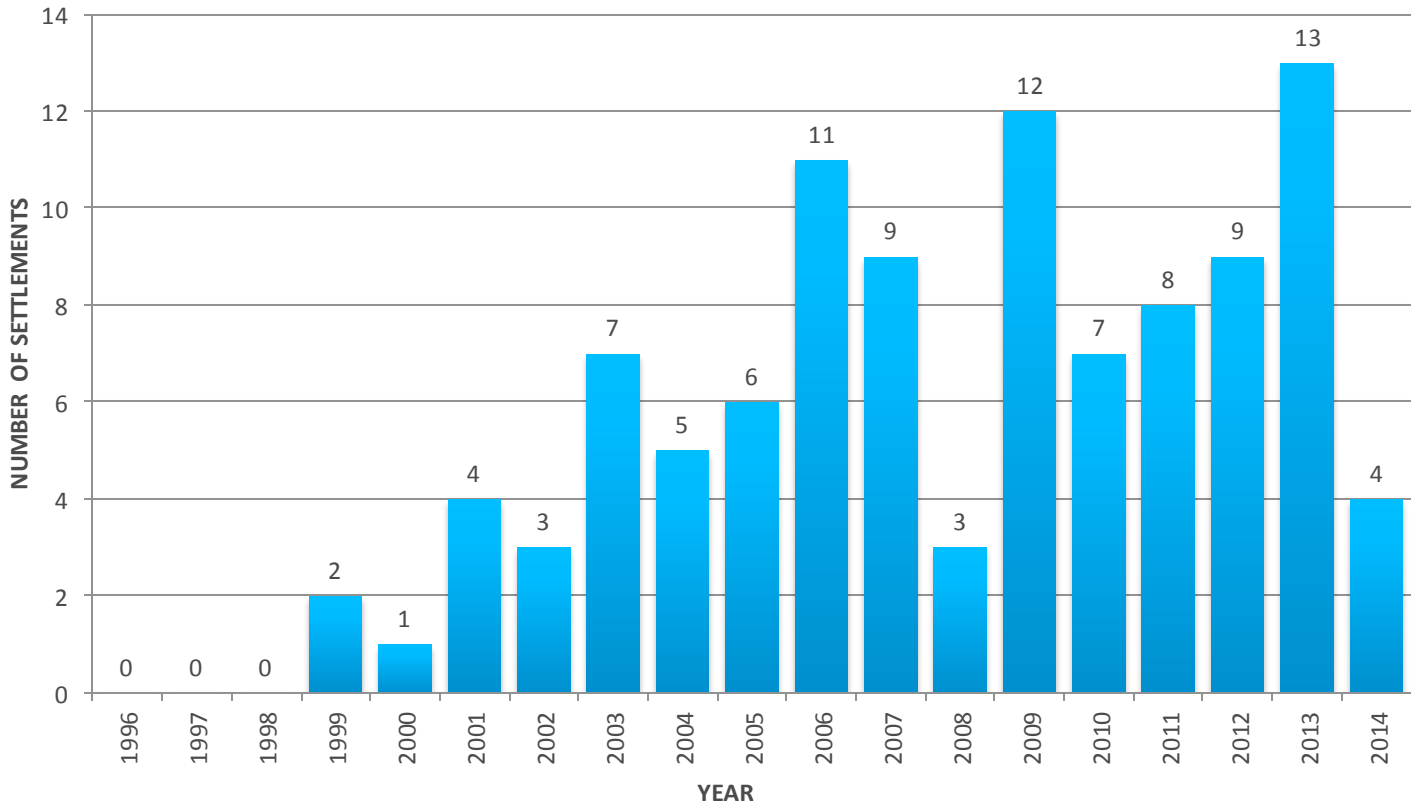
RANK	CASE NAME	SETTLEMENT YEAR	COURT	TOTAL SETTLEMENT AMOUNT
28	Dynegy Inc. (2002)	2005	S.D. Tex.	$474,050,000
29	Schering-Plough Corp. (2008)	2013	D. N.J.	$473,000,000
30	Raytheon Company	2004	D. Mass.	$460,000,000
31	Waste Management Inc. (1999) (S.D. Tex.)	2003	S.D. Tex.	$457,000,000
32	Global Crossing, Ltd. (2002)	2007	S.D.N.Y.	$447,800,000
33	Qwest Communications International, Inc. (2001)	2009	D. Colo	$445,000,000
34	Federal Home Loan Mortgage Corp. (Freddie Mac) (2003)	2006	S.D.N.Y.	$410,000,000
35	Marsh & McLennan Companies, Inc.	2009	S.D.N.Y.	$400,000,000
36	Cendant Corp. (PRIDES)	2006	D. N.J.	$374,000,000
37	Refco, Inc.	2011	S.D.N.Y.	$358,300,000
38	Rite Aid Corp.	2003	E.D. Pa.	$319,580,000
39	Merrill Lynch Mortgage Investors, Inc. (Mortgage Pass-Through Certificates)	2012	S.D.N.Y.	$315,000,000
40	Williams Companies, Inc. (2002)	2007	N.D. Ok.	$311,000,000
41	General Motors Corp. (2005) (E.D. Mich.)	2009	E.D. Mich.	$303,000,000
42	DaimlerChrysler AG (2000)	2004	D. Del.	$300,000,000
42	Bristol-Myers Squibb Co. (2002)	2004	S.D.N.Y.	$300,000,000
42	Oxford Health Plans Inc.	2003	S.D.N.Y.	$300,000,000
45	Bear Stearns Companies, Inc. (S.D.N.Y.)	2012	S.D.N.Y.	$294,900,000
46	El Paso Corporation (2002) (S.D. Tex.)	2007	S.D. Tex.	$285,000,000
47	Tenet Healthcare Corp. (2002)	2008	C.D. Cal.	$281,500,000
48	J.P. Morgan Acceptance Corp. I (Mortgage Pass-Through Certificates) (2008)	2014	E.D.N.Y.	$280,000,000
48	BNY Mellon, N.A.	2012	E.D. OK.	$280,000,000
50	HarborView Mortgage Loan Trust	2014	S.D.N.Y.	$275,000,000
51	Massey Energy Company (2010)	2014	S.D. WV.	$265,000,000
52	3Com Corp. (1997) (N.D. Cal.)	2001	N.D. Cal.	$259,000,000
53	Charles Schwab & Co., Inc. (2008) (N.D. Cal.) (Schwab YieldPlus Fund)	2011	N.D. Cal.	$235,000,000
54	Comverse Technology, Inc. (2006)	2010	E.D.N.Y.	$225,000,000
55	Waste Management Inc. (1997)	1999	N.D. Ill.	$220,000,000
56	Bernard L. Madoff Investment Securities LLC/Income-Plus Investment Fund (2009) (S.D.N.Y.) (Beacon Associates LLC I and II)	2013	S.D.N.Y.	$219,857,694
57	Merck & Co., Inc. (2008)	2013	D. N.J.	$215,000,000
57	Sears, Roebuck & Co. (2002)	2006	N.D. Ill.	$215,000,000
59	Washington Mutual, Inc. (2007)	2011	W.D.	$208,500,000

RANK	CASE NAME	SETTLEMENT YEAR	COURT	TOTAL SETTLEMENT AMOUNT
			Wash.	
60	The Mills Corp.	2009	E.D. Va.	$202,750,000
61	Motorola, Inc. (2007)	2012	N.D. Ill.	$200,000,000
61	WellCare Health Plans, Inc.	2011	M.D. Fla.	$200,000,000
61	Kinder Morgan, Inc. (2006) (Kansas District Court)	2010	Ks D. C.	$200,000,000
61	CMS Energy Corp.	2007	E.D. Mich.	$200,000,000
65	Safety-Kleen Corp. (Bondholders)	2006	D. S.C.	$197,622,944
66	MicroStrategy Inc.	2001	E.D. Va.	$192,500,000
67	Motorola, Inc. (2003)	2007	N.D. Ill.	$190,000,000
68	Bristol-Myers Squibb Co. (2000)	2006	D. N.J.	$185,000,000
69	Broadcom Corp. (2006)	2012	C.D. Cal.	$173,500,000
70	Maxim Integrated Products, Inc.	2010	N.D. Cal.	$173,000,000
71	Juniper Networks, Inc. (2006)	2010	N.D. Cal.	$169,500,000
72	National City Corp. (N.D. Ohio)	2012	N.D. Ohio	$168,000,000
73	Schering-Plough Corp. (2001)	2009	D. N.J.	$165,000,000
73	Digex, Inc.	2001	Del Chancery Court	$165,000,000
75	Pharmacia Corp.	2013	D. N.J.	$164,000,000
76	Dollar General Corp. (2001)	2002	M.D. Tenn.	$162,000,000
77	Brocade Communications Systems, Inc. (2005)	2009	N.D. Cal.	$160,098,500
78	Federal National Mortgage Association (Fannie Mae) (2004)	2013	D. Co.	$153,000,000
79	Bennett Funding Group, Inc.	2003	S.D.N.Y.	$152,635,000
80	Satyam Computer Services, Ltd.	2011	S.D.N.Y.	$150,500,000
81	Merrill Lynch & Co., Inc. (Bonds or Preferred Shares Offerings)	2009	S.D.N.Y.	$150,000,000
81	AT&T Wireless Tracking Stock	2006	S.D.N.Y.	$150,000,000
81	Broadcom Corp. (2001)	2005	C.D. Cal.	$150,000,000
84	TXU Corp. (2002)	2005	N.D. Tex.	$149,750,000
85	Sumitomo (Copper Trading) Corp.	2001	S.D.N.Y.	$149,250,000
86	Charter Communications, Inc. (2002)	2005	E.D. Mo.	$146,250,000
87	Apollo Group, Inc. (2004)	2012	D. Ariz.	$145,000,000
88	Sunbeam Corp.	2002	S.D. Fla.	$140,995,187
89	Biovail Corp. (2003)	2008	S.D.N.Y.	$138,000,000
90	The Coca-Cola Company (2000)	2008	N.D. Ga.	$137,500,000
90	Electronic Data Systems Corp. (2002)	2006	E.D. Tex.	$137,500,000

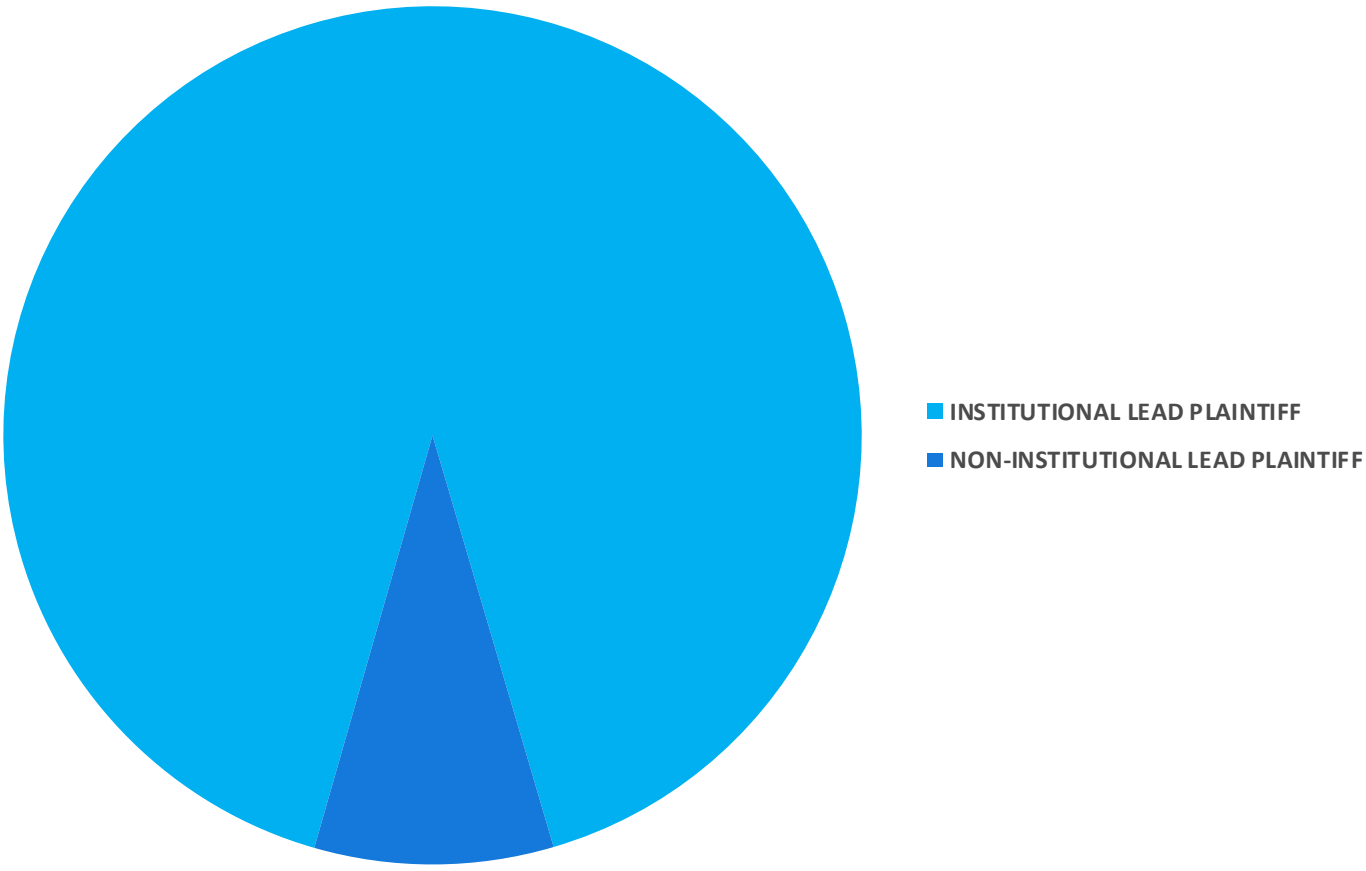
RANK	CASE NAME	SETTLEMENT YEAR	COURT	TOTAL SETTLEMENT AMOUNT
92	Informix Corp.	1999	N.D. Cal.	$136,500,000
93	Computer Associates International, Inc. (1998)	2003	E.D.N.Y.	$133,551,000
94	Doral Financial Corp. (2005)	2007	S.D.N.Y.	$130,000,000
95	Delphi Corporation	2009	E.D. Mich.	$128,350,000
96	Edward D. Jones & Co., L.P. (Federal & State Class Settlement)	2007	E.D. Mo. & Mo. C.C.	$127,500,000
97	Wells Fargo Mortgage-Backed Securities Pass-Through Certificates (N.D. Cal.)	2011	N.D. Cal.	$125,000,000
97	Bristol-Myers Squibb Co. (2007)	2009	S.D.N.Y.	$125,000,000
99	New Century Financial Corp.	2010	C.D. Cal.	$124,827,088
100	Mattel, Inc.	2003	C.D. Cal.	$122,000,000

NO. OF SETTLEMENTS ADDED TO SECURITIES CLASS ACTION SERVICES 100

1996-2014



SETTLEMENTS REPRESENTED BY INSTITUTIONAL LEAD PLAINTIFF IN TOP 100



INSTITUTIONAL LEAD PLAINTIFF PARTICIPATION

Cases Listed in Top 100 Settlements Categorized by Total Settlement Amount

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	CASE INSTITUTION
1	Enron Corp. (2001)	$7,242,000,000	Regents of the University of California
2	WorldCom, Inc. (2002)	$6,194,100,714	New York State Common Retirement Fund
3	Cendant Corp.	$3,319,350,000	New York City Pension Funds; New York State Common Retirement Fund; California Public Employees' Retirement System
4	Tyco International, Ltd. (2002)	$3,200,000,000	Louisiana State Employees Retirement System; Plumbers & Pipefitters National Pension Fund; Teachers' Retirement System of Louisiana; United Association Office Employees Pension Plan; United Association of Local Union Officers & Employees' Pension; United Association General Officers Pension Plan; Voyageur Asset Management
5	AOL Time Warner, Inc. (S.D.N.Y.)	$2,500,000,000	Minnesota State Board of Investment
6	Household International, Inc. (N.D. Ill.)*	$2,462,899,616	International Union of Operating Engineers Local 132 Pension Plan; PACE Industry Union Management Pension Fund; Glickenhaus & Company
7	Bank of America Corporation (2009) (S.D.N.Y.) (Equity Securities)	$2,425,000,000	Ohio Public Employees Retirement System; State Teachers Retirement System of Ohio; Teacher Retirement System of Texas; PGGM Vermogensbeheer B.V.; Fjarde AP-Fonden
8	Nortel Networks Corp. (2001) (I)	$1,142,775,308	Ontario Public Service Employees' Union Pension Plan Trust Fund
9	Royal Ahold, N.V.	$1,100,000,000	Public Employees' Retirement Association of Colorado; Generic Trading of Philadelphia, LLC
10	Nortel Networks Corp. (2004) (II)	$1,074,265,298	New Jersey Treasury Department; Ontario Teachers' Pension Plan Board
11	McKesson HBOC Inc.	$1,052,000,000	New York State Common Retirement Fund
12	American International Group, Inc. (2004)	$1,009,500,000	Ohio Police and Fire Pension Fund; Ohio Public Employees Retirement System; State Teachers Retirement System of Ohio
13	UnitedHealth Group, Inc.	$925,500,000	California Public Employees' Retirement System

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	CASE INSTITUTION
14	HealthSouth Corp. (2004)	$804,500,000	Central States, Southeast and Southwest Area Pension Fund; Educational Retirement Board of New Mexico; New Mexico State Investment Council; The Retirement Systems of Alabama; Michigan Retirement Systems
15	Xerox Corp. (2000)	$750,000,000	Louisiana State Employees Retirement System
16	Lehman Brothers Holdings, Inc. (S.D.N.Y.) (Equity/Debt Securities)	$735,218,000	Alameda County Employees' Retirement Association; The City of Edinburgh Council On Behalf of The Lothian Pension Fund; Government of Guam Retirement Fund; Operating Engineers Local 3 Trust Fund; Northern Ireland Local Government Officers Superannuation Committee
17	Citigroup Bonds	$730,000,000	Miami Beach Employees' Retirement Plan; Arkansas Teacher Retirement System; American European Insurance Company; Southeastern Pennsylvania Transportation Authority; City of Philadelphia Board of Pensions & Retirement; City of Tallahassee Retirement System; Louisiana Sheriffs' Pension and Relief Fund
18	Lucent Technologies, Inc.	$667,000,000	Employers-Teamsters Local 175 & 505 Pension Trust Fund Plan; The Parnassus Fund; The Parnassus Income Trust/Equity Income Fund
19	Wachovia Preferred Securities and Bond/Notes	$627,000,000	Louisiana Sheriffs' Pension and Relief Fund; Southeastern Pennsylvania Transportation Authority; Orange County Employees' Retirement System
20	Countrywide Financial Corp. (2007) (C.D. Cal.)	$624,000,000	New York City Employees' Retirement System; New York City Police Pension Fund; New York City Fire Department Pension Fund; New York City Board of Education Retirement System; Teachers' Retirement System of the City of New York
21	Cardinal Health, Inc.	$600,000,000	Amalgamated Bank; California Ironworkers Field Trust Funds; New Mexico State Investment Council; PACE Industry Union Management Pension Fund
22	Citigroup, Inc. (2007)	$590,000,000	NON-INSTITUTIONAL LEAD PLAINTIFF

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	CASE INSTITUTION
23	IPO Securities Litigation (Master Case)	$585,999,996	NON-INSTITUTIONAL LEAD PLAINTIFF
24	Countrywide Financial Corp. (2010) (C.D. Cal.)	$500,000,000	Iowa Public Employees' Retirement System
25	BankAmerica Corp. (1999)	$490,000,000	NON-INSTITUTIONAL LEAD PLAINTIFF
26	Adelphia Communications Corp.	$478,725,000	Argent Classic Convertible Arbitrage Fund; Argent Classic Convertible Arbitrage Fund (Bermuda) L.P.; Argent Lowlev Convertible Arbitrage Fund Ltd.; UBS O'Connor LLC f/b/o UBS Global Equity Arbitrage Master Ltd.; UBS O'Connor LLC f/b/o UBS Global Convertible Portfolio; Eminence Capital, LLC
27	Merrill Lynch & Co., Inc. (2007)	$475,000,000	State Teachers Retirement System of Ohio
28	Dynegy Inc. (2002)	$474,050,000	Regents of the University of California
29	Schering-Plough Corp. (2008)	$473,000,000	Arkansas Teacher Retirement System; Louisiana Municipal Police Employees' Retirement System; Public Employees' Retirement System of Mississippi; Massachusetts Pension Reserves Investment Management Board
30	Raytheon Company	$460,000,000	New York State Common Retirement Fund
31	Waste Management Inc. (1999) (S.D. Tex.)	$457,000,000	Connecticut Retirement Plans and Trust Funds
32	Global Crossing, Ltd. (2002)	$447,800,000	Ohio Public Employees Retirement System; State Teachers Retirement System of Ohio
33	Qwest Communications International, Inc. (2001)	$445,000,000	New England Health Care Employees Pension Fund
34	Federal Home Loan Mortgage Corp. (Freddie Mac) (2003)	$410,000,000	Ohio Public Employees Retirement System; State Teachers Retirement System of Ohio
35	Marsh & McLennan Companies, Inc.	$400,000,000	Ohio Bureau of Workers' Compensation; Public Employees' Retirement System of Ohio; State of New Jersey, Department of Treasury, Division of Investment; State Teachers Retirement System of Ohio
36	Cendant Corp. (PRIDES)	$374,000,000	Welch & Forbes Inc.
37	Refco, Inc.	$358,300,000	RH Capital Associates LLC; Pacific Investment Management Company LLC
38	Rite Aid Corp.	$319,580,000	NON-INSTITUTIONAL LEAD PLAINTIFF
39	Merrill Lynch Mortgage Investors, Inc. (Mortgage Pass-Through Certificates)	$315,000,000	Public Employees' Retirement System of Mississippi

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	CASE INSTITUTION
40	Williams Companies, Inc. (2002)	$311,000,000	Arkansas Teacher Retirement System; Ontario Teachers' Pension Plan Board
41	General Motors Corp. (2005) (E.D. Mich.)	$303,000,000	Deka International S.A. Luxembourg; Deka Investment GMBH
42	Oxford Health Plans Inc.	$300,000,000	PBHG Funds, Inc.; Public Employees' Retirement Association of Colorado
42	Bristol-Myers Squibb Co. (2002)	$300,000,000	Fresno County Employees' Retirement Association; General Retirement System of the City of Detroit; Louisiana State Employees Retirement System; Teachers' Retirement System of Louisiana
42	DaimlerChrysler AG (2000)	$300,000,000	Denver Employees Retirement Plan; Florida State Board of Administration; Municipal Employees Annuity and Benefit Fund of Chicago; Policemen's Annuity and Benefit Fund of Chicago
45	Bear Stearns Companies, Inc. (S.D.N.Y.)	$294,900,000	State of Michigan Retirement Systems
46	El Paso Corporation (2002) (S.D. Tex.)	$285,000,000	Jacksonville Police & Fire Pension Fund; Oklahoma Firefighters Pension and Retirement System
47	Tenet Healthcare Corp. (2002)	$281,500,000	Department of the Treasury of the State of New Jersey
48	J.P. Morgan Acceptance Corp. I (Mortgage Pass-Through Certificates) (2008)	$280,000,000	Public Employees' Retirement System of Mississippi
48	BNY Mellon, N.A.	$280,000,000	CompSource Oklahoma; The Children's Hospital of Philadelphia Foundation; The Children's Hospital of Philadelphia; Board of Trustees of the Electrical Workers Local No. 26 Pension Trust Fund
50	HarborView Mortgage Loan Trust	$275,000,000	Boilermaker Blacksmith National Pension Trust; New Jersey Carpenters Vacation Fund
51	Massey Energy Company (2010)	$265,000,000	Commonwealth of Massachusetts Pension Reserves Investment Trust
52	3Com Corp. (1997) (N.D. Cal.)	$259,000,000	Louisiana Municipal Police Employees' Retirement System; Louisiana School Employees' Retirement System
53	Charles Schwab & Co., Inc. (2008) (N.D. Cal.) (Schwab YieldPlus Fund)	$235,000,000	NON-INSTITUTIONAL LEAD PLAINTIFF

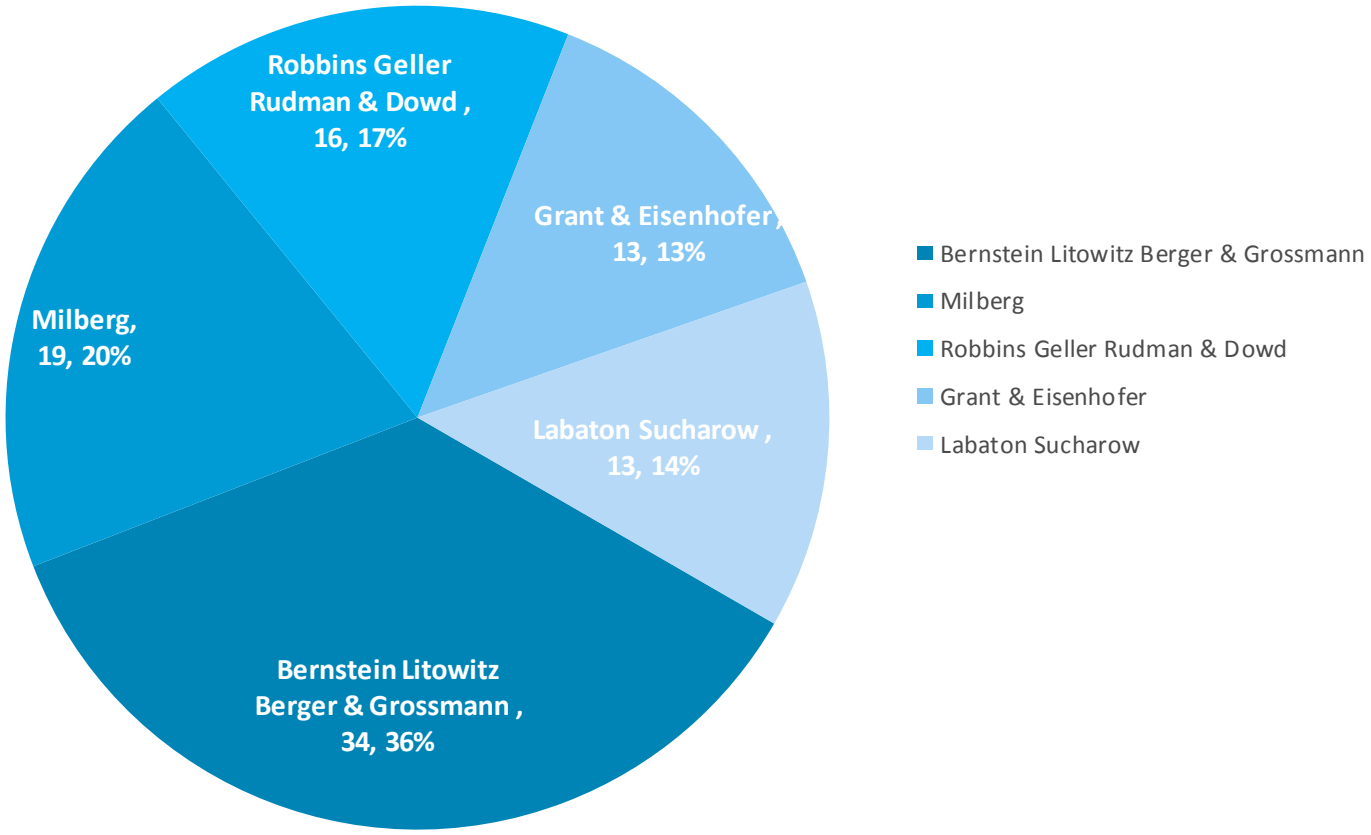
RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	CASE INSTITUTION
54	Comverse Technology, Inc. (2006)	$225,000,000	Menorah Insurance Co. Ltd.; Mivtachim Pension Funds Ltd.
55	Waste Management Inc. (1997)	$220,000,000	Jackson Grosvenor, Ltd.; Innovative Technologies Corp.; RML Limited Group
56	Bernard L. Madoff Investment Securities LLC /Income-Plus Investment Fund(2009) (S.D.N.Y.) (Beacon Associates LLC I and II)	$219,857,694	Plumbers & Steamfitters Local 267 Benefit Funds; Plumbers Local 112 Health Fund; Local 73 Retirement Fund; U.A. of Journeymen & Apprentices Local 73 Fund
57	Sears, Roebuck & Co. (2002)	$215,000,000	State of New Jersey, Department of Treasury, Division of Investment
57	Merck & Co., Inc. (2008)	$215,000,000	General Retirement System of the City of Detroit; International Fund Management S.A. Luxembourg; Stichting Pensioenfonds ABP; Jacksonville Police and Fire Retirement System
59	Washington Mutual, Inc. (2007)	$208,500,000	Ontario Teachers' Pension Plan Board
60	The Mills Corp.	$202,750,000	Iowa Public Employees' Retirement System; Public Employees' Retirement System of Mississippi
61	CMS Energy Corp.	$200,000,000	Andover Brokerage, LLC
61	WellCare Health Plans, Inc.	$200,000,000	New Mexico State Investment Council; Policemen's Annuity and Benefit Fund of Chicago; Public Employees Retirement Association of New Mexico; Teachers' Retirement System of Louisiana; Public School Teachers' Pension & Retirement Fund of Chicago
61	Kinder Morgan, Inc. (2006) (Kansas District Court)	$200,000,000	NON-INSTITUTIONAL LEAD PLAINTIFF
61	Motorola, Inc. (2007)	$200,000,000	Macomb County Employees' Retirement System
65	Safety-Kleen Corp. (Bondholders)	$197,622,944	American High-Income Trust; State Street Research Income Trust
66	MicroStrategy Inc.	$192,500,000	1199 SEIU Greater New York Pension Fund (f/k/a Local 144 Nursing Home Pension Fund)
67	Motorola, Inc. (2003)	$190,000,000	State of New Jersey, Department of Treasury, Division of Investment
68	Bristol-Myers Squibb Co. (2000)	$185,000,000	Long View Collective Investment Fund of the Amalgamated Bank
69	Broadcom Corp. (2006)	$173,500,000	New Mexico State Investment Council

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	CASE INSTITUTION
70	Maxim Integrated Products, Inc.	$173,000,000	Mississippi Public Employees' Retirement System; The Cobb County Government Employees' Pension Plan; The Dekalb County Pension Plan
71	Juniper Networks, Inc. (2006)	$169,500,000	New York City Employees' Retirement System; New York City Police Pension Fund; New York City Fire Department Pension Fund; New York City Police Superior Officers' Variable Supplements Fund; New York City Police Officers' Variable Supplements Fund; New York City Fire Officers' Variable Supplements Fund; New York City Teachers' Retirement System of the City of New York Variable Annuity Program; Teachers' Retirement System of the City of New York
72	National City Corp. (N.D. Ohio)	$168,000,000	New York State Common Retirement Fund
73	Digex, Inc.	$165,000,000	Kansas Public Employees Retirement System; TCW Technology Limited Partnership; TCW Small Capitalization Growth Stocks Limited Partnership; TCW Asset Management Company
73	Schering-Plough Corp. (2001)	$165,000,000	Florida State Board of Administration
75	Pharmacia Corp.	$164,000,000	Alaska Electrical Pension Fund; International Union of Operating Engineers; Local 132 Pension Plan; New England Health Care Employees Pension Fund; PACE Industry Union Management Pension Fund; Chemical Valley Pension Fund of West Virginia
76	Dollar General Corp. (2001)	$162,000,000	Florida State Board of Administration; Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust; Teachers' Retirement System of Louisiana
77	Brocade Communications Systems, Inc. (2005)	$160,098,500	Arkansas Public Employees Retirement System
78	Federal National Mortgage Association (Fannie Mae) (2004)	$153,000,000	Ohio Public Employees Retirement System; State Teachers Retirement System of Ohio
79	Bennett Funding Group, Inc.	$152,635,000	NON-INSTITUTIONAL LEAD PLAINTIFF
80	Satyam Computer Services, Ltd.	$150,500,000	Mississippi Public Employees' Retirement System; Mineworkers Pension Fund; SKAGEN A/S; Sampension KP Lifsforsikring A/S
81	Broadcom Corp. (2001)	$150,000,000	Minnesota State Board of Investment

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	CASE INSTITUTION
81	AT&T Wireless Tracking Stock	$150,000,000	Soft Drink and Brewery Workers Union Local 812 Retirement Fund
81	Merrill Lynch & Co., Inc. (Bonds or Preferred Shares Offerings)	$150,000,000	Louisiana Municipal Police Employees' Retirement System; Louisiana Sheriffs' Pension and Relief Fund
84	TXU Corp. (2002)	$149,750,000	Plumbers & Pipefitters National Pension Fund
85	Sumitomo (Copper Trading) Corp.	$149,250,000	NON-INSTITUTIONAL LEAD PLAINTIFF
86	Charter Communications, Inc. (2002)	$146,250,000	Stoneridge Investment Partners
87	Apollo Group, Inc. (2004)	$145,000,000	Policemen's Annuity and Benefit Fund of Chicago
88	Sunbeam Corp.	$140,995,187	CWA/ITU Negotiated Pension Plan; Generic Trading Associates, LLC; Smith Asset Management
89	Biovail Corp. (2003)	$138,000,000	Local 282 Welfare Trust Fund; Ontario Teachers' Pension Plan Board
90	Electronic Data Systems Corp. (2002)	$137,500,000	State of New Jersey, Department of Treasury, Division of Investment
90	The Coca-Cola Company (2000)	$137,500,000	1199 SEIU Greater New York Pension Fund (f/k/a Local 144 Nursing Home Pension Fund); Carpenters Health & Welfare Fund of Philadelphia & Vicinity
92	Informix Corp.	$136,500,000	Gateway Partners LLC
93	Computer Associates International, Inc. (1998)	$133,551,000	1199 SEIU Greater New York Pension Fund (f/k/a Local 144 Nursing Home Pension Fund); Capital West Asset Management; Employers-Teamsters Local 175 & 505 Pension Trust Fund Plan
94	Doral Financial Corp. (2005)	$130,000,000	West Virginia Investment Management Board
95	Delphi Corporation	$128,350,000	Mississippi Public Employees' Retirement System; Raiffeisen Kapitalanlage-Gesellschaft; Stichting Pensioenfonds ABP; Teachers' Retirement System of Oklahoma
96	Edward D. Jones & Co., L.P. (Federal Class Settlement); (State Class Settlement)	$127,500,000	NON-INSTITUTIONAL LEAD PLAINTIFF
97	Bristol-Myers Squibb Co. (2007)	$125,000,000	Ontario Teachers' Pension Plan Board

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	CASE INSTITUTION
97	Wells Fargo Mortgage-Backed Securities Pass-Through Certificates (N.D. Cal.)	$125,000,000	Louisiana Sheriffs' Pension and Relief Fund; New Orleans Employees' Retirement System; Alameda County Employees' Retirement Association; Government of Guam Retirement Fund
99	New Century Financial Corp.	$124,827,088	New York State Teachers' Retirement System
100	Mattel, Inc.	$122,000,000	Birmingham Retirement & Relief Fund

MOST FREQUENT LEAD COUNSEL IN TOP 100



LEAD COUNSEL PARTICIPATION

Most Frequent Lead/Co-Lead Counsel in Top 100 Settlements

Lead / Co-Lead Counsel | Case Name	Rank	Total Settlement Amount
Bernstein Litowitz Berger & Grossmann		**$ 23,030,796,100**
WorldCom, Inc. (2002)	2	$ 6,194,100,714
Cendant Corp.	3	$ 3,319,350,000
Bank of America Corporation (2009) (S.D.N.Y.) (Equity Securities)	7	$ 2,425,000,000
Nortel Networks Corp. (2004) (II)	10	$ 1,074,265,298
McKesson HBOC Inc.	11	$ 1,052,000,000
HealthSouth Corp. (2004)	14	$ 804,500,000
Lehman Brothers Holdings, Inc. (S.D.N.Y.) (Equity/Debt Securities)	16	$ 615,218,000
Citigroup Bonds	17	$ 730,000,000
Lucent Technologies, Inc.	18	$ 667,000,000
Wachovia Preferred Securities and Bond/Notes	19	$ 627,000,000
Schering-Plough Corp. (2008)	29	$ 473,000,000
Federal Home Loan Mortgage Corp. (Freddie Mac) (2003)	34	$ 410,000,000
Refco, Inc.	37	$ 358,300,000
Merrill Lynch Mortgage Investors, Inc. (Mortgage Pass-Through Certificates)	39	$ 315,000,000
Williams Companies, Inc. (2002)	40	$ 311,000,000
Bristol-Myers Squibb Co. (2002)	42	$ 300,000,000
DaimlerChrysler AG (2000)	42	$ 300,000,000
El Paso Corporation (2002) (S.D. Tex.)	46	$ 285,000,000
J.P. Morgan Acceptance Corp. I (Mortgage Pass-Through Certificates) (2008)	48	$ 280,000,000
3Com Corp. (1997) (N.D. Cal.)	52	$ 259,000,000
Merck & Co., Inc. (2008)	57	$ 215,000,000
Washington Mutual, Inc. (2007)	59	$ 208,500,000
The Mills Corp.	60	$ 202,750,000
WellCare Health Plans, Inc.	61	$ 200,000,000
Maxim Integrated Products, Inc.	70	$ 173,000,000
Bennett Funding Group, Inc.	79	$ 152,635,000
Satyam Computer Services, Ltd.	80	$ 150,500,000
Merrill Lynch & Co., Inc. (Bonds or Preferred Shares Offerings)	81	$ 150,000,000
Biovail Corp. (2003)	89	$ 138,000,000
Electronic Data Systems Corp. (2002)	90	$ 137,500,000
Delphi Corporation	95	$ 128,350,000

Lead / Co-Lead Counsel | Case Name	Rank	Total Settlement Amount
Bristol-Myers Squibb Co. (2007)	97	$ 125,000,000
Wells Fargo Mortgage-Backed Securities Pass-Through Certificates (N.D. Cal.)	97	$ 125,000,000
New Century Financial Corp.	99	$ 124,827,088
Milberg		**$ 9,252,401,491**
Tyco International, Ltd. (2002)	4	$ 3,200,000,000
Nortel Networks Corp. (2001) (I)	8	$ 1,142,775,308
Xerox Corp. (2000)	15	$ 750,000,000
Lucent Technologies, Inc.	18	$ 667,000,000
IPO Securities Litigation (Master Case)	23	$ 585,999,996
Raytheon Company	30	$ 460,000,000
Rite Aid Corp.	38	$ 319,580,000
Oxford Health Plans Inc.	42	$ 300,000,000
3Com Corp. (1997) (N.D. Cal.)	52	$ 259,000,000
Sears, Roebuck & Co. (2002)	57	$ 215,000,000
CMS Energy Corp.	61	$ 200,000,000
MicroStrategy Inc.	66	$ 192,500,000
Dollar General Corp. (2001)	76	$ 162,000,000
Sunbeam Corp.	88	$ 140,995,187
Biovail Corp. (2003)	89	$ 138,000,000
Informix Corp.	92	$ 136,500,000
Computer Associates International, Inc. (1998)	93	$ 133,551,000
Edward D. Jones & Co., L.P.	96	$ 127,500,000
Mattel, Inc.	100	$ 122,000,000
Robbins Geller Rudman & Dowd		**$ 15,328,699,616**
Enron Corp. (2001)	1	$ 7,242,000,000
Household International, Inc. (N.D. Ill.)	6	$ 2,464,399,616
UnitedHealth Group, Inc.	13	$ 925,500,000
HealthSouth Corp. (2004)	14	$ 804,500,000
Wachovia Preferred Securities and Bond/Notes	19	$ 627,000,000
Cardinal Health, Inc.	21	$ 600,000,000
Countrywide Financial Corp. (2010) (C.D. Cal.)	24	$ 500,000,000
Dynegy Inc. (2002)	28	$ 474,050,000
Qwest Communications International, Inc. (2001)	33	$ 445,000,000
Massey Energy Company (2010)	51	$ 265,000,000
Kinder Morgan, Inc. (2006) (Kansas District Court)	61	$ 200,000,000
Motorola, Inc. (2007)	61	$ 200,000,000
Pharmacia Corp.	75	$ 164,000,000

Lead / Co-Lead Counsel | Case Name	Rank	Total Settlement Amount
TXU Corp. (2002)	84	$ 149,750,000
The Coca-Cola Company (2000)	90	$ 137,500,000
Doral Financial Corp. (2005)	94	$ 130,000,000
Grant & Eisenhofer		**$ 6,327,572,944**
Tyco International, Ltd. (2002)	4	$ 3,200,000,000
Global Crossing, Ltd. (2002)	32	$ 447,800,000
Marsh & McLennan Companies, Inc.	35	$ 400,000,000
Refco, Inc.	37	$ 358,300,000
General Motors Corp. (2005) (E.D. Mich.)	41	$ 303,000,000
DaimlerChrysler AG (2000)	42	$ 300,000,000
Oxford Health Plans Inc.	42	$ 300,000,000
Merck & Co., Inc. (2008)	57	$ 215,000,000
Safety-Kleen Corp. (Bondholders)	65	$ 197,622,944
Digex, Inc.	74	$ 165,000,000
Dollar General Corp. (2001)	76	$ 162,000,000
Satyam Computer Services, Ltd.	80	$ 150,500,000
Delphi Corporation	95	$ 128,350,000
Labaton Sucharow		**$ 5,224,900,000**
American International Group, Inc. (2004)	12	$ 1,009,500,000
HealthSouth Corp. (2004)	14	$ 804,500,000
Countrywide Financial Corp. (2007) (C.D. Cal.)	20	$ 624,000,000
Schering-Plough Corp. (2008)	29	$ 473,000,000
Waste Management Inc. (1999) (S.D. Tex.)	31	$ 457,000,000
General Motors Corp. (2005) (E.D. Mich.)	41	$ 303,000,000
Bear Stearns Companies, Inc. (S.D.N.Y.)	45	$ 294,900,000
El Paso Corporation (2002) (S.D. Tex.)	46	$ 285,000,000
Massey Energy Company (2010)	51	$ 265,000,000
WellCare Health Plans, Inc.	61	$ 200,000,000
Bristol-Myers Squibb Co. (2000)	68	$ 185,000,000
Broadcom Corp. (2006)	69	$ 173,500,000
Satyam Computer Services, Ltd.	80	$ 150,500,000
Kessler Topaz Meltzer & Check		**$ 9,307,075,190**
Tyco International, Ltd. (2002)	4	$ 3,200,000,000
Bank of America Corporation (2009) (S.D.N.Y.) (Equity Securities)	7	$ 2,425,000,000
Lehman Brothers Holdings, Inc. (S.D.N.Y.) (Equity/Debt Securities)	16	$ 615,218,000
Wachovia Preferred Securities and Bond/Notes	19	$ 627,000,000
IPO Securities Litigation (Master Case)	23	$ 585,999,996
Countrywide Financial Corp. (2010) (C.D. Cal.)	24	$ 500,000,000

Lead / Co-Lead Counsel | Case Name	Rank	Total Settlement Amount
Tenet Healthcare Corp. (2002)	47	$ 281,500,000
BNY Mellon, N.A.	48	$ 280,000,000
Bernard L. Madoff Investment Securities LLC / Income-Plus Investment Fund (2009) (S.D.N.Y.) (Beacon Associates LLC I and II)	56	$ 219,857,694
Brocade Communications Systems, Inc. (2005)	77	$ 160,098,500
Satyam Computer Services, Ltd.	80	$ 150,500,000
Computer Associates International, Inc. (1998)	93	$ 133,551,000
Delphi Corporation	95	$ 128,350,000
Barrack, Rodos & Bacine		**$ 12,389,695,901**
WorldCom, Inc. (2002)	2	$ 6,194,100,714
Cendant Corp.	3	$ 3,319,350,000
McKesson HBOC Inc.	11	$ 1,052,000,000
Merrill Lynch & Co., Inc. (2007)	27	$ 475,000,000
DaimlerChrysler AG (2000)	42	$ 300,000,000
3Com Corp. (1997) (N.D. Cal.)	52	$ 259,000,000
The Mills Corp.	60	$ 202,750,000
Schering-Plough Corp. (2001)	73	$ 165,000,000
Apollo Group, Inc. (2004)	87	$ 145,000,000
Sunbeam Corp.	88	$ 140,995,187
Informix Corp.	92	$ 136,500,000
Kirby McInerney		**$ 2,133,360,000**
Citigroup, Inc. (2007)	22	$ 590,000,000
Adelphia Communications Corp.	26	$ 478,725,000
Cendant Corp. (PRIDES)	36	$ 374,000,000
Waste Management Inc. (1997)	55	$ 220,000,000
National City Corp. (N.D. Ohio)	72	$ 168,000,000
Bennett Funding Group, Inc.	79	$ 152,635,000
AT&T Wireless Tracking Stock	81	$ 150,000,000
Berger & Montague		**$ 1,155,575,187**
Merrill Lynch & Co., Inc. (2007)	27	$ 475,000,000
Rite Aid Corp.	38	$ 319,580,000
Waste Management Inc. (1997)	55	$ 220,000,000
Sunbeam Corp.	88	$ 140,995,187
Entwistle & Cappucci		**$ 1,762,000,000**
Royal Ahold, N.V.	9	$ 1,100,000,000
DaimlerChrysler AG (2000)	42	$ 300,000,000
CMS Energy Corp.	61	$ 200,000,000
Dollar General Corp. (2001)	76	$ 162,000,000

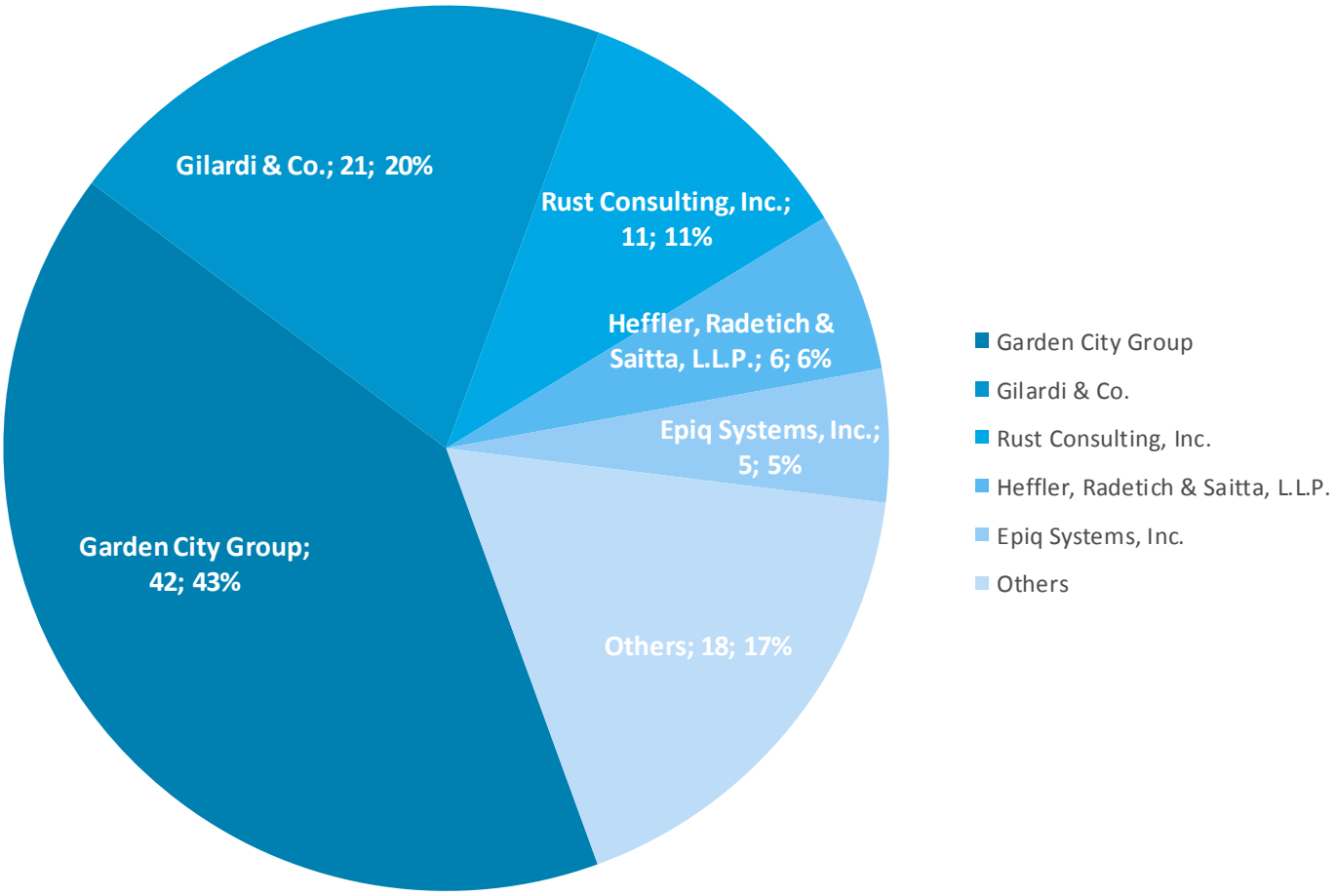
Lead / Co-Lead Counsel | Case Name	Rank	Total Settlement Amount
Chitwood Harley Harnes		**$ 1,100,500,000**
BankAmerica Corp. (1999)	25	$ 490,000,000
Oxford Health Plans Inc.	42	$ 300,000,000
Maxim Integrated Products, Inc.	70	$ 173,000,000
The Coca-Cola Company (2000)	90	$ 137,500,000
Kaplan Fox & Kilsheimer		**$ 3,295,500,000**
Bank of America Corporation (2009) (S.D.N.Y.) (Equity Securities)	7	$ 2,425,000,000
Merrill Lynch & Co., Inc. (2007)	27	$ 475,000,000
3Com Corp. (1997) (N.D. Cal.)	52	$ 259,000,000
Informix Corp.	92	$ 136,500,000
Stull Stull & Brody		**$ 1,337,050,996**
IPO Securities Litigation (Master Case)	23	$ 585,999,996
BankAmerica Corp. (1999)	25	$ 490,000,000
Computer Associates International, Inc. (1998)	93	$ 133,551,000
Edward D. Jones & Co., L.P.	96	$ 127,500,000
Wolf Popper		**$ 732,995,187**
J.P. Morgan Acceptance Corp. I (Mortgage Pass-Through Certificates) (2008)	48	$ 280,000,000
Motorola, Inc. (2003)	67	$ 190,000,000
Sunbeam Corp.	88	$ 140,995,187
Mattel, Inc.	100	$ 122,000,000
Berman DeValerio		**$ 1,629,900,000**
Xerox Corp. (2000)	15	$ 750,000,000
Bristol-Myers Squibb Co. (2002)	42	$ 300,000,000
Bear Stearns Companies, Inc. (S.D.N.Y.)	45	$ 294,900,000
El Paso Corporation (2002) (S.D. Tex.)	46	$ 285,000,000
Bernstein Liebhard		**$ 1,138,999,996**
IPO Securities Litigation (Master Case)	23	$ 585,999,996
Marsh & McLennan Companies, Inc.	35	$ 400,000,000
Federal National Mortgage Association (Fannie Mae) (2004)	78	$ 153,000,000
Nix, Patterson & Roach		**$ 568,448,500**
BNY Mellon, N.A.	48	$ 280,000,000
Brocade Communications Systems, Inc. (2005)	77	$ 160,098,500
Delphi Corporation	95	$ 128,350,000
Heins Mills & Olson		**$ 2,650,000,000**
AOL Time Warner, Inc. (S.D.N.Y.)	5	$ 2,500,000,000
Broadcom Corp. (2001)	81	$ 150,000,000
Lite, DePalma, Greenberg & Rivas		**$ 471,500,000**

Lead / Co-Lead Counsel | Case Name	Rank	Total Settlement Amount
Tenet Healthcare Corp. (2002)	47	$ 281,500,000
Motorola, Inc. (2003)	67	$ 190,000,000
Lowey Dannenberg Cohen & Hart		**$ 389,357,694**
Bernard L. Madoff Investment Securities LLC / Income-Plus Investment Fund (2009) (S.D.N.Y.) (Beacon Associates LLC I and II)	56	$ 219,857,694
Juniper Networks, Inc. (2006)	71	$ 169,500,000
Pomerantz		**$ 371,250,000**
Comverse Technology, Inc. (2006)	54	$ 225,000,000
Charter Communications, Inc. (2002)	86	$ 146,250,000
Waite, Schneider, Bayless & Chesley		**$ 563,000,000**
Federal Home Loan Mortgage Corp. (Freddie Mac) (2003)	34	$ 410,000,000
Federal National Mortgage Association (Fannie Mae) (2004)	78	$ 153,000,000
Wolf Haldenstein Adler Freeman & Herz		**$ 778,499,996**
IPO Securities Litigation (Master Case)	23	$ 585,999,996
MicroStrategy Inc.	66	$ 192,500,000
Abbey Spanier		**$ 698,725,000**
Adelphia Communications Corp.	26	$ 478,725,000
Waste Management Inc. (1997)	55	$ 220,000,000
Cohen Milstein Sellers & Toll		**$ 775,000,000**
Countrywide Financial Corp. (2010) (C.D. Cal.)	24	$ 500,000,000
HarborView Mortgage Loan Trust	50	$ 275,000,000
Hahn Loeser & Parks		**$ 1,009,500,000**
American International Group, Inc. (2004)	12	$ 1,009,500,000
Cunningham Bounds		**$ 804,500,000**
HealthSouth Corp. (2004)	14	$ 804,500,000
Schatz Nobel Izard		**$ 804,500,000**
HealthSouth Corp. (2004)	14	$ 804,500,000
Johnson & Perkinson		**$ 750,000,000**
Xerox Corp. (2000)	15	$ 750,000,000
Girard Gibbs[2]		**$ 120,000,000**
Lehman Brothers Holdings, Inc. (S.D.N.Y.) (Equity/Debt Securities)	16	$ 120,000,000

[2] Partial representation on the complete settlement

Lead / Co-Lead Counsel | Case Name	Rank	Total Settlement Amount
Howard B. Sirota, Esq.		**$ 585,999,996**
IPO Securities Litigation (Master Case)	23	$ 585,999,996
Abbey Spanier Rodd & Abrams		**$ 490,000,000**
BankAmerica Corp. (1999)	25	$ 490,000,000
Green Schaaf & Jacobson		**$ 490,000,000**
BankAmerica Corp. (1999)	25	$ 490,000,000
Barrett & Weber		**$ 410,000,000**
Federal Home Loan Mortgage Corp. (Freddie Mac) (2003)	34	$ 410,000,000
Susman Godfrey		**$ 311,000,000**
Williams Companies, Inc. (2002)	40	$ 311,000,000
Hagens Berman Sobol Shapiro		**$ 235,000,000**
Charles Schwab & Co., Inc. (2008) (N.D. Cal.) (Schwab YieldPlus Fund)	53	$ 235,000,000
Chimicles & Tikellis		**$ 200,000,000**
Kinder Morgan, Inc. (2006) (Kansas District Court)	61	$ 200,000,000
The Nygaard Law Firm		**$ 200,000,000**
Kinder Morgan, Inc. (2006) (Kansas District Court)	61	$ 200,000,000
Patton Roberts		**$ 160,098,500**
Brocade Communications Systems, Inc. (2005)	77	$ 160,098,500
Markovits, Stock & DeMarco		**$ 153,000,000**
Federal National Mortgage Association (Fannie Mae) (2004)	78	$ 153,000,000
Provost & Umphrey		**$ 149,750,000**
TXU Corp. (2002)	84	$ 149,750,000
Lovell & Stewart		**$ 149,250,000**
Sumitomo (Copper Trading) Corp.	85	$ 149,250,000
Lowenstein Sandler		**$ 137,500,000**
Electronic Data Systems Corp. (2002)	90	$ 137,500,000
Blitz Bardgett & Deutsch		**$ 127,500,000**
Edward D. Jones & Co., L.P.	96	$ 127,500,000
Goodin MacBride Squeri Ritchie & Day		**$ 127,500,000**
Edward D. Jones & Co., L.P.	96	$ 127,500,000
Hulett Harper Stewart		**$ 127,500,000**
Edward D. Jones & Co., L.P.	96	$ 127,500,000
Stanley, Mandel & Lola		**$ 127,500,000**
Edward D. Jones & Co., L.P.	96	$ 127,500,000
Weiss & Lurie		**$ 127,500,000**
Edward D. Jones & Co., L.P.	96	$ 127,500,000

MOST FREQUENT CLAIMS ADMINISTRATOR IN TOP 100



MOST FREQUENT CLAIMS ADMINISTRATOR IN TOP 100

CLAIMS ADMINISTRATOR | CASES	RANK	CASE SETTLEMENT AMOUNT	TOTAL AMOUNT SETTLED
Garden City Group			**$26,351,074,954**
WorldCom, Inc. (2002)	2	$6,194,100,714	
Tyco International, Ltd. (2002)	4	$3,200,000,000	
Bank of America Corporation (2009) (S.D.N.Y.) (Equity Securities)	7	$2,425,000,000	
Nortel Networks Corp. (2001) (I)	8	$1,142,775,308	
Royal Ahold, N.V.	9	$1,100,000,000	
Nortel Networks Corp. (2004) (II)	10	$1,074,265,298	
Lehman Brothers Holdings, Inc. (S.D.N.Y.) (Equity/Debt Securities)	16	$615,218,000	
Citigroup Bonds	17	$730,000,000	
Lucent Technologies, Inc.	18	$667,000,000	
Wachovia Preferred Securities and Bond/Notes	19	$627,000,000	
Citigroup, Inc. (2007)	22	$590,000,000	
IPO Securities Litigation (Master Case)	23	$585,999,996	
Countrywide Financial Corp. (2010) (C.D. Cal.)	24	$500,000,000	
Global Crossing, Ltd. (2002)	32	$447,800,000	
Federal Home Loan Mortgage Corp. (Freddie Mac) (2003)	34	$410,000,000	
Refco, Inc.	37	$358,300,000	
Merrill Lynch Mortgage Investors, Inc. (Mortgage Pass-Through Certificates)	39	$315,000,000	
Williams Companies, Inc. (2002)	40	$311,000,000	
Bristol-Myers Squibb Co. (2002)	42	$300,000,000	
DaimlerChrysler AG (2000)	42	$300,000,000	
Oxford Health Plans Inc.	42	$300,000,000	
Bear Stearns Companies, Inc. (S.D.N.Y.)	45	$294,900,000	
Tenet Healthcare Corp. (2002)	47	$281,500,000	
BNY Mellon, N.A.	48	$280,000,000	
J.P. Morgan Acceptance Corp. I (Mortgage Pass-Through Certificates) (2008)	48	$280,000,000	
Bernard L. Madoff Investment Securities LLC /Income-Plus Investment Fund(2009) (S.D.N.Y.) (Beacon Associates LLC I and II)	56	$219,857,694	
Sears, Roebuck & Co. (2002)	57	$215,000,000	
Washington Mutual, Inc. (2007)	59	$208,500,000	
The Mills Corp.	60	$202,750,000	
CMS Energy Corp.	61	$200,000,000	

CLAIMS ADMINISTRATOR | CASES	RANK	CASE SETTLEMENT AMOUNT	TOTAL AMOUNT SETTLED
Kinder Morgan, Inc. (2006) (Kansas District Court)	61	$200,000,000	
WellCare Health Plans, Inc.	61	$200,000,000	
Safety-Kleen Corp. (Bondholders)	65	$197,622,944	
Bristol-Myers Squibb Co. (2000)	68	$185,000,000	
Broadcom Corp. (2006)	69	$173,500,000	
Maxim Integrated Products, Inc.	70	$173,000,000	
Dollar General Corp. (2001)	76	$162,000,000	
Federal National Mortgage Association (Fannie Mae) (2004)	78	$153,000,000	
Bennett Funding Group, Inc.	79	$152,635,000	
Delphi Corporation	95	$128,350,000	
Bristol-Myers Squibb Co. (2007)	97	$125,000,000	
Wells Fargo Mortgage-Backed Securities Pass-Through Certificates (N.D. Cal.)	97	$125,000,000	
Gilardi & Co.			**$17,742,330,616**
Enron Corp. (2001)	1	$7,242,000,000	
AOL Time Warner, Inc. (S.D.N.Y.)	5	$2,500,000,000	
Household International, Inc. (N.D. Ill.)[3]	6	$2,462,899,616	
UnitedHealth Group, Inc.	13	$925,500,000	
Xerox Corp. (2000)	15	$750,000,000	
Cardinal Health, Inc.	21	$600,000,000	
Dynegy Inc. (2002)	28	$474,050,000	
Qwest Communications International, Inc. (2001)	33	$445,000,000	
Rite Aid Corp.	38	$319,580,000	
3Com Corp. (1997) (N.D. Cal.)	52	$259,000,000	
Charles Schwab & Co., Inc. (2008) (N.D. Cal.) (Schwab YieldPlus Fund)	53	$235,000,000	
Motorola, Inc. (2007)	61	$200,000,000	
MicroStrategy Inc.	66	$192,500,000	
Pharmacia Corp.	75	$164,000,000	
AT&T Wireless Tracking Stock	81	$150,000,000	
Broadcom Corp. (2001)	81	$150,000,000	

[3] Passed Court Judgment.

CLAIMS ADMINISTRATOR | CASES	RANK	CASE SETTLEMENT AMOUNT	TOTAL AMOUNT SETTLED
TXU Corp. (2002)	84	$149,750,000	
The Coca-Cola Company (2000)	90	$137,500,000	
Computer Associates International, Inc. (1998)	93	$133,551,000	
Doral Financial Corp. (2005)	94	$130,000,000	
Mattel, Inc.	100	$122,000,000	
Rust Consulting, Inc. (Complete Claim Solutions, Inc.)			**$4,418,000,000**
American International Group, Inc. (2004)	12	$1,009,500,000	
HealthSouth Corp. (2004)	14	$804,500,000	
Countrywide Financial Corp. (2007) (C.D. Cal.)	20	$624,000,000	
Merrill Lynch & Co., Inc. (2007)	27	$475,000,000	
Waste Management Inc. (1999) (S.D. Tex.)	*31*	*$457,000,000*	
Marsh & McLennan Companies, Inc.	35	$400,000,000	
Motorola, Inc. (2003)	*67*	*$190,000,000*	
Juniper Networks, Inc. (2006)	71	$169,500,000	
Satyam Computer Services, Ltd.	80	$150,500,000	
Biovail Corp. (2003)	*89*	*$138,000,000*	
Heffler, Radetich & Saitta, L.L.P.			**$4,475,850,000**
Cendant Corp.	3	$3,319,350,000	
BankAmerica Corp. (1999)	25	$490,000,000	
Waste Management Inc. (1997)	55	$220,000,000	
Schering-Plough Corp. (2001)	73	$165,000,000	
Apollo Group, Inc. (2004)	87	$145,000,000	
Informix Corp.	92	$136,500,000	
Epiq Systems, Inc. (Poorman-Douglas)			**$1,288,598,500**
Schering-Plough Corp. (2008)	29	$473,000,000	
General Motors Corp. (2005) (E.D. Mich.)	41	$303,000,000	
Merck & Co., Inc. (2008)	57	$215,000,000	
Brocade Communications Systems, Inc. (2005)	77	$160,098,500	
Electronic Data Systems Corp. (2002)	*90*	*$137,500,000*	
Analytics, Inc.			**$1,777,327,088**
McKesson HBOC Inc.	11	$1,042,500,000	
Raytheon Company	30	$460,000,000	
Merrill Lynch & Co., Inc. (Bonds or Preferred Shares	81	$150,000,000	

CLAIMS ADMINISTRATOR | CASES	RANK	CASE SETTLEMENT AMOUNT	TOTAL AMOUNT SETTLED
Offerings)			
New Century Financial Corp.	99	$124,827,088	
A.B. Data, Ltd.			**$670,000,000**
Lehman Brothers Holdings, Inc. (S.D.N.Y.) (Equity/Debt Securities)[4]	16	$120,000,000	
El Paso Corporation (2002) (S.D. Tex.)	46	$285,000,000	
Massey Energy Company (2010)	51	$265,000,000	
Valley Forge Administrative Services, Inc.			**$852,725,000**
Adelphia Communications Corp.	26	$478,725,000	
Cendant Corp. (PRIDES)	36	$374,000,000	
Berdon Claims Administration LLC			**$371,250,000**
Comverse Technology, Inc. (2006)	54	$225,000,000	
Charter Communications, Inc. (2002)	86	$146,250,000	
ACS Financial Securities Services			**$290,245,187**
Sumitomo (Copper Trading) Corp.	85	$149,250,000	
Sunbeam Corp.	88	$140,995,187	
BMC Group			**$177,500,000**
McKesson HBOC Inc.[5]	11	$9,500,000	
National City Corp. (N.D. Ohio)	72	$168,000,000	
Kurtzman Carson Consultants			**$275,000,000**
HarborView Mortgage Loan Trust	50	$275,000,000	
Digex, Inc.			**$165,000,000**
Digex, Inc.	73	$165,000,000	
Edward D. Jones & Co., L.P.			**$127,500,000**
Edward D. Jones & Co., L.P. (Federal Class Settlement); (State Class Settlement)	96	$127,500,000	

[4] Partial administration on the complete settlement
[5] Partial administration on the complete settlement

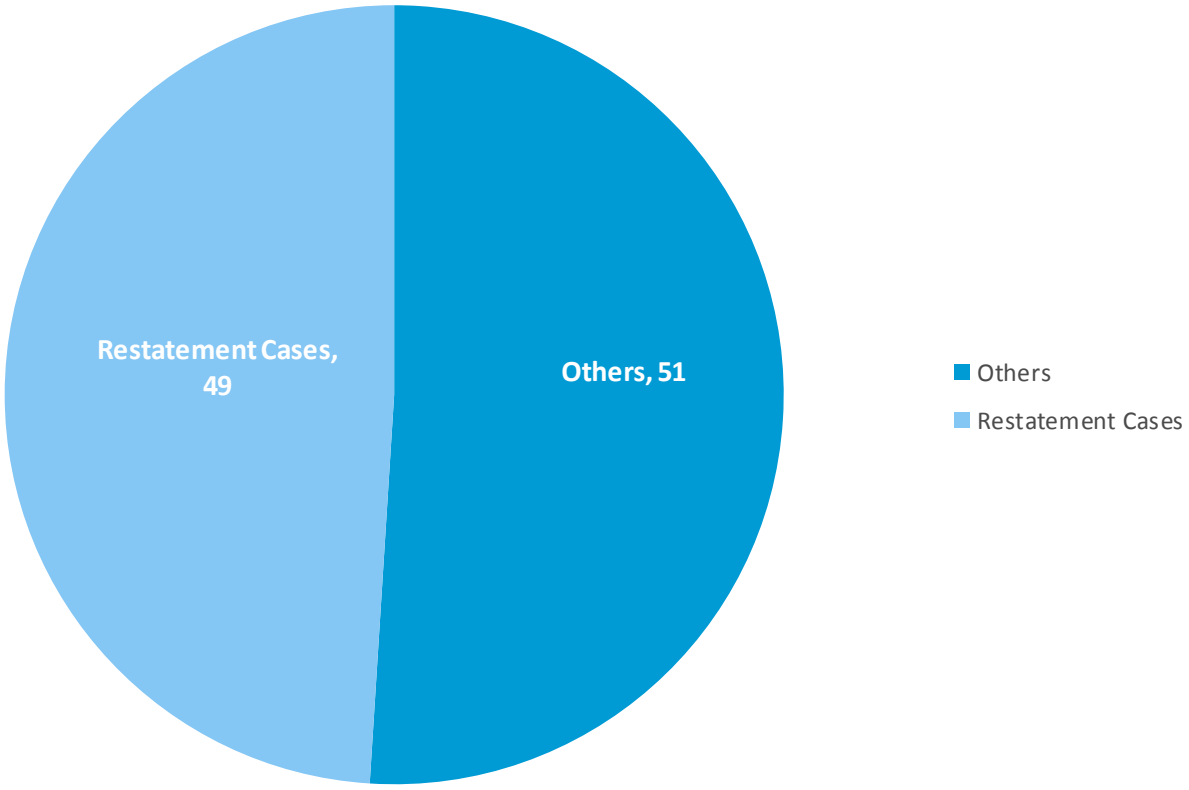
SECURITIES CLASS ACTION SERVICES RESTATEMENTS

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	SETTLEMENT YEAR
1	Enron Corp. (2001)	$7,242,000,000	2010
2	WorldCom, Inc. (2002)	$6,194,100,714	2012
3	Cendant Corp.	$3,319,350,000	2000
5	AOL Time Warner, Inc. (S.D.N.Y.)	$2,500,000,000	2006
8	Nortel Networks Corp. (2001) (I)	$1,142,775,308	2006
9	Royal Ahold, N.V.	$1,100,000,000	2006
10	Nortel Networks Corp. (2004) (II)	$1,074,265,298	2006
11	McKesson HBOC Inc.	$1,052,000,000	2013
12	American International Group, Inc. (2004)	$1,009,500,000	2013
13	UnitedHealth Group, Inc.	$925,500,000	2009
14	HealthSouth Corp. (2004)	$804,500,000	2010
15	Xerox Corp. (2000)	$750,000,000	2009
18	Lucent Technologies, Inc.	$667,000,000	2003
20	Countrywide Financial Corp. (2007) (C.D. Cal.)	$624,000,000	2011
21	Cardinal Health, Inc.	$600,000,000	2007
26	Adelphia Communications Corp.	$478,725,000	2013
31	Waste Management Inc. (1999) (S.D. Tex.)	$457,000,000	2003
32	Global Crossing, Ltd. (2002)	$447,800,000	2007
33	Qwest Communications International, Inc. (2001)	$445,000,000	2009
34	Federal Home Loan Mortgage Corp. (Freddie Mac) (2003)	$410,000,000	2006
36	Cendant Corp. (PRIDES)	$374,000,000	2006
37	Refco, Inc.	$358,300,000	2011
38	Rite Aid Corp.	$319,580,000	2003
41	General Motors Corp. (2005) (E.D. Mich.)	$303,000,000	2009
42	Bristol-Myers Squibb Co. (2002)	$300,000,000	2004
46	El Paso Corporation (2002) (S.D. Tex.)	$285,000,000	2007
52	3Com Corp. (1997) (N.D. Cal.)	$259,000,000	2001
54	Comverse Technology, Inc. (2006)	$225,000,000	2010
55	Waste Management Inc. (1997)	$220,000,000	1999
60	The Mills Corp.	$202,750,000	2009
61	Motorola, Inc. (2007)	$200,000,000	2012
61	WellCare Health Plans, Inc.	$200,000,000	2011
65	Safety-Kleen Corp. (Bondholders)	$197,622,944	2006
66	MicroStrategy Inc.	$192,500,000	2001
69	Broadcom Corp. (2006)	$173,500,000	2012
70	Maxim Integrated Products, Inc.	$173,000,000	2010

RANK	CASE NAME	TOTAL SETTLEMENT AMOUNT	SETTLEMENT YEAR
71	Juniper Networks, Inc. (2006)	$169,500,000	2010
76	Dollar General Corp. (2001)	$162,000,000	2002
77	Brocade Communications Systems, Inc. (2005)	$160,098,500	2009
78	Federal National Mortgage Association (Fannie Mae) (2004)	$153,000,000	2013
80	Satyam Computer Services, Ltd.	$150,500,000	2011
81	Merrill Lynch & Co., Inc. (Bonds or Preferred Shares Offerings)	$150,000,000	2009
86	Charter Communications, Inc. (2002)	$146,250,000	2005
88	Sunbeam Corp.	$140,995,187	2002
89	Biovail Corp. (2003)	$138,000,000	2008
92	Informix Corp.	$136,500,000	1999
94	Doral Financial Corp. (2005)	$130,000,000	2007
95	Delphi Corporation	$128,350,000	2009
99	New Century Financial Corp.	$124,827,088	2010

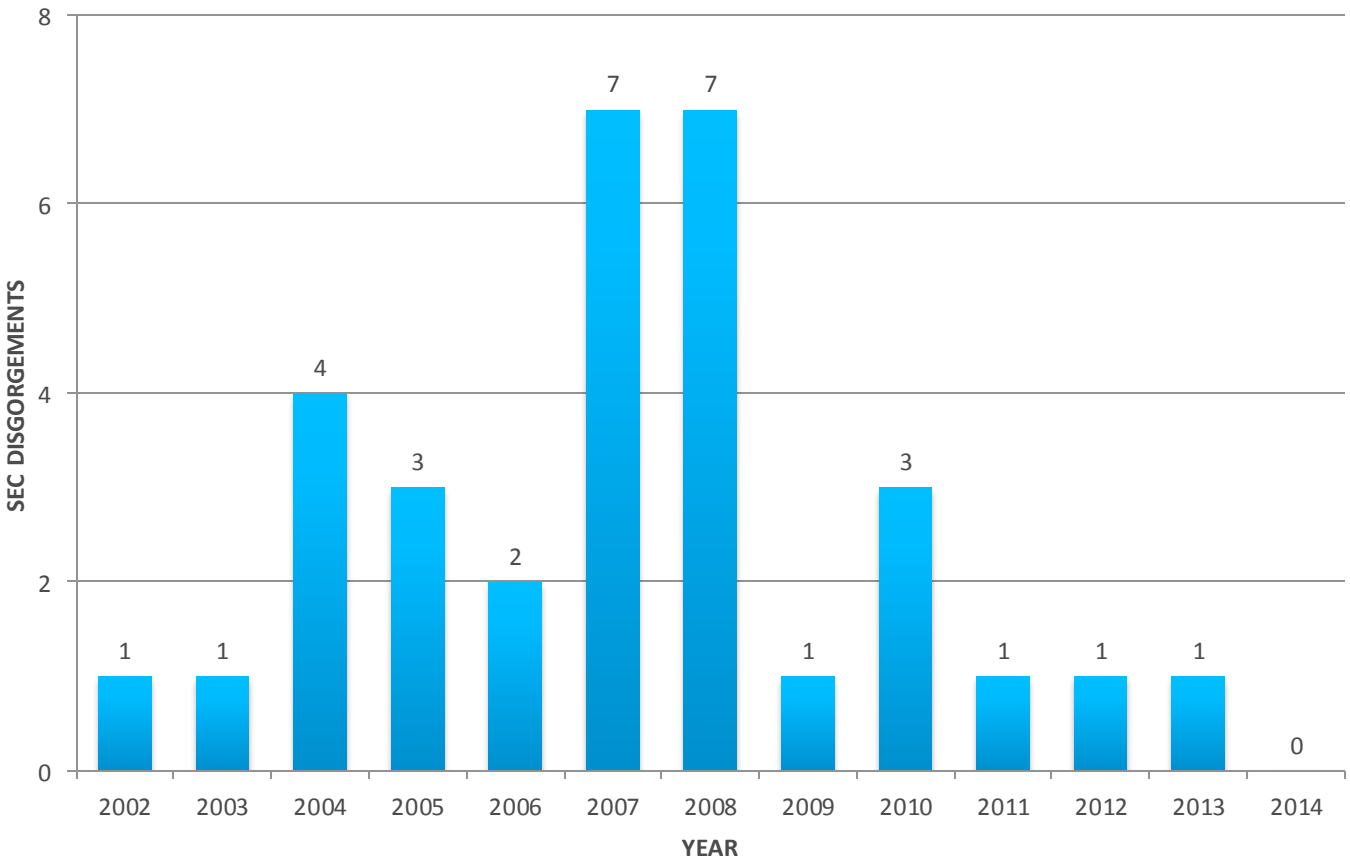
RESTATEMENTS

Cases Involving Accounting Restatements in Top 100 Settlements



NO. OF SETTLEMENTS ADDED TO SECURITIES CLASS ACTION SERVICES TOP 30 SEC DISGORGEMENTS

2002 - Present



TOP 30 SEC DISGORGEMENTS

Cases Listed in Top 30 Disgorgements Categorized By Settlement Amount

RANK	CASE NAME	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
1	American International Group, Inc. (SEC) (2006)	2008	$800,000,000
2	WorldCom, Inc. (SEC)	2003	$750,000,000
3	Enron Corp. (SEC)	2008	$450,000,000
4	Banc of America Capital Management, LLC (SEC)	2007	$375,000,000
5	Federal National Mortgage Association (Fannie Mae) (SEC)	2007	$350,000,001
6	Invesco Funds (SEC)	2008	$325,000,000
7	Time Warner Inc. (SEC)	2005	$308,000,000
8	Prudential Securities (SEC)	2010	$270,000,000
9	Qwest Communications International Inc. (SEC Fair Fund)	2006	$252,869,388
10	Alliance Capital Management L.P. (SEC)	2008	$250,000,000
10	PBHG Mutual Funds (SEC)	2004	$250,000,000
10	Bear Stearns (SEC)	2008	$250,000,000
13	NYSE Specialist Firms (SEC)	2004	$247,557,023
14	Massachusetts Financial Services Co. (SEC)	2007	$225,629,143
15	Computer Associates International, Inc. (CRIMINAL)	2005	$225,000,000
16	Millennium Partners, L.P. (SEC)	2007	$180,575,005
17	SEC Analyst Suit 2 - Citigroup Global Markets f/k/a Salomon Smith Barney	2005	$157,500,000
18	Putnam Investment Management, LLC (SEC)	2007	$153,524,387
19	Bristol-Myers Squibb Co. (SEC)	2004	$150,000,001
19	Bank of America Corporation (SEC)	2010	$150,000,001
21	AOL Time Warner, Inc. (DOJ)	2006	$150,000,000
22	Strong Capital Management, Inc. (SEC)	2009	$140,750,000
23	Columbia Funds (SEC) (2005)	2007	$140,000,000
24	American International Group, Inc. (SEC) (2004)	2004	$126,366,000
25	Canadian Imperial Holdings Inc./CIBC World Markets Corp. (SEC)	2010	$125,000,000
26	Royal Dutch Petroleum / Shell Transport (SEC)	2008	$120,000,000
27	Dell Inc. (SEC)	2012	$110,962,734
28	Charles Schwab Investment (SEC)	2011	$110,000,000
29	Morgan Keegan Funds (SEC)	2013	$100,300,000
30	Capital Consultants, LLC (SEC)	2002	$100,000,000
30	HealthSouth Corp. (SEC)	2007	$100,000,000
30	Janus Capital Management LLC (SEC)	2008	$100,000,000

GLOSSARY

Claims Administrator – an entity selected by the Lead Counsel or appointed by the court to manage the settlement notification and claim process.

Disgorgement - a repayment of ill-gotten gains that is imposed on wrong-doers by the courts.

Final settlements – settlements that received final approval from the court.

Institutional Lead Plaintiff - an institutional shareholder or group of institutional shareholders appointed by the court to represent the interests of a class or classes of similarly situated shareholders.

Lead Counsel - law firm, or lawyer, appointed by the court, that prosecutes a class action on behalf of the class members.

Partial Settlement – a preliminary agreement between some of the identified defendants in the action.

PSLRA – Private Securities Litigation Reform Act of 1995 - Legislation passed by Congress that implemented several substantive changes in the United States, affecting certain cases brought under the federal securities laws, including changes related to pleading, discovery, liability, class representation, and awards fees and expenses.

Settlement Year - corresponds to the year the settlement, or the most recent partial settlement, received final approval from the Court.

Total Settlement Amount - refers to the sum of the settlement fund or the gross settlement fund approved by the court.

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Note

BETTER GO IT ALONE: AN EXTENSION OF FIDUCIARY DUTIES FOR INVESTMENT FUND MANAGERS IN SECURITIES CLASS ACTION OPT-OUTS

Brian J. Shea [a1]

Abstract

Securities class actions provide a vehicle for plaintiffs to recover billions of dollars in settlement awards. Given the prevalence of institutional investors in the market for publicly traded securities, it is no surprise that large investment funds are often implicated as lead plaintiffs in securities class actions. Despite having recoverable claims in many of these settlements, these investment funds often fail to participate in the action on behalf of their beneficiaries (their investors). Some scholars argue that fund managers have a fiduciary obligation to participate in claim filing and monitoring processes in an effort to recover settlement awards and to maximize the value of their beneficiaries' investments. Courts have yet to hold fund managers liable for failure to do so.

This Note explores a separate but related phenomenon: the increased prevalence of class action "opt-outs" in which a plaintiff may choose not to be a part of the action in favor of pursuing a separate action, and hopefully recover more than would be available within the class action structure. Inherent in the opt-out calculus is the risk of receiving nothing at all. Given this phenomenon, this Note asks whether it would make sense to extend fiduciary duties to contemplate opt-out behavior in an effort to encourage fund managers to monitor those securities class actions that implicate their respective funds. According to this argument, a fund manager would have a duty to opt out when the recovery outside the class action was likely greater, and when there was a reasonable likelihood that such recovery could be obtained.

At the moment, such an extension would not be appropriate. A clear departure from case law related to fiduciary duties and officer liability, such an extension would also inject too much legally encouraged risk taking into the capital markets; it would undermine many of the valid policy objectives of the securities class action; and it would place an undue burden on fund managers to take monitoring obligations to unprecedented levels.

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*257 Introduction

Today's securities class action settlement pipeline stands at $18 billion. [1] Although the total number of securities class actions filed in 2013 was somewhat lower than in previous years, seven of the twenty-five largest settlements in history were approved in 2013. [2] The top settlements involved companies such as Bank of America, AIG, Lehman Brothers, Citigroup, Countrywide, Adelphia, and Schering-Plough, to name a few. [3]

As owners of the majority of publicly traded equity securities in the United States, institutional investors-pension funds in particular-reaped the majority of these settlement profits. The Regents of the University of California, the California Public Employees' Retirement System (CALPRS), the New York State Common Retirement Fund, New York City Pension Funds, Plumbers & Pipefitters National Pension Fund, and United Association of Local Union Officers & Employees Pension were among the primary institutions to recoup large sums for their beneficiaries by participating in these actions. [4]

An overview of lead plaintiffs in the securities class action space would lead the casual observer to conclude that institutional investors like those mentioned above would be actively involved in filing claims on behalf of their beneficiaries. Nevertheless, several empirical analyses in this field of institutional behavior suggest the contrary-as of 2005, it was estimated that slightly more than $1 billion was left on the table by non-filing institutions each year. [5] Several possible explanations exist as to why ***258** institutional investors with provable losses failed to file claims on behalf of their investors. [6]

Some scholars argue that failure on the part of pension fund managers to pursue these settlements should be evaluated as potential breaches of fiduciary duty under Delaware's Caremark decision. [7] As applied, this standard holds that institutional investors have a good faith obligation to ensure that their fund has adequate monitoring systems in place to identify and process claims-in essence, to monitor the settlement pipeline and participate when appropriate-and to periodically update these systems as problems arise. [8] Courts have yet to codify this fiduciary obligation as it applies to investment fund managers; however, there is some evidence that it has been adopted in practice. [9]

This Note expands upon the argument advanced by these scholars and practitioners in the context of class action "opt-outs." Current empirical research suggests that the larger the award at stake in a securities class action, the more likely it is that at least one member of the class will choose to go it alone-opt out-in order to pursue a separate lawsuit against the defendant. [10] According to this research, the primary reason that class action participants choose to pursue individual actions is the potential for a larger recovery in the end. [11] The study is keen to point out that the legal strategy ***259** of opting out also carries with it greater risks of receiving no settlement award at all. [12]

To what extent should the fiduciary duties of fund managers (principally those of large pension funds) extend to opt-outs in securities class actions? [13] This Note posits and assesses the argument that fund managers, as trustees, owe an extended fiduciary responsibility to their beneficiaries that includes, at minimum, monitoring standards to determine whether the potential recovery could be greater if the fund opts out of a given class action. This duty would require fund managers to consider the potential recovery and assess the risks and rewards involved in opting out. As the law currently stands, there is no clear legal precedent available to hold fund managers liable for failure to file a claim in a particular class action-although investors have

sued under such theories-not to mention failure to assess the risks and rewards involved in opting out. Caremark provides some guidance to investors, although this Note readily acknowledges Delaware courts' reluctance to broaden the scope of fiduciary duties to corporate inaction of this nature. [14]

It is undoubtedly reasonable for an investor to expect that those who manage his or her portfolio will remain vigilant as to potential class action claims, especially given the recent trend toward larger settlements. Although some might advocate for a full expansion of liability to include opt-out assessment under a modified Caremark standard, [15] such a solution is inappropriate and unfeasible. This approach is improper for several reasons: First, it frustrates the purposes of shareholder class actions by encouraging strategic behavior. Second, it places an unnecessary burden on fund managers to do more than simply monitor their involvement in shareholder litigation and to file claims on behalf of their beneficiaries. Last, it exposes investors to risky speculation that may result in substantial loss, which, if reeking of gross negligence, may in and of itself constitute a breach of duty of care. [16]

***260** Part I provides a brief background on the current securities class action environment, followed by an overview of the mechanics of filing claims in securities class actions. Part II discusses current scholarship as it relates to the fiduciary duties of fund managers and the analytical framework that has been adopted following Caremark. Part III then applies that framework to the behavior of fund managers in large-scale securities class actions and considers the optimal strategies that should be pursued by these managers on behalf of their beneficiaries, ultimately concluding that the current framework as articulated by Delaware courts is insufficient to address the risks inherent in class action opt-outs.

I. The Current Securities Class Action Environment

Each year, well over 100 securities class actions are filed in the United States. [17] According to Cornerstone Research, 166 federal securities class action cases were filed in 2013, a slight increase over 2012, although roughly thirteen percent below the national average observed since the 1995 Private Securities Litigation Reform Act (PSLRA). [18] Broadly speaking, class actions resulting from alleged securities fraud appear on a daily basis in notable business news publications and remain a centerpiece of the national discourse surrounding the right of investors to recover for corporate wrongs. [19]

***261** Federal courts have exclusive jurisdiction over securities fraud class actions since the enactment of the Securities Litigation Uniform Standards Act of 1998 (SLUSA). [20] As a practical matter, almost all securities class actions settle before trial. [21] A number of key trends emerged in 2013: (1) the majority of claims were brought under SEC Rule 10b-5, the catch-all provision for securities fraud; (2) the median lag time between the end of the alleged class period and the filing date of the lawsuit became shorter; (3) health care, biotechnology, and pharmaceutical companies represented the largest industry group among class action targets; and (4) the vast majority of filings occurred in the Second and Ninth Circuits. [22]

The class action is a powerful legal tool used to provide relief to multiple individuals who otherwise would not have the incentive to pursue their claims individually; in the aggregate, these claims address widespread harm resulting from corporate fraud in connection with the purchase or sale of securities. [23] Since the codification of Fed. R. Civ. P. 23, scholars have widely debated the justifications and effects of these actions. [24] The academia repeats several major policy justifications for this device, including: (1) class actions provide a solution to the economic obstacle of gathering many small claims together into an amalgamation that can support the cost of litigation; [25] (2) class actions arguably create a level playing field for ***262** individuals with less economic power, who might otherwise be disadvantaged under the legal system; [26] (3) class actions also serve the valuable social goals of deterrence and compensation, thus providing the appropriate incentives for corporations and corporate actors to pay for and internalize the true cost of their conduct; [27] and (4) they also eliminate the need to re-litigate common claims in similar small-scale cases, thus bringing efficiency to the overall court system. [28] From a practical standpoint,

class actions create incentives for attorneys to represent and aggressively advocate on behalf of individuals who would not otherwise be able to obtain meaningful representation due to the costs associated with litigation. [29]

In the United States, class actions are governed by the Federal Rules of Civil Procedure. [30] Although all class actions are governed by the same rule, several distinct categories of actions have emerged: consumer rights, securities and antitrust, environmental, mass torts, and civil rights. [31] It is worth denoting these categories in order to cabin the discussion of opt-outs within the securities context. Needless to say, civil rights and environmental class actions deal with completely distinct issues that are beyond the scope of this Note.

A. The Private Right of Action for Securities Fraud

In general, securities class action claims in the U.S. are alleged as violations of the federal securities laws based on misrepresentations concerning the financial and business conditions of a company. [32] These claims are often brought under section 17(a) of the Securities Act of 1933 ("Securities Act"), section 10(b) of the Exchange Act of 1934 ("Exchange Act"), and SEC Rule 10b-5. [33] The statutes and rules prohibit fraud by any "person" in connection with purchase or sale of a security. [34] Because securities are sold in ***263** large numbers or blocks to many disparate investors, it is easy to understand why the class action is a useful vehicle to remedy the harm felt by many individual investors who would not otherwise have the means or the incentive to bring a direct action against the company. It is also easy to understand why the class action might be ill-suited or disadvantageous to institutional investors who hold a larger portion of the securities sold, and who would otherwise have an incentive to bring a separate action.

Section 17(a) provides the following:
It shall be unlawful for any person in the offer or sale of any securities .... by the use of any means or instruments of transportation or communication in interstate commerce ... directly or indirectly-

(1) to employ any device, scheme, or artifice to defraud; or

(2) to obtain money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. [35]
The statute broadly prohibits (1) the employment of any device, scheme, or artifice to defraud (2) in the offer or sale of any securities.

Similarly, section 10(b) provides:
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange ....

. . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. [36]

Thus, section 10(b) prohibits (1) using any manipulative or deceptive device in contravention of the SEC's rules (2) in connection with the purchase or sale of securities. [37] As written, section 10(b) does not limit itself merely to deception of a purchaser or seller, but rather applies to any deception used "in connection with the purchase or sale of any security." [38]

***264** The SEC adopted Rule 10b-5 pursuant to its rulemaking authority:
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud, [or]

. . .

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. [39]

In essence, a private right of action for damages under these provisions can be broken down into the following elements: (1) a material misrepresentation or omission; (2) scienter; (3) in connection with a purchase or sale of a security; (4) reliance, often referred to as "fraud-on-the-market" in public securities cases; (5) economic loss; and (6) loss causation, that is, a causal connection between the material misrepresentation and the loss. [40] Materiality in the securities fraud context is a determination of whether there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." [41] "Scienter" is defined as "intent to deceive, manipulate, or defraud." [42]

From a historical standpoint, although the relevant provisions of the federal securities action had their genesis in the '33 Act, the securities class action did not take hold until Rule 23 of the Federal Rules of Civil Procedure was fundamentally changed in 1966. [43] Under these 1966 changes, the outcome of a class action became binding on nonparticipating class members who received notice of the action and were given the opportunity to opt in. [44] Provided the case satisfies Rule 23's requirements, the court may certify the class action and the outcome is binding. [45]

Corporations and the defense bar became critical of securities class actions in the 1980s and 1990s on the basis that the class action structure ***265** was unfairly biased in favor of plaintiffs. [46] Congress responded with the Private Securities Litigation Reform Act of 1995 (PSLRA), which imposed a number of procedural reforms and enhanced pleading standards. [47] Following the PSLRA, a plaintiff in a securities fraud case must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." [48] The Supreme Court in 2007 held that in order for an inference of scienter to qualify as "strong," it "must be more than merely plausible or reasonable-it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent." [49] Circuits are split as to how plaintiffs may give rise to a strong inference of scienter: in some, plaintiffs must allege facts to show that defendants had both motive and opportunity to commit fraud; in others, courts require facts constituting strong circumstantial evidence of conscious misbehavior or recklessness; and others apply a "totality of circumstances" test for which a showing of motive and opportunity may be relevant but not dispositive. [50]

B. Filing a Claim and Giving Notice

Once a class action has been filed in federal court, the law firm representing the filing plaintiff publishes notice that the action has been filed. [51] Both the filing plaintiff and other plaintiffs implicated in the action then have sixty days to file lead plaintiff motions. [52] The court appoints lead plaintiffs who are then authorized to select lead counsel and file a consolidated amended complaint. [53] This determination is generally made with consideration for the interests of the plaintiff with the largest potential losses. [54] The process of selecting a lead plaintiff generally involves many plaintiff groups representing a variety of interests, while defendants play little role in the initial organization of the class action. [55] In cases in which multiple lawsuits are filed by multiple plaintiffs, whichever party is selected ***266** as lead plaintiff files a consolidated complaint including new claims and new defendants. [56]

C. Legal Standard for Class Certification

A party seeking class certification must demonstrate four prerequisites: "(1) numerosity of plaintiffs; (2) common questions of law or fact ; (3) the named plaintiff's claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class." [57] A district court must employ a rigorous analysis to determine whether the party seeking certification has met these prerequisites. [58] The party must provide specific facts to satisfy the requirements for class certification rather than resting on mere allegations. [59]

After satisfying the four initial requirements, a party must demonstrate either: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; (2) the defendant has treated the members of the class as a class, making appropriate injunction or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. [60]

The trial court is given broad discretion as to whether to grant or deny a motion for class certification. [61] In doing so, the requirements of Rule 23 should be construed liberally to recognize the rule's policy in favor of class actions, and should not involve an inquiry into whether the plaintiff is likely to succeed on the merits of the case. [62]

*267 D. Certification of the Class and Opting Out

The required notice distributed to class members must inform them of their right to opt out of the class. [63] A plaintiff would generally choose to opt out if, for whatever reason, (1) he decided that he did not want to be a part of the class, (2) he would rather bring his own suit separately, or (3) he is not amenable to the terms of the proposed settlement. [64] In some cases, a settlement agreement may permit the defendant to cancel the settlement if too many class members opt out. [65] It is worth noting that this is really only an issue applicable to large-scale class actions, generally those arising from securities fraud or products liability. [66] In small claims class actions, such as those arising from some consumer protection claims, individual suits are economically infeasible given the small amount of damages at stake. [67]

After discovery commences, the lead plaintiff(s) generally ask the court to certify the class, permitting the action to proceed as an action on behalf of one or more classes. [68] Once a class is certified, all plaintiffs/class members are bound by the outcome of the proceeding, unless those individuals choose to opt out. [69]

E. Settlement

According to Rule 23(e), a class action may not be dismissed or settled without prior notice to the class and approval by the court. [70] As mentioned above, very few securities class actions go to trial; almost all settle prior to trial. [71] The mechanics of these settlements may take many different forms, although they generally involve counsel from all interested parties, including insurers. [72] Once the terms of the settlement are determined, parties file ***268** extensive briefs on the fairness of the settlement, and the court must preliminarily approve them. [73]

After the settlement is approved, all class members are provided with notice and a hearing at which they have the opportunity to argue that the settlement is inadequate. [74] The settlement is not officially approved until after the "fairness hearing." [75] It is not uncommon for judges to take an active role in the crafting of the settlement terms; they will often-especially in large class actions-insist on modifications in the interest of fairness to absent class members. [76]

F. Measuring Damages

Measuring damages in securities class actions can be a difficult task and often involves large sums of money. There are several tools that plaintiffs use to estimate damages in the class action context, among these, the "constant dollar inflation model" and the "constant percentage model." [77] Under the constant dollar method, damages are calculated based on available public information used to measure the decline in the value of a company's stock as a result of the alleged "corrective disclosure" (i.e., the disclosure alleged to have revealed the alleged fraud) and assumes that that decrease is the actual measure of artificial inflation resulting from fraud. [78] Alternatively, the constant percentage model takes the percentage decline of the residual drop, and applies that percentage to the stock price throughout the entire class period. [79] In general, securities class actions settle for a small fraction of the actual estimated damages. [80]

*269 II. Fiduciary Obligations of Fund Managers

This Part sets forth the groundwork for this Note's discussion of opt-outs in terms of fiduciary duties. Section A provides an in-depth summary of the seminal Cox and Thomas study along with its criticisms, which provides a useful framework for analyzing opt-outs. Section B gives an overview of the recent Cornerstone study that sheds new light on the role of opt-outs in securities class actions.

A. Participation Failure in Securities Class Action Settlements: Cox & Thomas Study

The empirical study by Cox and Thomas was the first to explore the participation- or surprising lack thereof-of financial institutions in the securities class action settlement environment. [81] Following a preliminary survey of institutional investors, the study proffers four broad hypotheses as to why this problematic inaction may exist.

First, the study identifies a host of issues associated with what it terms "[s]leeping with the [e]nemy." [82] The realities of agency costs often result in perverse actions on the part of managers seeking to maximize their own utility rather than that of the firm's owners or beneficiaries. [83] Further, the study recognizes the complexity of the financial services industry and the inevitability of conflicts that result from managers asserting their rights to a certain share of settlement funds in a given case. [84] Classes of financial institutions-banks, mutual funds, and insurance companies, for example-often cater to companies and accounting firms in the course of their business, the very institutions that are often the targets of securities class action law suits. [85] It is easy to see how such relationships among market participants through social forces could engender conflicting attitudes with respect to filing class action claims by "align[ing] themselves with protagonists of their ***270** clientele." [86] Further evidence indicates

that an institution that considers its principal purpose to be something other than establishing and monitoring procedures to ensure its participation in class action settlements may be inherently unlikely to institute such practices. [87]

The second hypothesis identified by the study may be categorized as the practical and logistical considerations inherent in the claim filing process. A survey of class action settlements finds that on average settlement notices are not circulated until more than twenty-six months after the end of the class action period. [88] Practically speaking, this means that there often passes in excess of three years between the time at which an institution trades in securities giving rise to the action, and when notice of that action is actually brought to the institution's attention. [89] The implication of such a delay undoubtedly affects whether an institution is likely to file a claim. Cox and Thomas point out that most financial institutions do not actually manage their own funds; rather, these funds are managed by a variety of different investment advisors. [90] A given investment fund frequently reviews the performance of its subsidiary advisors, "terminating its relationship with under-performing advisors and substituting in their places those who emerge from ongoing beauty contests." [91] The role of investment advisers in client class action claims is undoubtedly a complicated one that varies from firm to firm. [92]

The study also found that many institutional investors relied on custodian banks to conduct their claim filing, which also changed with relative frequency. [93] The flux in investment advisors and custodian banks is particularly important in that these are often the institutions responsible for back-office duties such as filing claims. [94] It has never been the custom of departing investment advisors or banks to forward trading records necessary to evaluate whether provable claims exist; in essence, information is unavailable to assess the claim-worthiness of a particular trade. [95]

***271** These problems are only compounded when one considers the additional challenges of providing notice of a class action to a terminated investment advisor; not surprisingly, notice, if not lost to the passage of time, is difficult to achieve. [96] Incentives in this complex structure are likewise often perverse in that a terminated advisor is unlikely to reap any benefit for calling a former client's attention to an arisen claim. [97]

The third hypothesis stems from public perceptions of securities class actions, even following the PLSRA, which remain predominantly negative. [98] In general, this perception involves small monetary awards for class members and substantial fees for plaintiffs' attorneys. [99] This is generally supported by recovery statistics that suggest that settlements yield small recoveries of ten cents per each dollar of provable losses. [100] Given this perception, it is understandable why fund managers would be hesitant to devote substantial financial resources to monitoring systems for class action claims.

Some managers might argue that it is not cost-effective to institute such processes, which would include identifying and processing a claim, when weighed against their primary role as securities traders. [101] Cox and Thomas offer no evidence as to the prevalence of this perception among fund managers; however, they do suggest that such concerns may be overstated and/or underexplored given the low administrative costs required to identify and process claims. [102]

The fourth and last hypothesis functions as a catch-all for a lack of monitoring by the management of a given institution. [103] Such failures may be remedied by clearly specifying in the contracts with custodians, advisors, or brokers the procedures for which one should file a claim. [104] Unclear obligations, requirements, and mutual misunderstandings as communicated by financial institutions clearly function as a barrier to effective claim monitoring. The study further suggests that lines of authority are often blurred within institutions. [105]

B. Results of the Cox & Thomas Study

In fact, the Cox and Thomas study spurred a wave of litigation against mutual fund advisers in federal courts across the country for failure to file ***272** claims on behalf of their funds and their shareholders. [106] The claims were brought under the theories articulated by Cox and Thomas against mutual fund companies, individual fund directors and trustees, and fund advisers and sub-advisers, seeking monetary damages, disgorgement of fees, punitive damages, and lawyers' fees. [107] Many of these cases were voluntarily dismissed "because the complaints were based on bad facts" and because the courts were reluctant to take an expansive reading of section 36(a) of the Investment Company Act, as well as other technicalities. [108]

The Securities & Exchange Commission (SEC) reacted to the Cox and Thomas article as well by "seeking information on advisers' procedures for identifying, evaluating and pursuing legal class action claims for securities held in client accounts and related records." [109] The SEC's Office of Compliance Inspections and Examinations (OCIE) sought information on (1) adviser processes for identifying situations in which clients may be eligible to participate in class actions; (2) policies and procedures for such; and (3) the number and amount of previous class action recoveries in which the advisers' clients participated. [110]

Practitioners interpreted these inquiries as a signal to investment advisers that the SEC believed they had a "legal responsibility to monitor for class actions involving their clients' portfolio securities and to decide whether to participate ...." [111] Stone and Helmrich articulate several reasons why acting on class actions exceeds the typical responsibility and authority of investment advisers:

· The authority for handling class action claims rests with the client and does not flow accordingly to the investment adviser unless specified by contract. This comes down to an issue of custom in the drafting of advisory agreements, which do not generally grant power of attorney to the adviser to pursue litigation on behalf of the client. [112]

***273** · Cox and Thomas fail to "parse the fine distinctions between the roles of different in-house and outside fiduciaries." [113] As discussed above, in the mutual fund context, the roles of various advisers, managers, and custodians are defined in a way that is dissimilar to that of, for example, ERISA, which defines the duties of such actors differently vis-a-vis class action participation. [114]

· Whether a client participates in a class action is beyond the expertise and abilities of an investment adviser, who is charged solely with the question of whether investment in a given security is prudent. [115]

Stone and Helmrich sum up their analysis with a series of "Best Practices" for, presumably, '40 Act attorneys and their clients, which suggest careful attention to the contractual obligations of the adviser in its investment adviser agreement, as well as a clear designation of the parties responsible for receiving and transmitting class action notices. [116]

C. Complications Resulting from Opt-Outs: What Does This Mean for Fund Managers?

The recent Cornerstone study looking at opt-out cases in securities class action settlements is the impetus behind this Note. [117] Expanding upon previous work from Stanford's Securities Class Action Clearinghouse, the report provides a comprehensive analysis of publicly available information on securities class actions in which at least one class member has opted to pursue a separate lawsuit against the defendant. [118] The report surveyed ***274** 1,272 securities class action settlements from between 1996 and 2011, identifying thirty-eight settlements in which at least one plaintiff opted to pursue a separate case against the defendant. [119] A summary of the report's key findings follows:

· Plaintiffs were more likely to bring opt-out cases when larger class action settlements were at stake. [120]

· Opt-out settlements represented 12.5 percent of the value of the class action settlements, and a median of 3.8 percent of the value. [121]

· Between 1996 and 2006, there were six cases in which the opt-out settlements represented more than twenty percent of the total settlement value. [122]

· For the period surveyed, Cornerstone found seven opt-out cases with settlements above ten million dollars. [123]

· Pension funds were the most frequent to opt-out, followed by other types of asset management companies. [124]

· Overall and based on the anecdotal evidence obtained in the survey, opting-out carries a greater risk, but with the potential for significantly greater reward, depending upon the circumstances of the case. [125]

In general, most securities class action cases are either dismissed or settled. [126] As the study finds, the amount of the settlement is the greatest predictor of whether opt-outs will follow-as the settlement gets larger, plaintiffs are more likely to opt out. [127] The frequency of opt-outs may increase in light of the U.S. Supreme Court's recent reversal of its decision to hear a case concerning the timing of investor opt-out rights. [128] The ***275** reversal leaves in place a split between the Second and Tenth Circuits as to whether a timely filed class action operates to suspend the statute of limitations as well as the '33 Act's statute of repose. [129] The result of this, as some have suggested, is to encourage litigants in securities class actions who "fear they won't be able to bring their claims after an unfavorable settlement is reached" to opt out. [130] There is currently no indication whether the Supreme Court will reassess this issue in 2015.

In terms of settlement amounts for the publicly available cases surveyed, the average total opt-out was $85.4 million, or 12.5 percent of the average class action settlement in these cases. [131] More specifically,
The largest set of opt-out settlements related to a single case was AOL Time Warner, Inc., where the $764 million of opt-out settlements was 30.6 percent of the size of the class action settlement. The largest opt-out settlement amount as a percentage of the class action settlement was Qwest Communications International Inc., where the $411 million opt-out settlement was 92.4 percent of the final class action settlement. [132]

The study suggests that the potential for larger class action settlements in the future may signal a greater frequency of opt-outs to come. [133] By virtue of their size, these settlements engender significant publicity, as was the case in Time Warner and Qwest.

***276** From a strategic standpoint, the study suggests that fund managers and their custodian banks should pay greater attention to the frequency of such opt-outs, and adjust their management practices accordingly. As discussed earlier, many of the recurring plaintiffs in opt-out cases were pension funds, which accounted for sixteen of the thirty-four cases studied. [134] Fourteen opt-out cases involved mutual funds, hedge funds, or other investment companies. [135] All of these plaintiffs undoubtedly consulted with their legal counsel on the risks and rewards of opting out. Several plaintiffs' law firms have correspondingly published on the topic. [136] As Blair Nicholas and Ian Berg of Bernstein Litowitz Berger & Grossman LLP discuss, "institutional investors should remain selective in the cases they decide to opt out from and carefully consider the upside and downside of the factors impacting the success of a particular opt-out action ...." [137] They further outline the potential factors that sophisticated institutional investors should consider when formulating an opt-out strategy, such as (1) the opportunity for increased recovery, (2) broader claims for recovery in a direct state court action, (3) levels of control over the litigation and settlement, (4) availability of alternative claims, and (5) ability to overcome certain jurisdictional issues, among other factors. [138]

The array of factors that an institutional investor plaintiff should consider in its opt-out strategy is boundless. And while pressure to opt out may increase in the face of large-scale opt-out recoveries in the news, institutional investors should be equally mindful of the risks of pursuing individual claims. [139] This means a "thorough factual and legal analysis of the merits of the potential opt-out claims for recovery ...." [140] The question ***277** arises whether an institutional investor can be held liable for failure to engage in such a comprehensive analysis with respect to opt-out possibilities. One might also ask whether an institutional investor can be held liable for failing to opt out when it is clear that doing so would reap a greater settlement award (in some cases, perhaps as large as the overall class action settlement). And lastly, if an institutional investor takes a risk and opts out only to receive nothing, should beneficiaries be able to sue for their estimated portion of the class action settlement? The following discussion suggests a legal framework within which to consider these questions.

D. Caremark, the Duty of Good Faith, and Monitoring Obligations

1. Caremark Background

Given the dearth of scholarship related to class action claim filing and the role of fund managers, [141] it is difficult to devise an appropriate legal standard with which to analyze their duties in the opt-out context. While traditional approaches to the duty of loyalty and duty of care may be applicable or instructive in some cases, Cox and Thomas suggest that Caremark should be the appropriate standard. [142] Although not entirely distinguishable from the canon of duty of care and loyalty cases, Caremark stands for the proposition that corporate officers have a duty to make a good faith effort to assure that corporate information and reporting systems are adequate and up-to-date, and that failure to do so may render a director liable for losses. [143]

Caremark involved employees' alleged violations of federal and state laws governing health care providers, namely the Anti-Referral Payments Law (ARPL), which prohibits health care providers from paying remuneration to induce Medicare and Medicaid patient referrals. [144] Caremark was actively involved in contracting for services through consultation agreements and research grants with physicians, who then recommended Caremark products and services to Medicare and Medicaid patients. [145]

Caremark's uniqueness stems from the company's pre-existing internal controls, as well as its actions following investigations by both the United ***278** States Department of Health and Human Services (HHS) and the Department of Justice (DOJ). [146] Prior to both investigations, Caremark had distributed an intra-company Guide to Contractual Relationships to all employees, which set forth the company's policy that "no payments would be made in exchange for or to induce patient referrals." [147] Furthermore, Caremark asserted that in the year prior to the commencement of the DOJ action, it had made active attempts to increase supervision and oversight by centralizing its management structure. [148] Once the investigations were initiated, Caremark instituted multiple corporate actions aimed at improving its employee monitoring mechanisms overall. [149]

The company ultimately entered into a settlement agreement with federal authorities and several private insurance companies in which no senior officers or directors were charged with corporate wrongdoing. [150] The settlement terms proposed, among other provisions: (1) that Caremark undertake not to pay any compensation to third parties, physicians, or business combinations in which it had a financial interest in exchange for referrals; (2) that the Board semi-annually discuss material changes in government healthcare regulations and their effect on relationships with healthcare providers; (3) that patients receive written disclosure of any relationship between Caremark and health care providers making referrals; (4) that the Board establish a compliance and ethics committee to monitor business segment compliance with the APRL; and (5) that corporate officers responsible for various business segments report to the compliance and ethics committee and get advanced approval of any new forms of contract. [151]

2. Legal Standards

The court in Caremark reviewed the settlement terms to determine whether they were "fair and reasonable," ultimately concluding that they ***279** were in light of their perceived "positive consequences," regardless of what the court identified as an overall "weakness of the plaintiffs' claims." [152] In discerning an appropriate legal standard under which to judge the settlement, the court acknowledged that the complaint "[did] not charge either director self-dealing or the more difficult loyalty-type problems arising from ... suspect director motivation ...." [153] The court highlighted the appropriate standard for duty of care cases, which is "whether there was good faith effort to be informed and exercise judgment," [154] noting that this formulation does not necessarily apply to the Caremark case.

Rather, the court considered liability for the failure to monitor in the Caremark context, which implicated a loss not as a result of a particular decision made by management, but rather from unconsidered action. [155] This alternative theory recognizes that the vast majority of the decisions that a corporation makes stem from its employees acting on its behalf as agents, not from corporate officers. [156] Because the actions of agents-whether they are employees, traders, or fund managers-inevitably have the ability to affect the welfare of the corporation, the appropriate inquiry should be to ask, "what is the board's responsibility with respect to the organization and ***280** monitoring of the enterprise to assure that the corporation functions within the law to achieve its purposes?" [157] The claim, in such a case, is that the directors or officers should have known about the insubordinate behavior of its employees, and if they had known, then they would be under a fiduciary duty to bring the employees into compliance and spare the company the loss. [158]

The court in Caremark revisited its previous ruling in Graham, concluding that corporate boards cannot satisfy their obligation to be reasonably informed about corporate activities (including those of its agents)
without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance. [159]

Articulating the new standard, Chancellor Allen concluded that directors have a duty to attempt in good faith to assure (1) that corporate information gathering and reporting systems exist, (2) that the board has concluded that such reporting systems are adequate, and (3) that failure to do so-under circumstances not articulated in Caremark-may render a director liable for losses. [160] Admittedly, this test for liability presents a high burden, requiring a "lack of good faith as evidenced by sustained or systematic failure of a director to exercise reasonable oversight ." [161]

The Delaware Supreme Court goes on to explain that a demanding test for liability in cases like Caremark is justified in the oversight context, and is beneficial overall to classes of shareholders in that it "makes board service by qualified persons more likely, while continuing to act as a stimulus to good faith performance of duty by such directors." [162] This notion ***281** of encouraging qualified and competent leaders to serve on boards and in management roles is one that comes up frequently in the fiduciary duties cases and serves as a relevant consideration in the context of opt-outs.

Affirming and clarifying the court's ruling in Caremark, Stone v. Ritter explicitly approved the standard for oversight liability. [163] The court outlined the necessary conditions for director oversight liability:

> (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.... Where directors fail to act

> in the face of a known duty to act ... they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith. [164]

Decisions since Stone have not added much additional factual or legal basis for determining when and under what circumstances a fiduciary's failure to act constitutes a breach of duty. [165] Most recently in In re Citigroup Shareholder Derivative Litigation, the Court of Chancery of Delaware seemed to signal a retreat to the business judgment rule instead of extending the director oversight liability to claims alleging failure to monitor business risk. [166]

The case involved Citigroup's participation in the subprime mortgage market in the years leading up to the 2008 financial crisis and whether the board ignored "red flags" resulting in inappropriate business risk. [167] The court acknowledged and affirmed the duties of oversight that emerged from Caremark, but was reluctant to extend them to the factual circumstances of the case. [168] Rather, the court suggested that the theory should be constrained to those cases that do not look to make directors "personally liable for making (or allowing to be made) business decisions that, in hindsight, turned out poorly for the Company." [169] The court held that the obligation to implement and monitor a system of oversight

does not eviscerate the core protections of the business judgment rule-protection designed to allow corporate managers and directors to pursue ***282** risky transactions without the specter of being held personally liable if those decisions turn out poorly.... [T]he burden to show bad faith is even higher.... [A]nd the difficulty of proving a Caremark claim ... function[s] to place an extremely high burden on a plaintiff to state a claim for personal director liability for a failure to see the extent of a company's business risk. [170]

In sum, there is no doubt that Delaware courts, as the preeminent creators and enforcers of corporate law, recognize an obligation of good faith in connection with corporate monitoring and oversight systems following Caremark and Stone. Nevertheless, the particular factual circumstances under which a director or officer may be held liable under this theory remain unclear, as does the degree to which that theory might be extended to other contexts, such as the monitoring of class action claims. As Citigroup suggests, at least in recent years, Delaware courts are unlikely to extend monitoring standards to factual circumstances that would otherwise receive traditional business judgment rule treatment. This careful balancing of the business judgment rule alongside Caremark and its progeny gets at the heart of this Note and the unique circumstances that influence a fund manager's decision to opt out of a class action.

III. Should Fiduciary Duties Extend to Class Action Opt-Out Scenarios?

A. Caremark in the Opt-Out Context: Expanding Monitoring Obligations?

In discussing whether fiduciaries should be exposed to liability for failure to monitor the risks and rewards of opt-outs, I begin by setting forth a potential claim under the Caremark standard. Accordingly, I address a host of issues unique to securities class actions that make such an extension of liability inappropriate.

Again, it is worth noting that fiduciary duties have never been extended to the claim filing process, neither to encourage investment fund managers to file claims in the first place nor to impose additional duties to assess recovery prospects in connection with a potential opt-out. [171]

***283** 1. Failure to Implement Monitoring Systems

As the law currently stands under Caremark, a claim against an investment fund fiduciary would have to allege that the directors failed to implement any monitoring or information system or controls with respect to claim monitoring. [172] This clearly fits

more squarely with the obligations suggested by Cox and Thomas: "[I]n order to satisfy their oversight responsibilities, the trustees of institutional investors must, in good faith, insure that their fund has an adequate system in place to identify and process the funds' claims." [173]

Cox and Thomas go on to claim that the standard is in no way onerous, which is compelling in the case of "opt-ins," although much less so in the case of opt-outs. [174] Recognizing the differences between the two alternatives at issue, it is much easier to argue that monitoring obligations extend to some activity that actually involves some form of monitoring, that is, staying abreast of potential claims to which the fund might be entitled to recover as a class member. This type of monitoring would not require drastic alterations in business practice, [175] and would likely only reshape the roles of current employees involved in the fund's daily trading activities. [176]

As a practical matter, the Delaware courts would first have to recognize a fiduciary duty to file claims in a securities class action before it would be possible to extend the theory any further. Alleging failure to implement a particular system related to opt-outs would not only presume the existence of a well-functioning system to process and track claims initially, but would also prove unduly onerous when compared with the system advocated for by Cox and Thomas. [177] All of the steps that they outline to achieve better monitoring practices in this context, with the exception of creating a centralized clearing house, serve as mere modifications to existing systems. [178] For example, 13F filing requirements already exist, regardless of whether institutions abide by them. Nudging fund managers toward compliance ***284** under existing frameworks presents a much more feasible solution than one which requires development of an entirely new system altogether.

Opt-outs involve an inherent level of uncertainty and risk that makes them unfit for traditional fiduciary liability. To be sure, very few plaintiffs' law firms currently in practice offer opt-out counseling and analysis as a substantive practice area. [179] Of those that do, many go out of their way to stress the degree of balancing that an opt-out analysis requires. [180] Without question, there is a potential for greater recovery; however, with the potential for similar losses, there is little reason to thrust such a calculus upon a given fund manager. [181]

The other issue that stems from extending this duty to fund managers is the degree to which a fiduciary's decision-making process would still be subject to the business judgment rule. Imagine a scenario where the fund manager, acting as trustee on behalf of his investor clients determines, based on his own calculus, that it would be advantageous to opt out of a particular class action and pursue a separate private action in the hopes of gaining a greater recovery. He acts on this calculation, and it turns out that his separate action is not permitted. The plaintiff beneficiary receives nothing. Should the fiduciary be liable for the extent of the damages that would have been recovered had he not opted out? The flip side of this hypothetical is that corporate actions by fiduciaries are generally subject to the business judgment rule [182] and would be given deference under that standard, even if they resulted in an aggregate loss. Nevertheless, requiring fund managers to increase their level of risk taking in an activity that currently lacks scholarly or legal acceptance is problematic.

2. Failure to Monitor Systems Once Implemented

The alternative to the "failure to implement" claim under Caremark would be to argue that after having implemented such a system or controls, the fiduciary consciously failed to monitor or oversee its operations, ***285** thus failing to discharge his or her duty of good faith. [183] Similarly, this claim rests on the preexistence of some sort of monitoring system, one that would both identify claims as they arise, and then weigh their subjective risks and rewards. [184] Given the dearth of current scholarship on opt-out valuation, [185] it is unlikely that such a claim would prevail under Delaware law as it stands.

Beyond the inapplicability of Delaware law, the fundamental policy rationales behind Rule 23 and the PSLRA likewise point away from extending fiduciary duties. [186] As discussed previously, the class action is a device meant to solve a collective

action problem that recognizes both individual plaintiff and defendant limitations in light of large-scale damages. [187] Anything that diminishes the predictability of the class action model or that systematically undermines its ability to distribute limited settlement funds, is likewise contrary to Congressional intent in drafting the rules.

Conclusion

"Letting Billions [of dollars] Slip Through [anyone's] Fingertips," as the Cox and Thomas title indicates, in whatever context, is cause for alarm for those who may have access that money. As previously discussed, in the securities class action space, the primary market participants who are concerned with foregone settlement profits are large institutional investors who manage vast portfolios on behalf of smaller investors. Given the sums at stake in today's securities fraud settlements- and the even greater sums potentially available to opt-out plaintiffs-there is little doubt that fund managers with claims in securities class actions should be actively engaged in the process on behalf of their beneficiaries. This Note concurs with the thrust of the Cox and Thomas article, that extending fiduciary liability to fund managers to monitor class action claim filing would be minimally invasive in terms of adopting and integrating new policies, and would yield a positive result for both managers and investors. Delaware law has already extended such duties to similar factual circumstances in Stone and Caremark; thus, it would not signal a significant legal departure from existing case law. Furthermore, it would satisfy expectations of most investors who entrust ***286** their fund managers with the task of maximizing their portfolios through prudent management.

Despite the growing trend of opting out of securities class actions, fiduciary duties as the courts have traditionally recognized them are not the proper vehicles to ensure that plaintiffs receive the maximum recovery. Opting out-despite its potential rewards-may be incompatible with the fund manager's fiduciary role. Under a regime that scrutinizes managers' assessment of opt-out risks and rewards, managers may be incentivized to risk significant portfolio value on the possibility of success in a direct action, rather than relying on a proportional share of the class action settlement. Moreover, on the aggregate, extending fiduciary duties to the opt-out sphere would likely encourage strategic behavior, particularly among the largest institutional investors, which would undermine the collective benefits of the class action system-either so many plaintiffs would opt out that settlements would be frequently vacated, or the pool of assets available for recovery would become less certain overall. Under this scenario, unsophisticated investors without the financial resources to opt out would likely suffer, as would the judicial system as a whole.

Perhaps the most compelling argument against extending fiduciary duties is that Delaware law as it stands does not properly square with the factual circumstances necessary to bring an action for failing to opt out, or as a more extreme example, opting out and then receiving nothing. Monitoring is reasonable in the opt-in context for which systems can be readily developed to file class action claims, the risks are minimal to investors, and the probability of increasing the value of the underlying portfolio is nearly certain. It would be impractical to encourage the development of monitoring systems to assess the risk of opting out given the complexity of the risk calculus, and the many other factors that may influence a given institutional investor's probability of success. A prudent fund manager with substantial resources would engage legal counsel to explore opt-out possibilities, but he or she should not be liable for choosing not to do so, or for preferring the predictability of the existing class action proceeding.

Footnotes

a1 J.D. Candidate, 2015, William & Mary Law School; A.B., 2011, Dartmouth College. Many thanks to my parents, Robert and Kristen Shea, and my sister, Leah Shea, for their support throughout my legal education, and to the outstanding staff and editorial board of the William & Mary Business Law Review for their assistance in preparing this Note.

1 Securities Class Action Services, Institutional Shareholder Services Inc. (ISS), http://www.issgovernance.com/governance-solutions/securities-class-action-services/ (last visited Jan. 24, 2015). ISS, which is the source of much of the data in this Note, is a large proxy advisory and corporate governance firm. In March of 2014, ISS was acquired by Vestar Capital Partners, a leading middle-market private equity firm. See Vestar Capital Partners Completes Acquisition of Institutional Shareholder Services, Reuters (Apr. 30,

2014, 11:51 AM), http://www.reuters.com/article/2014/04/30/ny-vestar-capital-idUSnBw306292a+100+BSW20140430 (including company profiles of both ISS and Vestar).

2 See Cornerstone Research, Securities Class Action Filings, 2013 Year in Review 1 (2014), available at http://securities.stanford.edu/research-reports/1996-2013/Cornerstone-Research-Securities-Class-Action-Filings-2013-YIR.pdf [hereinafter 2013 Cornerstone Report] ("Plaintiffs filed 166 new federal class action securities cases (filings) in 2013-fourteen more than in 2012. This number is 13 percent below the historical average of 191 between 1997 and 2012.").

3 See Securities Class Action Services, The SCAS 100 for 1H 2014, Institutional Shareholder Services, Inc. 4 (2014), available at http://www.issgovernance.com/library/securities-class-action-services-top-100-settlements-1h-2014/ (listing the top 100 settlements as of July, 2014).

4 See id. at 11 (listing institutional lead plaintiff participation for the top 100 settlements).

5 See James D. Cox & Randall S. Thomas, Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements, 58 Stan. L. Rev. 411, 412 (2005). The Cox and Thomas study was the first to explore the fiduciary obligations of fund managers in this context. Their study was empirical in nature, although the authors openly acknowledge their small sample size. Id.

6 Id. at 413; see infra Part II.

7 Id. (citing In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)).

8 Id.

9 See, e.g., About Class Actions, Spector Roseman Kodroff & Willis, P.C. (2011), http://www.srkw-law.com/about-class-actions.html ("While the duties of an institutional investor will depend greatly on the jurisdiction where the investor is located and on the specific facts of the situation, acting as Lead Plaintiff may help ensure that the trustees of the fund are discharging their fiduciary duties."); Leaving Money on the Table? Investment Advisor Responsibility for Client Class Action Claims, Edwards Wildman LLP (Apr. 10, 2005), http://www.edwardswildman.com/insights/PublicationDetail.aspx? publication=3426 ("Advisors should now be reviewing existing advisory relationships and establishing and implementing new procedures ....").

10 See Amir Rozen et al., Opt-Out Cases in Securities Class Action Settlements, Cornerstone Research 1, 1 (2013), available at http:// www.cornerstone.com/getattachment/7cf8bd53-9e0b-45be-b4b3-3d810dfe2be3/Opt-Out-Cases-in-Securities-Class-Action-Settlemen.aspx. This study was a joint effort of Cornerstone Research and Latham & Watkins to analyze public information regarding judgments and settlements from opt-outs between 1996 and 2011. Id.

11 See id. at 5.

12 Id. ("In addition to giving up their share of the class action settlement ... the plaintiffs were forced to pay the defendant's legal fees.").

13 This Note does not distinguish at great length between managers of specific types of funds or consider their qualification as investment advisers under the Investment Advisers Act. Rather, the discussion broadly refers to "fund managers" as those individuals who are responsible for implementing a fund's investing strategy and managing its portfolio. These individuals serve as the trustees on behalf their investors. See generally Definition of Fund Manager, Investopedia, http://www.investopedia.com/terms/f/fundmanager.asp.

14 See Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985); McPadden v. Sidhu, 964 A.2d 1262, 1273 (Del. Ch. 2008); In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

15 See Cox & Thomas, supra note 5, at 413.

16 Furthermore, this Note does not distinguish between various levels of risk that may attach to specific funds. Of course, behavior that is proper for a high-risk investment fund may be inappropriate for certain low-risk pension funds. Acknowledging these distinct risk profiles further supports the conclusion of this Note, as its discussion of fiduciary duties proceeds with the low-risk pension fund manager in mind. For a greater discussion of duty of care cases, see infra note 128.

17 See 2013 Cornerstone Report, supra note 2, at 3.

18 Id. at 1.

19 See, e.g., Adam Liptak, New Hurdle in Investors' Class Actions, N.Y. Times (June 23, 2014), http://www.nytimes.com/2014/06/24/business/Justices-rule-on-class-actions-for-securities-fraud.html?_r=0 (discussing the Supreme Court's controversial ruling in Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014), which was considered a minor victory for corporate defendants at the expense of investor plaintiffs seeking to bring class action claims); Greg Stohr, Investor Class Actions Seen at Risk in Halliburton Case, Bloomberg (Feb. 27, 2014), http://www.bloomberg.com/news/2014-02-27/investor-class-actions-seen-at-risk-in-halliburton-case.html (referring to the Supreme Court's grant of certiorari in Halliburton).
Securities fraud cases have become an industry unto themselves even as Congress has tried to rein them in. More than 4,000 class-action suits have been filed since 1996, producing almost $80 billion in settlements .... Accords involving Enron Corp. and WorldCom Inc. alone totaled more than $13 billion, and Bank of America Corp. last year agreed to pay $2.4 billion to settle investor claims over its Merrill Lynch & Co. acquisition. Pfizer Inc. (PFE), Vivendi SA and Amgen Inc. (AMGN) are among the companies with pending lawsuits that could be affected by the high court case.
Id.; see generally Brief for Financial Economists as Amici Curiae in Support of Respondents, Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423 (5th Cir. 2013) (No. 13-317); Brief for DRI-The Voice of the Defense Bar as Amicus Curiae in Support of Petitioners, Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423 (5th Cir. 2013) (No. 13-317).

20 See Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. 105-353, § 16(b)-(c), 112 Stat. 3227, 3228 (codified as amended at 15 U.S.C. § 78bb(f)(2012)).

21 See Kevin M. LaCroix, Rare Securities Suit Trial Produces Jury Verdict Against Former Longtop Financial CEO, The D&O Diary (Nov. 24, 2014), http://www.dandodiary.com/2014/11/articles/securities-litigation/rare-securities-suit-trial-produces-jury-verdict-against-former-longtop-financial-cfo/ (“[T]rial in securities class action lawsuits [are] extremely rare .... [[T]here have been only 24 securities class action lawsuits that have gone to verdict since Congress enacted the [PSLRA].”). LaCroix estimates that less than half of one percent of all cases filed during this period have gone to trial. Id. He explores various explanations for this settlement preference beyond the fear of an exorbitantly large jury verdict, e.g., fraud exclusions in D&O insurance policies. Id.

22 See 2013 Cornerstone Report, supra note 2, at 1.

23 See Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, at 1, July 21-22, 2000 [hereinafter Alexander Presentation]; see generally Fed. R. Civ. P. 23.

24 See, e.g., Alexander Presentation, supra note 23; Bernstein Litowitz Berger & Grossman, Litigating Securities Class Actions § 1.01 (2014) (providing a history of securities class actions beginning with the 1966 amendments to Rule 23).

25 Id. at 1.

26 Id.

27 Id.

28 Id.

29 Id. at 2.

30 Fed. R. Civ. P. 23.

31 See Alexander Presentation, supra note 23, at 2-3.

32 See generally Bernstein, supra note 24.

33 See Securities Act of 1933, 15 U.S.C. § 77q (2012); Exchange Act of 1934, 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2014).

34 A corporation may be liable for violations of the Exchange Act based on the definition of “person” under Section 3(a)(9). See 15 U.S.C. § 78c (2012). Section 20(a) gives rise to joint and several liability for a person who controls any person liable under the Exchange Act. See 15 U.S.C. § 78t (2012). It is worth noting that some courts have imposed 10b-5 liability under the tort doctrine of respondeat superior, which renders an employer liable for wrongs by an employee committed within the scope of employment.

See generally Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990); In re Network Equip. Tech., Inc., Litig., 762 F.Supp. 1359 (N.D. Cal. 1991).

35 15 U.S.C. § 77q(a) (2012) (emphasis added).

36 15 U.S.C. § 78j(b) (2012) (emphasis added).

37 Id.

38 United States v. O'Hagan, 521 U.S. 642, 651 (1997).

39 17 C.F.R. § 240.10b-5 (2014).

40 See, e.g., Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005).

41 See Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).

42 See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

43 See Bernstein, supra note 24, at § 1.01[1][a].

44 Id. at § 101.1[1][b].

45 These requirements include numerosity of the class, commonality of legal or factual questions, adequacy of representative plaintiffs, and the requirement "that the questions of law or fact common to class members predominate over any questions affecting only individual members," and that the class action is superior to other available methods of adjudication. Id.

46 Id. at § 101.1[2][i].

47 See Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

48 See Bernstein, supra note 24, at § 101.1[2][i][i].

49 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007).

50 See, e.g., GSC Partners CDO Fund v. Washington, 368 F.3d 228, 237 (3d Cir. 2004); Kalnit v. Eichler, 264 F.3d 131, 138-39 (2d Cir. 2001).

51 See Alexander Presentation, supra note 23, at 8.

52 About Class Actions, Spector Roseman Kodroff & Willis (2011), http://www.srkw-law.com/about-class-actions.html.

53 See Alexander Presentation, supra note 23, at 7.

54 See supra note 49.

55 See Alexander Presentation, supra note 23, at 7.

56 Id.

57 Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992); see Fed. R. Civ. P. 23(a).

58 See Middlesex Ret. Sys. v. Quest Software, Inc., No. 06-6863, 2009 U.S. Dist. LEXIS 132650, at *6, (C.D. Cal. Sept. 8, 2009).

59 Id.; see also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233 (9th Cir. 1996) (finding decertification is appropriate where the rigorous analysis standard is not met); In re Am. Med. Sys., 75 F.3d 1069, 1079 (6th Cir. 1996) (finding mere designation as a class in the pleading does not suffice to maintain a class action); Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977) (finding class certification requires a statement of basic facts in addition to the Rule 23 allegations).

60 See Fed. R. Civ. P. 23(b).

61 See Fed. R. Civ. P. 23(c)(1); see also Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 877-78 (11th Cir. 1986) (finding the district court has broad discretion in interpreting the prerequisites for class certification).

62 See Yamamoto v. Omiya, 564 F.2d 1319, 1325 (9th Cir. 1977); see also Schwartz v. Harp, 108 F.R.D. 279, 281 (C.D. Cal. 1985) (discussing the policies underlying Rule 23).

63 See Alexander Presentation, supra note 23, at 9.

64 See id.

65 See id.; see also, e.g., In re Cmty. Bank of N. Va., 418 F.3d 277, 318 (3d Cir. 2005) (finding opt-outs by a specific percentage of the class members in a mortgage fraud class action may allow the settling defendants to terminate the settlement), vacated and remanded on other grounds.

66 See Alexander Presentation, supra note 23, at 9; see also, e.g., In re Cmty. Bank of N. Va., 418 F.3d at 286.

67 See Alexander Presentation, supra note 23, at 9.

68 See Fed. R. Civ. P. 23(c)(1).

69 See Fed. R. Civ. P. 23(c)(3); see also Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 548-49 (1974) ("[I]n Rule 23(b)(3) actions the judgment shall include all those found to be members of the class who have not requested exclusion.").

70 See Fed. R. Civ. P. 23(e).

71 See Franklin v. Kaypro Corp., 884 F.2d 1222, 1225 (9th Cir. 1989).

72 See Manual for Complex Litigation (Fourth) § 13.11 (2004).

73 See Alexander Presentation, supra note 23, at 9.

74 See id. at 8.

75 See Fed. R. Civ. P. 23(e)(2); see also Armstrong v. Bd. of Sch. Dirs., 616 F.2d 305, 314 (7th Cir. 1980) (holding that district court's review of a class action settlement includes a preliminary, pre-notice hearing and a fairness hearing at which class members and all interested parties have an opportunity to be heard), overruled by Felzen v. Andreas, 134 F.3d 873, 875 (7th Cir. 1998) on other grounds; Alexander Presentation, supra note 23, at 9.

76 See Alexander Presentation, supra note 23, at 9.

77 See, e.g., Jeff G. Hammel & B. John Casey, Sizing Securities Fraud Damages: 'Constant Percentage' on Way Out?, 241 N.Y.L.J. 1, 1 (2009).

78 See id.

79 See id. at 1-2. For a greater discussion of damage calculations in the securities context, see Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 343 (2005) (finding considerations in economic loss calculation may include not only an inflated purchase price but also other factors, such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events .").

80 See, e.g., John D. Finnerty & Gautam Goswami, Determinants of the Settlement Amount in Securities Fraud Class Action Litigation, 2 Hastings Bus. L.J. 453, 461, 479 (2006) (explaining an empirical study involving data sets between 1995 and 2005 indicates that the settlement amount averages approximately 3.60% of the estimated damages).

81 See Cox & Thomas, supra note 5, at 425. Part II of that article delves deeper into the settlement methodology and results, which involves, among other information-gathering tactics, conversations with market participants. For the purposes of this Note, we set aside the in-depth methodology and raw results of the authors' study.

82 Id.

83 See id. The study notes that a host of regulatory efforts have aimed to shape the incentives of fund managers, particularly those related to proxy rules and significant shareholder disclosures for publicly traded companies. See id. at 425-26.

84 See id. at 427.

85 See id.

86 Id. Cox and Thomas note that no recorded case exists where a bank or insurance company acted as lead plaintiff in a securities class action case. Id. They also note the prevalence of "strike suits" and recognize that institutions may have perverse incentives to participate in a case that they believe is just extorting the company. Id.

87 See id. at 428 ("[S]ubmitting claims is likely to be viewed as subsidiary to what the firm perceives to be its primary operations.").

88 See id. at 429.

89 See id.

90 See id.

91 Id.

92 See infra note 109 and accompanying text.

93 See Cox & Thomas, supra note 5. at 429.

94 See id.

95 See id.

96 See id. at 430.

97 See id.

98 See id.

99 See id.

100 See id.

101 See id. at 431.

102 See id.

103 See id. at 432.

104 See id.

105 See id.

106 See Steven Stone & Ryan F. Helmrich, The Role of Investment Advisers in Client Class Action Claims, 12 The Investment Lawyer 10, at 17 (2005). Stone and Helmrich note that this series of lawsuits identified over 130 class actions for which mutual fund advisers failed to submit proofs of claims to collect settlement proceeds. Id.

107 Id.

108 Id. at 18. As of publication in 2005, Stone and Helmrich note that "this may signal the beginning of the end of the recent wave of class actions against large fund groups and their advisers on processing class action claims ...." Id.

109 Id.

110 Id.

111 Id. ("[I]t is troubling when the OCIE enters the fray, hinting at responsibilities that are not established as a matter of law ....").

112 Id. at 18-19 ("[S]uch authority [to execute a proof of claim], for example, 'cannot be established by stockbrokers only demonstrating that they have discretionary authority to trade stock in anothers' accounts."').

113 Id. at 19.

114 Id. It is worth noting that Stone and Helmrich, though not directly addressing the question of manager responsibilities, acknowledge that managers may have fiduciary duties to participate in class actions: "This position does not invariably mean that this responsibility flows with the appointment of an investment manager down to an adviser ...." Id.

115 Id. at 19-20. In relation to this argument, Stone and Helmrich make note of the complicating analysis posed by opt-outs, which they assume as a matter of fact is well beyond the expertise of an investment advisor. Id. at 20.

116 Id.

117 See Rozen, supra note 10, at 1; see also Opt-Outs: A Worrisome Trend in Securities Class Action Litigation, 2 OakBridge InSights, 1, 1 (2007), http://clients.oakbridgeins.com/newsletters/April_Opt-OutsAWorrisomeTrendinSecuritiesClassActi (suggesting in response to the massive Time-Warner opt-out that the "recent wave of ... opt-out settlements could completely change the way securities fraud lawsuits are resolved in the future").

118 See Rozen, supra note 10, at 1.

119 Id.

120 Id. Of those cases with settlements of $500 million or more, fifty-three percent involved an opt-out case, compared with three percent of all securities class actions. Id.

121 Id.

122 Id.

123 Id.

124 Id.

125 Id.

126 Id. at 2.

127 Id. at 3. The study notes that this may not be indicative of trends in securities class actions throughout the course of recent history. Id. For example, following the Private Securities Litigation Reform Act in 1995, studies suggested that plaintiffs opted out of class actions for other reasons than to pursue their own legal action. Id. at 2.

128 See Stephanie Russell Kraft, Securities Cases to Watch in 2015, Law360 (Jan 2, 2015, 3:07 PM), http:// www.law360.com/articles/600266/securities-cases-to-watch-in-2015 ("In a brief order, the high court dismissed as improvidently granted its writ of certiorari to the Public Employees' Retirement System of Mississippi, which had been looking to overturn a 2013 Second Circuit decision that blocked it and other plaintiffs from intervening in a putative class action accusing IndyMac [and others] of misrepresenting certain mortgage-backed securities.").

129 Id.

130 Id. (quoting Stephen Tountas, founding partner at Bleichmar Fonti Tountas & Aud LLP: "With what's in play right with IndyMac, any opt-out that happens after the statute of limitations and statute of repose runs the risk of getting nothing"); see also Kevin LaCroix, The Top D&O Stories of 2014, The D&O Diary (Jan. 6, 2015), http:// www.dandodiary.com/2015/01/articles/director-and-officer-

liability/the-top-ten-do-stories-of-2014-2/ (“If the filing of a class action lawsuit does not toll the statute of repose, current practice regarding class action opt-outs could be significantly affected.”).

131 See Rozen, supra note 10, at 2. These numbers are skewed by the small sample size and wide distribution of settlement amounts.

132 Id.

133 Id. at 3; see also Bailey Cavalieri LLC, Securities Class Action Opt-Out Claims: A Growing Problem, available at http:// www.baileycavalieri.com/articles.html (discussing the growing trend in opt-outs and its implications for director and officer defendants).
The trend of institutional opt-outs is likely to continue as institutions are able to leverage greater settlements than they would as members of a class, as plaintiffs' counsel are able to reap huge fees in the opt-out claims, and as elected officials who control some of the public institutional investors tout the financial benefits of their recoveries for political gain.
Id.

134 See Rozen, supra note 10, at 3. Seven of nineteen cases brought between 1996 and 2005 involved the Florida State Board of Administration. Id.

135 Id. (“Fifteen opt-out cases involved individual shareholders who were not identified as former employees or subsidiaries, and four involved shareholders of companies that were brought by or otherwise affiliated with the defendant.”).

136 See, e.g., Blair A. Nicholas & Ian D. Berg, Why Institutional Investors Opt-Out of Securities Fraud Class Actions and Pursue Direct Individual Actions, Prac. Law Inst. (Oct. 15, 2009), available at http:// www.blbglaw.com/news/media_mentions/00104.

137 Id. at 7.

138 See id. for a greater discussion of the less obvious benefits of opting out. The myriad jurisdictional and governance related benefits discussed by Nicholas and Berg are beyond the scope of this Note; however, they serve to further highlight the complex calculus that institutional investors should engage in when confronted with a large-scale securities class action.

139 Id. Nicholas and Berg discuss the opportunity for increased recovery in the context of the highly publicized AOL/Time Warner, Qwest, and Tyco International securities litigations. Id. at 2.

140 Id. at 7.

141 See generally Bernard S. Black, The Value of Institutional Investor Monitoring: The Empirical Evidence, 39 UCLA L. Rev. 895 (1992); Cox & Thomas, supra note 5; Jonathan R. Macey & Geoffrey P. Miller, The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991).

142 See Cox & Thomas, supra note 5, at 439-40.

143 In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969 (Del. Ch. 1996).

144 Id. at 960.

145 Id. at 962.

146 Id. at 965.

147 Id. at 962. The case further notes that general confusion existed amongst Caremark's management as to the legality of their contracting activities, even though they were unaware of any kickbacks or remuneration. Id.

148 Id.

149 Id. at 962-63. Among these actions, Caremark: (1) announced that it would no longer pay management fees to physicians for services to Medicare and Medicare patients; (2) revised and published an updated version of its Contractual Relationships Guide, requiring regional officers to approve transactions entered into with physicians; (3) hired PriceWaterhouse to conduct an assessment of its

control structure (of which they found no material weaknesses); and (4) increased staff education with regard to the ARPL and use of Caremark's form contracts. Id.

150 Id. at 965.

151 Id. at 966.

152 Id. at 970, 972.

153 Id. at 967 (“The theory here advanced is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment. There are good policy reasons why it is so difficult to charge directors with responsibility for corporate losses for an alleged breach of care, where there is no conflict of interest or no facts suggesting suspect motivation involved ....”) (citing Gagliardi v. Tri-Foods Int'l Inc., 683 A.2d 1049, 1051 (Del. Ch. 1996)). There are two contexts in which breach of fiduciary duty may arise in connection with a corporate loss: (1) from a situation in which the Board makes a decision that results in loss because that decision was either ill-advised or negligently made; or (2) from a failure of the Board to act in a situation in which due attention would have prevented a loss. See Veasey & Seitz, The Business Judgment Rule in the Revised Model Act, 63 Tex. L. Rev. 1483, 1484-93 (1985). See generally Stone v. Ritter, 911 A.2d 362 Del. 2006); In re Walt Disney Co. Deriv. Litig., 906 A.2d 27 (Del. 2006); In re Soporex, Inc., 463 B.R. 344, 367 (Bankr. N.D. Tex. 2011) (discussing how the duty of loyalty now encompasses cases where the fiduciary fails to act in good faith). As the Soporex court notes, the duty to act in good faith is relatively uncharted, even given the wealth of case law addressing it. Id. at 368.

154 Caremark, 698 A.2d at 968 (summarizing Judge Learned Hand's formulation in Barnes v. Andrews, 204 N.Y.S. 326 (N.Y. App. Div. 1924)). The court discusses duty of care cases at greater length in the context of the business judgment rule. Id. While the breadth of case law surrounding the business judgment rule is beyond the scope of this Note, the Caremark court notes that a proper understanding of the rule's application requires “consideration of the good faith or rationality of the process employed [by the Board].” Id. at 967 (discussing Aronson v. Lewis, 473 A.2d 805 (Del. Supr. 1984)).

155 Id.

156 Id. at 968.

157 Id. at 968-69.

158 See, e.g., Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 132 (Del. 1963). Notably in Graham, the court found no basis for concluding that the directors had breached their fiduciary duty to remain informed of the ongoing operations of the firm, based on the facts presented. Id. Graham represents the Delaware Supreme Court's initial reluctance to extend director liability to cases involving failure to monitor. Id. As the court in Caremark points out, more recent case law with regard to takeovers highlighted the evolving role of the corporate board, and the increased monitoring obligations required of board members. 698 A.2d at 970 (citing Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Paramount Communications v. QVC Network, 637 A.2d 34 (Del. 1994)).

159 Caremark, 698 A.2d at 970.

160 Id.

161 Id. at 971.

162 Id.

163 Stone v. Ritter, 911 A.2d 362, 369-70 (Del. 2006).

164 Id. at 370.

165 See, e.g., In re Massey Energy Co., No. 5430-VCS, 2011 Del. Ch. LEXIS 83, 2011 WL 2176479 (Del. Ch. May 31, 2011); Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009); Desimone v. Barrows, 924 A.2d 908 (Del. Ch. 2007).

166 964 A.2d 106, 129-30 (Del. Ch. 2009).

167 Id. at 124.

168 Id.

169 Id.

170 Id. at 125 (holding that to entertain claims brought under these facts would undermine the long-established protections of the business judgment rule).

171 See, e.g., Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 132 (Del. 1963); In re Citigroup Shareholder Deriv. Litig., 964 A.2d 106, 129-30 (Del. Ch. 2009).

172 See Stone v. Ritter, 911 A.2d 362 (Del. 2006).

173 Cox & Thomas, supra note 5, at 440 ("[T]hey [fiduciaries] should establish a monitoring mechanism to insure that this system is adequate, and if they learn it is inadequate, they must take measures to fix the problems.").

174 Id. at 440-41.

175 Id. at 441.

176 Id.

177 See generally id. at 442-49 (outlining several easy steps to ensure that institutions receive their fair share, including establishing a centralized information clearinghouse, standardizing trading documentation and claims forms, improving institutional monitoring and claims filing, strengthening institutions' 13F filing requirements, and improving claims filing systems overall).

178 Id.

179 An exhaustive search of firms that market themselves as having knowledge in the realm of opt-outs yields surprisingly abysmal results. See, e.g., Nicole Lavallee, Practical Matters: When Should Funds Opt-Out of a Class Action?, Berman DiValerio (last visited Sept. 2, 2014), http:// www.bermandevalerio.com/NEWS/FIRM-NEWSLETTER/67-PRACTICAL-MATTERS-WHEN-SHOULD-FUNDS-OPT-OUT-OF-A-CLASS-ACTION ("Each fact pattern gives rise to unique issues and there is no one-size-fits-all solution."); Representing Opt-Outs in Class Actions, Berger & Montague, P.C. (last visited Sept. 2, 2014), http:// www.bergermontague.com/PRACTICE-AREAS/REPRESENTING-OPT-OUTS-IN-CLASS-ACTIONS.

180 See supra note 136 and accompanying text.

181 See Lavallee, supra note 154; see also Representing Opt-Outs, supra note 154.

182 See, e.g., Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

183 See Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

184 Id.

185 See generally Rozen, supra note 10; Keith Sharfman, Valuation Averaging: A New Procedure for Resolving Valuation Disputes, 88 Minn. L. Rev. 357, (2003).

186 See Schwartz v. Harp, 108 F.R.D. 279, 281 (C.D. Cal. 1985); see also Private Securities Litigation Reform Act, supra note 43; Cox & Thomas supra note 5, at 416-21.

187 See Fed. R. Civ. P. 23.

815 F.Supp.2d 26
United States District Court,
District of Columbia.

William S. HARRIS, et al., Plaintiffs,
v.
James E. KOENIG, et al., Defendants.

Civil Action No. 02–618 (GK). | Nov. 2, 2011.

Synopsis

Background: Retirement plan participants brought action against various plan fiduciaries, including plan trustee, under the Employee Retirement Income Security Act (ERISA). Participants moved for partial summary judgment and trustee moved for summary judgment.

[Holding:] The District Court, Gladys Kessler, J., held that participants failed to establish that trustee breached its fiduciary duty under ERISA.

Plaintiffs' motion denied; defendant's motion granted.

Attorneys and Law Firms

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MEMORANDUM OPINION

GLADYS KESSLER, District Judge.

Plaintiffs William S. Harris, Reginald E. Howard, and Peter M. Thornton, Sr. are former employees of Waste Management Holdings, Inc. ("Old Waste") and participants in the Waste Management Profit Sharing and Savings Plan ("Old Waste Plan" or "Plan"). They bring this action on behalf of the Plan's approximately 30,000 participants under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, against Defendants, [1] all of whom were fiduciaries of the Old Waste Plan [2] or of its successor plan, the Waste Management Retirement Savings Plan ("New Waste Plan"). [3]

This matter is now before the Court on the portions of Plaintiffs' Motion for Partial Summary Judgment that address Counts VI and VII against Defendants State Street Bank and Trust Company ("State Street") and Old Waste [Dkt. No. 435], and on State Street's Motion for Summary Judgment [Dkt. No. 442]. [4] Upon consideration of the Motions, Oppositions, ***28** Replies, and the entire record herein, the Court concludes that Plaintiffs' Motion for Partial Summary Judgment is **denied** as to Counts VI and VII. State Street and Old Waste's Motion for Summary Judgment is **granted.**

I. Background [5]

This action arises from Old Waste's announcement on February 24, 1998, that, prior to 1992 and continuing through the first three quarters of 1997, it had materially overstated its reported income by approximately $1.3 billion, and that it was therefore restating several of its financial statements for periods between 1991 and 1997. That announcement led to the filing of a securities class action in the United States District Court for the Northern District of Illinois, which settled on September 17, 1999 (the "Illinois Litigation").

Earlier, on July 15, 1999, the Illinois district court entered a Preliminary Approval Order approving a proposed settlement and provisionally certifying a class, for settlement purposes only, of all persons (other than Defendants and their affiliates) who had acquired Old Waste common stock between November 3, 1994, and February 24, 1998. *See* Fifth

Amended Complaint ("FAC") ¶ 138 [Dkt. No. 408]. Pursuant to the Preliminary Approval Order, "a Notice of Pendency and Proposed Settlement of Class Action, dated July 20, 1999 (the 'Illinois Class Notice'), was sent to [all] members of the [Illinois settlement class], including the Plan and its fiduciaries." *Id.* The Illinois Notice described the scope of the release that would be given by members of the Illinois settlement class in exchange for the settlement consideration, and advised class members of their right to object to or opt out of the proposed settlement by September 2, 1999. *See id.*

At the time of the Illinois settlement, State Street served as Trustee and Investment Manager for the New Waste Plan. [6] State Street Bank and Trust Co.'s Statement of Undisputed Material Facts ("Def.'s SoF") ¶ 4 [Dkt. No. 442]; Pls.' Counter–Statement in Response to State Street Bank and Trust Co.'s Statement of Undisputed Material Facts ("Pls.' CSoF") ¶ 4 [Dkt. No. 470–1]. As Trustee and Investment Manager, State Street received the Illinois Class Notice on or about July 27, 1999. Def.'s SoF ¶ 13; Pls.' CSoF ¶ 13. State Street then forwarded the Notice to Monet Ewing, an attorney in its legal department. Def.'s SoF ¶ 14; Pls.' CSoF ¶ 14. At that time, it was State Street's practice to review the terms of a securities class action settlement and to prepare and submit claims on behalf of benefit plans for which it served as trustee. Def.'s SoF ¶ 16; Pls.' CSoF ¶ 16. Under the terms of the settlement in the Illinois Litigation, Old Waste and its agents were released from liability for any claims —including unknown claims—brought by members of the Illinois Settlement Class in exchange for ***29** $220 million. Def.'s SoF ¶ 12; Pls.' CSoF ¶ 12; Notice of Pendency and Proposed Settlement of Class Action 7–8, July 20, 1999 [Dkt. No. 440–16]. On December 1, 1999, State Street submitted a claim on behalf of the New Waste Plan, resulting in a recovery of $86,609.76. Def.'s SoF ¶ 28; Pls.' CSoF ¶ 28.

On April 1, 2002, Plaintiffs filed suit in this Court, alleging ten counts of ERISA violations pursuant to ERISA § 502(a)(2), codified as 29 U.S.C. § 1132(a)(2). Plaintiffs' claims were originally divided into three periods. First, Plaintiffs alleged five ERISA violations related to the Plan's purchase of inflated shares of Company Stock in the first claim period between January 1, 1990, and February 24, 1998 (Counts I–V, the "First Period Claims"). Second, Plaintiffs alleged four ERISA violations related to the release of claims by the Plan's fiduciaries in the Illinois Litigation in the second claim period between July 15, 1999, and December 1, 1999 (Counts VI–IX, the "Second Period Claims"). Third, Plaintiffs alleged one ERISA violation related to the release of claims by State Street in the Texas Litigation in the third claim period between February 7, 2002, and July 15, 2002 (Count X).

While there has been a significant amount of litigation regarding the various counts, the only counts relevant to the pending Motions are Counts VI and VII, which are also the only remaining counts specific to State Street. [7] Pursuant to Plaintiffs' Fifth—and final—Amended Complaint, Count VI alleges that, during the second claim period, from July 15, 1999, to December 1, 1999, State Street breached its fiduciary duty by failing to adequately investigate and preserve claims of breach of fiduciary duty under ERISA § 404 in the Illinois Litigation and by causing those claims to be released. [8] Count VII alleges that, during the same time period, Old Waste and State Street engaged in a prohibited transaction in violation of ERISA § 406(a)(1)(A) by releasing claims in the Illinois Litigation. [9]

***30** On March 30, 2011, Plaintiffs filed their Motion for Partial Summary Judgment, which addressed, in part, Counts VI and VII against State Street and Old Waste ("Pls.' Mot."). On the same date, State Street filed its Motion for Summary Judgment ("Def.'s Mot."). On May 2, 2011, State Street filed a Response to Plaintiffs' Motion for Partial Summary Judgment ("Def.'s Opp'n") [Dkt. No. 467], and Plaintiffs filed their Opposition to State Street's Motion for Summary Judgment ("Pls.' Opp'n") [Dkt. No. 470]. On June 8, 2011, Plaintiffs ("Pls.' Reply") [Dkt. No. 497] and State Street ("Def.'s Reply") [Dkt. No. 506] filed their respective Replies.

II. Standard of Review

Summary judgment may be granted "only if" the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c), as amended Dec. 1, 2007; *Arrington v. United States*, 473 F.3d 329, 333 (D.C.Cir.2006). In other words, the moving party must satisfy two requirements: first, that there is no "genuine" factual dispute and, second, if there is, that it is "material" to the case. "A dispute over a material fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the non-moving party.' " *Arrington*, 473 F.3d at 333 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A fact is "material" if it might affect the outcome of the case under the substantive governing law. *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505.

As the Supreme Court stated in *Celotex Corp. v. Catrett*, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Supreme Court has further explained,

> [a]s we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (footnote omitted). " '[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.' "

Scott v. Harris, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (quoting *Liberty Lobby*, 477 U.S. at 247–48, 106 S.Ct. 2505) (emphasis in original).

However, the Supreme Court has also consistently emphasized that "at the summary judgment stage, the judge's function is not ... to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. 2505. In both *Liberty Lobby* and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the Supreme Court cautioned that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts, are jury functions, not those of a ***31** judge" deciding a motion for summary judgment. *Liberty Lobby*, 477 U.S. at 255, 106 S.Ct. 2505.

III. Analysis

A. Count VI: Failure to Investigate and Preserve Claims

In Count VI, Plaintiffs allege that State Street, in its capacity as Trustee and Investment Manager, breached its fiduciary duty to the New Waste Plan. FAC ¶¶ 205–09. Specifically, Plaintiffs claim that State Street failed to adequately review and investigate the claims in the Illinois litigation and appropriately consider whether Plaintiffs' ERISA claims in that case should have caused State Street to opt out of the settlement. *Id.* ¶ 207.

Plaintiffs now move for summary judgment on the ground that "under the undisputed facts and circumstances presented here, State Street's mere reading of the class notice [did not] satisf[y] State Street's duty to investigate and recover on the Plan's potential ERISA claims." [10] Pls.' Mot. 45. State Street argues that "it satisfied its fiduciary duties as a matter of law" because "there is no evidence, expert or otherwise, that participation in the Illinois settlement was an imprudent decision, i.e., that a reasonable fiduciary in the same or similar circumstances would have followed a different process or made a different decision." Def.'s Mot. 14.

[1] **[2]** Under ERISA Section 404(a)(1), "a fiduciary shall discharge his [or her] duties with respect to a plan ... with the care, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1). As this Court has previously explained:

> The duties of loyalty and prudence mandated in Section 404(a) of ERISA include the "duty to take reasonable steps to realize on claims held in trust." *Donovan v. Bryans*, 566 F.Supp. 1258, 1262 (E.D.Pa.1983). When, as in this case, a plan has potential claims against a third party, the "trustees have a duty to investigate the relevant facts, to explore alternative courses of action and, if in the best interests of the plan participants, to bring suit...." *McMahon v. McDowell*, 794 F.2d 100, 112 (3d Cir.1986).

Harris v. Koenig, 602 F.Supp.2d 39, 54–55 (D.D.C.2009) ("*Harris I* ").

[3] Notably, however, Section 404 requires a fiduciary to act "with the care, prudence, and diligence" a prudent person would use "*under the circumstances then prevailing.*" 29 U.S.C. § 1104(a)(1) (emphasis added). The question now before the Court is not whether State Street's conduct appears prudent as of this time, i.e. 2011, but whether State Street acted with the type of care and engaged in the type of investigation that would reasonably be expected of someone acting as a Trustee during the second half of 1999. *See Chao v. Merino*, 452 F.3d 174, 182 (2d Cir.2006) (a fiduciary's "actions are not to be judged 'from the vantage point of hindsight' ") (quoting *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.1984)); *Henry v. Champlain Enters., Inc.*,

445 F.3d 610, 620 (2d Cir.2006) ("The focal point of our inquiry under ERISA is ... whether [the fiduciary] acted with the prudence required of a fiduciary under the prevailing circumstances at the time of the transaction."); ***32** *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir.2000) ("In determining compliance with ERISA's prudent man standard, courts objectively assess whether the fiduciary, at the time of the transaction, utilized proper methods to investigate, evaluate and structure the investment; acted in a manner as would others familiar with such matters; and exercised independent judgment when making investment decisions. [ERISA's] test of prudence ... is one of conduct, and not a test of the result of performance of the investment.") (quoting *Laborers Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir.), *cert. denied sub nom.*, *Laborers Nat'l Pension Fund v. American Nat'l Bank & Trust Co.*, 528 U.S. 967, 120 S.Ct. 406, 145 L.Ed.2d 316 (1999)). Indeed, "so long as the 'prudent person' standard is met, ERISA does not impose a 'duty to take any particular course of action if another approach seems preferable.' " *Merino*, 452 F.3d at 182 (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 917 (2d Cir.1989)).

[4] In support of their Motion, Plaintiffs point to a litany of shortcomings in State Street's process for dealing with the Illinois litigation. For example:

- "no one at State Street reviewed any complaint in the Illinois Litigation";
- "State Street also failed to determine whether the Illinois plaintiffs were pursuing ERISA claims";
- "State Street similarly failed to consider whether any Old Waste Plan or New Waste Plan fiduciaries had engaged in the misconduct at issue";
- "State Street did not ask New Waste for any information about the Illinois allegations";
- "State Street likewise reviewed no facts";
- "State Street also did not ask New Waste for any information about the amount of Company Stock purchased for the Plan;"
- "State Street never contacted counsel representing the Illinois Plaintiffs";
- "[t]he only people who reviewed the Class Notice in the Illinois Litigation were State Street's in-house lawyers Monet Ewing and Denise Sisk."

Pls.' Mot. 36–39. In essence, Plaintiffs contend that without undertaking some or all of these proposed actions, State Street breached its fiduciary duty under Section 404.

State Street responds that because it took into account relevant factors such as "the cost of enforcing the claim, the chance of success and the likelihood of collecting a judgment ... State Street's handling of the Illinois settlement in 1999 was both sound and consistent with industry standards," notwithstanding any omissions identified by Plaintiffs. Def.'s Mot. 8–9 (citing Scott & Ascher, *Trusts* § 17.9 (5th Ed. 2007)).

State Street explains that "[f]ollowing its standard practice, State Street sent the notice of the Illinois settlement to the lawyers for its company stock group," who "were well aware of the laws and regulations applicable to company stock plans and followed developments in benefits litigations." *Id.* at 9. These attorneys considered the notice and determined that "the proposed settlement was the result of contested litigation and there were no reasonable concerns suggested by the notice with respect to issues such as the independence or qualifications of plaintiffs' counsel in the Illinois class actions." *Id.* at 10. Therefore, State Street did not object to the settlement and filed a claim for the Plan. *Id.*

***33** State Street argues that it was justified in not expending the resources required by the additional steps described by Plaintiffs because "[t]here is no evidence that a prudent fiduciary acting in similar circumstances at the time of the Illinois settlement would have taken a different approach, let alone made a different decision than State Street." *Id.* at 12. State Street explains that its standard approach at the time was to participate in securities class action settlements because it "was not aware of any company stock plan that had ever recovered money by pursuing an ERISA fiduciary breach claim separate from a recovery for securities law violations" and it would therefore not have been prudent to incur additional costs in pursuing such claims. *Id.* at 13.

In support of its position, State Street points to the statements of Plaintiffs' own experts who acknowledge that, in 1999, it was the standard practice of ERISA plans to accept securities class action settlements and file the appropriate claims. Plaintiffs' expert Alan D. Biller, who served as an independent

consultant advising between 50 and 100 ERISA plans prior to 2000 regarding the filing of claims as part of securities class action settlements, stated that none of those plans opted out of a proposed settlement. Biller Dep., Jan. 21, 2011, Curto Decl., Ex. 13, at 170–81 [Dkt. No. 442–19]. Biller also admitted that he could not recall ever calculating the potential recovery for any plan under a proposed settlement and that "generally we didn't even try to estimate that." *Id.* at 179. Nor could Biller recall ever calculating the potential value of a carve-out for ERISA claims. *Id.* at 180.

Marcia Wagner, an ERISA compliance attorney retained by Plaintiffs to provide expert testimony, similarly was not aware of any ERISA plan that opted out of a settlement to pursue ERISA claims or that carved ERISA claims out of a settlement prior to 2000. Wagner Dep. Jan 27, 2011, Curto Decl., Ex. 14, at 47–48 [Dkt. No. 442–20]. She knew of no cases in which an ERISA plan trustee had "obtained substantial recoveries under alternative claims for relief under ERISA next door to a piece of securities litigation by 1999." *Id.* at 51–52.

Plaintiffs offer absolutely no countervailing evidence suggesting that a prudent person in State Street's position *at the time of the settlement* would have made greater efforts to pursue a carve-out of ERISA claims or otherwise opt out of the settlement. Instead, Plaintiffs identify twenty-eight decisions, opinion letters, amicus curiae briefs, and articles that they label as "pertinent legal precedent that predates September 1999." Pls.' Opp'n 21–27. Not a single one of these citations support Plaintiffs' position.

First, Plaintiffs offer fifteen cases which simply have nothing to do with ERISA litigation claims based on a drop in company stock price analogous to the ERISA claims that Plaintiffs argue deserved additional attention by State Street. Pls.' Opp'n 21–26. None suggest that an ERISA plan would be successful in opting out of a securities class action settlement and pursuing its own claims.

Second, Plaintiffs cite to two cases which do involve ERISA stock drop litigation. Pls.' Mot. 25. These cases stand for the well established principle, which does not support Plaintiffs' claims in this case, that "an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision." *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir.1995); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir.1995).

Third, Plaintiffs quote from a smattering of Department of Labor Advisory Opinion ***34** Letters, Amicus Curiae briefs, and articles. Pls.' Mot. 20–27. These items are not only unhelpful in resolving the question of whether State Street's conduct was prudent but also do not provide a source of persuasive authority upon which the Court may rely.

Fourth, and finally, Plaintiffs cite to cases decided after 1999, which, once again, for the reasons given above, are not relevant to whether State Street's conduct was prudent at the time in question. *Id.* at 25–27.[11] Even crediting their own descriptions of the materials they cite, Plaintiffs' twenty-eight sources stand for nothing more than the fact that "ERISA itself was adopted in 1974" and that State Street owed the Plan a duty of care under Section 404. *Id.* at 20.

[5] Plaintiffs present no evidence whatsoever that there was any "history of success in ERISA 'stock drop' litigation of the kind [P]laintiffs say State Street should have pursued" or that a prudent fiduciary would have taken the steps suggested by Plaintiffs. Def.'s Mot. 4. Instead, as discussed above, Plaintiffs have merely presented a long list of additional steps they believe State Street should or could have undertaken that may or may not have yielded a preferable settlement for the Plan. But "ERISA does not impose a duty to take any particular course of action," nor does it allow a fiduciary's "actions to be judged from the vantage point of hindsight." *Merino*, 452 F.3d at 182 (internal quotations omitted).

In short, Plaintiffs have submitted no evidence that a prudent person acting in a like capacity and familiar with such matters would have taken a different course of action under the conditions prevailing at that time. 29 U.S.C. § 1104(a)(1). Without any such evidence, Plaintiffs "fail[ ] to make a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. 2548. Therefore, Plaintiffs' Motion for Summary Judgment as to Count VI is **denied** and State Street's Motion for Summary Judgment is **granted.**[12]

B. Count VII: Prohibited Transaction

Both parties also seek summary judgment on Plaintiffs' claim that State Street engaged in a prohibited transaction under ERISA Section 406 by agreeing to a settlement in the Illinois Litigation that released the Plaintiffs' claims. Section 406 forbids a plan's fiduciary from "caus[ing] the plan to engage in a transaction, if he [or she] knows or should know that such

transaction constitutes a direct or indirect ... sale or exchange, or leasing, of any property between the plan and a party in interest." 29 U.S.C. § 1106(a)(1). The Section "categorically bar[s] certain transactions deemed likely to injure the pension ***35** plan." *Harris Trust & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 242, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) (internal quotation omitted).

In concluding that Plaintiffs had adequately stated a claim and therefore denying State Street's Motion to Dismiss Count VII, this Court stated that "it is a prohibited exchange of property under ERISA Section 406 for State Street, a Plan fiduciary, to enter into the Illinois Securities Settlement on behalf of the New Waste Plan against Old Waste, the Plan sponsor and a party in interest, *unless* the transaction is exempted from the proscriptions of ERISA Section 406." *Harris I*, 602 F.Supp.2d at 56–57 (emphasis added).

As the Court also noted at that early point in the litigation, State Street's participation in the settlement might be exempted from the strictures of Section 406 by Prohibited Transaction Exemption ("PTE") 2003–39, 68 Fed.Reg. 75,632. *Id.* at 57. PTE 2003–39 "permits transactions engaged in by a plan, in connection with the settlement of litigation" and "affects all employee benefit plans, the participants and beneficiaries of such plans, and parties in interest with respect to those plans engaging in the described transactions." 68 Fed.Reg. 75,632. In order to qualify for the exemption, the settlement must be "reasonable in light of the plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone." *Id.* at 75,639. As the Department of Labor explained, this requirement demands that any exempted settlement "involve a prudent decision-making process, given the facts and circumstances of the particular situation." *Id.* at 75,636.

State Street devotes a great deal of its briefing to rearguing whether a settlement of the type in question is a prohibited transaction under ERISA Section 406, noting in particular that no other court has examined some of the issues implicated by that question. [13] Def.'s Reply 15. However, it is unnecessary to reach that issue at this time.

Regardless of whether State Street's participation in the settlement is subject to Section 406, it is clear that, even assuming Section 406 does apply, PTE 2003–39 covers the release of claims included in the Illinois settlement. The language used by the Department of Labor demonstrates that exactly the same level of prudence is required to obtain an exemption under PTE 2003–39 as is required by the fiduciary duties outlined in ERISA Section 404. *Compare id.* at 75,636 (an exempted settlement "will always involve a prudent decision-making process, given the facts and circumstances of the particular situation."), *with* 29 U.S.C. § 1104(a)(1) ("a fiduciary shall discharge his [or her] duties with respect to a plan ... with the care, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.").

Indeed, Plaintiffs' arguments attempting to demonstrate why State Street's conduct should not be covered by PTE 2003–39 are ***36** indistinguishable from those raised by Plaintiffs under Count VI and already rejected by the Court, *supra* Part III.A. *See* Pls.' Mot. 49–51. As State Street argues, albeit briefly, its "approach to litigation settlements in 1999 already included the steps called for by PTE 2003–39 for settlements entered into before January 1, 2004." Def.'s Mot. 27.

For the reasons spelled out above, *supra* Part III.A, State Street's participation in the Illinois settlement involved what was at that time "a prudent decision-making process, given the facts and circumstances of the particular situation" and was "reasonable in light of the plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone." 68 Fed.Reg. 75,633, 75,639. Therefore, Plaintiffs' Motion for Summary Judgment as to Count VII is **denied,** and State Street and Old Waste's Motion for Summary Judgment is **granted.** [14]

Footnotes

1 Defendants include the "Old Waste Fiduciaries," which are Old Waste (the Plan's sponsor), the Waste Management, Inc. Profit Sharing and Savings Plan Investment Committee ("Old Waste Investment Committee"), the Waste Management, Inc. Profit Sharing and Savings Plan Administrative Committee ("Old Waste Administrative Committee"), the individual Trustee Members of the Committees, the Old Waste Board of Directors and its individual members, and fifteen unidentified

fiduciaries; and the "New Waste Fiduciaries," which are the Waste Management Retirement Savings Plan ("New Waste Plan"), the Investment Committee of the Waste Management Retirement Savings Plan ("New Waste Investment Committee") and its individual Trustee Members, the State Street Bank and Trust Company ("State Street"), and fifteen unidentified fiduciaries.

2 From at least January 1, 1989, Old Waste also sponsored an employee stock ownership plan (the "ESOP"). In May 1998, the ESOP was merged into the Old Waste Plan, and its assets were held by the Old Waste Plan in a fund called the "ESOP Fund."

3 On January 16, 1998, Old Waste and Waste Services, Inc., merged to become New Waste. On January 1, 1999, the Old Waste Plan merged with the USA Waste Services, Inc. Employee's Savings Plan to become the New Waste Plan.

4 Because Old Waste is also named in Count Seven and has filed a Notice of Joinder in Co–Defendants' Motions for Summary Judgment [Dkt. No. 443] and a Notice of Joinder in Co–Defendants' Oppositions to Plaintiffs' Motion for Partial Summary Judgment [Dkt. No. 482], the Court will treat State Street's filings as applying to both State Street and Old Waste as to Count VII. Oddly, the Notice of Joinder in Co–Defendants' Motions for Summary Judgment does not specify Old Waste's joinder in State Street's Motion for Summary Judgment, but rather indicates that Old Waste joins in the Second Period Individual Defendants' Motion for Summary Judgment based on "Plaintiffs' inability to show ... that State Street acted imprudently or breached any of its fiduciary duties by causing the Plan to participate in the Illinois Settlement." Since that topic was addressed in State Street's Motion, and not in the Second Period Individual Defendants' Motion, the Court will treat Old Waste as having joined in State Street's Motion as well.

5 Unless otherwise noted, the facts set forth herein are drawn from the parties' Statements of Material Facts Not in Dispute submitted pursuant to Local Rule 7(h).

6 On January 1, 1999, State Street was appointed Trustee of the New Waste Plan. Effective February 1, 1999, the New Waste Investment Committee appointed State Street to also serve as the Investment Manager for the New Waste Plan. *See* FAC ¶¶ 47, 50. Pursuant to the terms of the Investment Manager Agreement between State Street and the New Waste Investment Committee, State Street had "full discretionary authority to manage" the New Waste Plan's assets and funds. *Id.* ¶ 50.

7 Plaintiffs withdrew Count X against State Street in the Fifth Amended Complaint on the basis that the evidence obtained in discovery was insufficient to prove the claim. *See* FAC ¶¶ 224–69. State Street is also named in Count IX, which has survived a Motion to Dismiss. *Harris v. Koenig,* 602 F.Supp.2d 39, 61–62 (D.D.C.2009) ("*Harris I* "). That Count alleges, in part, that State Street should be held liable as a co-fiduciary for breaches of duty by other Defendants. *See* FAC ¶¶ 220–23. Plaintiffs' Motion for Summary Judgment includes arguments directed toward Count X, which will be addressed in a separate order and memorandum opinion.

8 Specifically, Plaintiffs allege that State Street should have investigated and preserved claims that, between January 1, 1990, and February 24, 1998, (1) the Old Waste Investment Committee and certain individuals who are or were members of that Committee breached their fiduciary duties under ERISA § 404 by failing to prudently manage the assets of the Plan; (2) the Old Waste Administrative Committee and certain individuals who are or were members of that Committee breached their fiduciary duties under ERISA § 404 by failing to provide complete and accurate information to Plan participants and beneficiaries; (3) Old Waste, the Old Waste Administrative Committee, the Old Waste Investment Committee, and certain individuals who are or were members of those Committees engaged in prohibited exchanges of stock between the Plan and Old Waste in violation of ERISA § 406(a)(1)(A); (4) Old Waste, its Board of Directors, and certain individuals on the Old Waste Board breached their fiduciary duties under ERISA § 404 by failing to monitor the fiduciaries of the Plan; and (5) all Old Waste Fiduciaries breached their fiduciary duties under ERISA § 405(a)(2) and (3) by enabling their co-fiduciaries to commit the ERISA violations cited above, and by failing to remedy them.

9 On March 12, 2009, the Court denied Defendants' Motion to Dismiss, which included Counts VI and VII. *Harris I,* 602 F.Supp.2d at 54–59.

10 As previously noted, *supra* Part I, what Plaintiffs refer to as "mere reading," did include review by State Street's legal department.

11 The Court cannot help but note that in citing these cases, Plaintiffs followed the curious—and unusual—practice of giving the date of filing instead of the usual practice of giving the date of decision. *Id.* at 25–27. One can only wonder if this was done to obscure the fact that these cases were decided—not filed—after the time period which is relevant in this case.

12 It is immaterial to the ruling on this Motion that the Court has, on this date, denied State Street's Motion to Reconsider June 20, 2011 Memorandum Order [Dkt. No. 542]. Pursuant to the Order denying that Motion as well as the Court's June 20, 2011, Memorandum Order [Dkt. No. 521], State Street has lost its expert, Wilson H. Ellis. Of course, for the reasons

given above, State Street has nonetheless demonstrated that it is entitled to judgment as a matter of law because of Plaintiffs' failure to establish the existence of an essential element of their claim.

13 PTE 2003–39 itself reads:

> As the Department noted in proposing this exemption, the fact that a transaction is subject to an administrative exemption is not dispositive of whether the transaction is, in fact, a prohibited transaction. Rather, the exemption is being granted in response to uncertainty expressed on the part of plan fiduciaries charged with the responsibility under ERISA for determining whether it is in the interests of a plan's participants and beneficiaries to enter into a settlement agreement with a party in interest.

68 Fed.Reg. 75,633.

14 For the reason stated above, *supra* note 4, the grant of State Street's Motion applies to both State Street and Old Waste.

SECURITIES LITIGATION POLICY

The _____ adopts this policy to establish procedures and guidelines for monitoring _____'s portfolio for potentially actionable losses to protect _____'s interest and maximize any recoveries available from such actionable losses. This policy has three parts: 1) a policy for asset recovery as absent class members in domestic securities actions; 2) a litigation policy for securities listed on a domestic exchange and 3) a policy for securities listed on a foreign exchange.

SECURITIES POLICY FOR FILING PROOFS OF CLAIMS

Under U.S. federal law, securities class actions function as "opt-out" classes. This means that investors do not need to participate as named parties in order to recover their *pro rata* share of a class action recovery. Rather, they need only submit a timely and valid proof of claim in order to realize recoveries. [THE FOLLOWING THREE OPTIONS ARE AVAILABLE FOR THIS PURPOSE]

OPTION A:_____'s custodial bank is responsible for filing all proofs of claims, including the necessary supporting documents and information, in every securities class action pending in the U.S. in which _____ has an interest (the "Claims Filing"). To memorialize the custodian's Claims Filing responsibilities, [FUND/GC, EXECUTIVE DIRECTOR, ADMINISTRATOR] [shall or has] prepare[d] and revise[d], as appropriate, or caused to be prepared and revised, a statement of work to be included with the custodial agreement setting forth formalized claims filing procedures for the custodial bank to follow. These procedures shall include (i) identifying and reviewing all class action recoveries (whether by settlement or trial); (ii) providing timely notice of each settlement recovery, with sufficient time to allow _____ to opt-out; (iii) filing complete and accurate proof of claim forms in a timely fashion on _____'s behalf; (iv) providing quarterly reports regarding these efforts; and (v) providing quarterly reports identifying all securities litigation proceeds recovered by_____ directly or on its behalf.

POTENTIAL INSERTION IF FUND HAS SWITCHED CUSTODIANS WITHIN LAST 10 YEARS. HERE ARE TWO DIFFERENT SUBOPTIONS:

> SUBOPTION 1: Since _____ switched custodians on _[DATE]_, [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] will instruct its current custodian to obtain all prior trading records from _____'s previous custodian and complete and file all proof of claims regardless of whether the class period covers, in whole or in part, a period prior to custodian's engagement.

SUBOPTION 2 (less favored): Since _____ switched custodians on _[DATE]_, [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] will (i) instruct its current custodian to obtain all prior trading records from _____'s previous custodian and complete and file all proof of claims for securities class action recoveries where the class period covers any period of time during which custodian has been engaged; and will (ii) instruct its previous custodian to file all proofs of claims for securities class action recoveries where the class period occurred entirely during the period of time said prior custodian was engaged.

To the extent, _____ switches custodians in the future, [GC, EXECUTIVE DIRECTOR OR ADMIMNISTRATOR] shall ensure that (i) the current custodian transfers all trading records in its possession to the new custodian in a prompt manner; and (ii) the new custodian undertakes to file proof of claims for all U.S. securities class actions in which the _____ has an interest regardless of whether the custodian was engaged during the class period.

OPTION IF FUND HAS LIST OF APPROVED SECURITIES MONITORING COUNSEL: _____ shall also request that its selected securities monitoring law firms identify all U.S. class actions in which it has an interest on a quarterly basis and perform random audits to ensure that its custodian is filing complete and accurate proof of claims in securities recoveries.

OPTION B: _____ shall instruct a securities monitoring law firm to: (i) identify and review all class action recoveries (whether by settlement or trial); (ii) provide timely notice of each settlement recovery, with sufficient time to allow _____ to opt-out; (iii) file complete and accurate proof of claim forms in a timely fashion on _____'s behalf; (iv) provide quarterly reports regarding these efforts; and (v) provide quarterly reports identifying all securities litigation proceeds recovered by _____ directly or on its behalf. This service shall be at no cost to _____.

OPTION C: _____ shall retain a third party claims submission vendor at a fair and reasonable rate to: (i) identify and review all class action recoveries (whether by settlement or trial); (ii) provide timely notice of each settlement recovery, with sufficient time to allow _____ to opt-out; (iii) file complete and accurate proof of claim forms in a timely fashion on _____'s behalf; (iv) to reconcile all funds received against amounts due _____ for each securities class action recovery; (v) to hold all receipts in escrow and account for and disburse funds in the method as required by _____; (vi) to provide periodic reports regarding these efforts as instructed by _____; and (vii) to warrant that full amounts due _____ have been recovered, subject to audit, and to indemnify the _____ for any loss from any failure(s) to collect the maximum amounts due _____.

SECURITIES LITIGATION POLICY FOR SECURITIES LISTED ON A DOMESTIC EXCHANGE

It is the purpose of the _____to create an evaluation policy to provide guidance regarding when and how _____ will become actively involved in domestic securities litigation including seeking lead plaintiff status in any particular class action. Adoption of this policy is intended to put [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] in the best position to identify, protect, and serve the interests of _____.

When time is of the essence, [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] must be able to prudently evaluate and pursue lead plaintiff status and other alternatives as are deemed appropriate after conferring with _____'s [Executive Director or the Board of ___]. Updates of securities litigation activities will be reported to the Board at each regular meeting of the Board of _____.

_____s goals in creating this policy are to:

- Fulfill _____'s fiduciary duty by effectively managing claims as assets of the trust fund.
- Increase recoveries on claims.
- Reduce fees paid to obtain recoveries.
- Deter future frauds by imposing personal liability on bad actors.
- Assist in identifying corporate governance issues and participate in developing corporate governance improvements through litigation.
- Change the litigation system to better protect interests of shareholders and meet above goals.

The following is an outline of the processes to assist [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] in decisions regarding securities litigation issues.

Monitoring Procedures:

Suggested Language A:

_____ uses internal staff to monitor potential class action filings by using the [Stanford Class Action Clearinghouse web site] [private non-law firm monitoring service] and other resources. Lawsuit class periods are compared to _____'s trading history to identify cases where _____ is a class member and to estimate a loss figure associated with each such potential or actual class action filing.

Suggested language B:

_____may retain a vendor specializing in identifying and analyzing potential and existing securities cases to perform this function, and to report its findings on a timely basis. ___ may also retain __

[two or more depending on size] monitoring law firms to advise them of recently-filed class actions that appear to have merit and for which __ has sustained a loss that (i) exceeds its "Loss Threshold" set forth below or (ii) is substantial and there are special factors justifying ___'s involvement despite the fact that losses are below its Loss Threshold.

Investigation Guidance:

Loss Threshold: [This will depend on the size of the Fund and the figures below are provided as examples]:

$ 5 Million [For funds with assets greater than $30 Billion]
$ 3 Million [For funds with assets between $20 and 30 Billion]
$ 1 Million [For funds with assets between $5 and 20 Billion]
$ 250,000 [For funds with assets between $1 and 5 Billion]
$ 150,000 [For funds with assets below $1 Billion]

When a case meets _____ Loss Threshold for active management, _____, through its [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] shall evaluate whether the class action is meritorious and deserves closer examination. [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] will review available information regarding the lawsuit before considering whether to seek lead plaintiff or embark on some other active claim management strategy. This investigation will include asking some of the following questions:

- Is it a viable case based on an initial assessment of certain key elements, including, for example, alleged misrepresentations and/or omissions, scienter and loss causation, recognizing the heightened pleading standard of the Private Securities Litigation Reform Act ("PSLRA")?
- What can _____ bring to the litigation to improve the outcome?
- Assuming Plaintiffs can prevail, will there be sources of recovery available to satisfy a judgment or settlement?
- Is _____ eligible to pursue lead plaintiff status?
- Is another sophisticated and reliable lead plaintiff planning to come forward?
- Can or should _____ team up with other funds as a co-lead plaintiff?
- How much has _____ lost?
- What are the available internal _____ resources to undertake the active management strategy?

Decision-making Process:

In an analysis to determine whether the benefits of involvement in the case outweigh the costs, consideration must be given to the following goals:

- Are there claims against auditors or other third parties that are not being pursued?
- Is _____ the best fund to represent the class for any reasons other than the monetary loss, such as lending credibility to a less obvious claim?
- What are __'s potential recoverable damages?

- Was there egregious activity within the company such that a personal recovery from the defendants appears to be the most expedient way of preventing similar future corporate behavior?
- Will participating in the suit assist in lowering plaintiff's attorney fees and foster healthy competition within the plaintiff's bar?
- What are the corporate governance changes that could be considered to address causes of the fraud?
- Will _____'s involvement increase the likely recovery to be realized from this action?
- Does _____ have the internal resources necessary to be an active participant in the case, recognizing that there will be discovery and other time consuming matters.

Claim Maximization Process

_____ should implement policies and procedures to allow [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] to determine how to maximize the value of any litigation claims relating to _____'s portfolio. [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] shall obtain information during the pendency of any lawsuit and immediately upon its proposed settlement, in order make the following determinations:

- Is there a viable case opt-out strategy?
- Should _____ object to any settlement?
- Should _____ object to any attorneys' fee application?
- What is _____'s recognized loss under the adjudication?

Selection of Outside Counsel

[_] Counsel may/shall retain one or more private law firms with demonstrated expertise and experience in prosecuting securities actions (the "Securities Litigation Counsel") to advise and/or represent the Fund in securities actions. All retainer agreements shall be negotiated by [_] Counsel and submitted for approval, in advance, to the [Decision Maker] at a regularly-scheduled meeting or, where immediate approval is necessary, at a specially-called meeting. However, where it is determined that immediate approval is required in order to preserve the Fund's rights and/or interests by retaining such counsel, and the matter cannot be timely presented for approval at a regularly-scheduled or special meeting, or where a quorum cannot be reached at such meeting, the CEO/Director/Administrator is authorized to make the decision. In the event such authority is exercised, the CEO/Director/Administrator shall instruct [ ] Counsel to concurrently notify the [Decision Maker], and provide a summary of the action at the next regularly-scheduled meeting of the [Decision Maker].

If _____ determines to take an active management role for securities litigation, and where time and circumstances allow, the counsel selection process should include the following, if possible:

- A competitive process whereby _____ seeks multiple proposals from competent counsel to reasonably assure the most favorable retention terms;

- A written retainer agreement that memorializes the retention terms signed by counsel prior their selection by [_____];
- A requirement that counsel maintain contemporaneous time records that are available to _____ (and ultimately the Court) in compliance with current LEDES standards (http://www.ledes.org/).
- A requirement that counsel charge only reasonable and necessary costs and contemporaneously record those costs for inspection by _____ upon request.
- For class actions, a requirement that counsel abide by the procedures set forth in In re Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 994 (9th Cir. 2010) (procedural due process with respect to attorneys' fees applications) and Scott v. City of N.Y., 626 F.3d 130 (2d Cir. 2010) (requiring submission of contemporaneous time records) in making an fee application, regardless of the particular practices within a district or a circuit
- Except where inconsistent with the ethical rules of _____'s jurisdiction, a requirement that class counsel abide by the American Bar Association Model Rules of Professional Conduct, including Rule 1.5 (regarding fees) and ABA Formal Ethics Opinion 08-451 (regarding outsourced attorney relationships)

SECURITIES LITIGATION POLICY FOR SECURITIES LISTED ON A FOREIGN EXCHANGE

The landscape of United States securities laws has drastically changed with the recent Supreme Court case, *Morrison v. National Australia Bank Ltd.,* S. Ct. 2869 (2010). Due to *Morrison,* investors no longer have the protection of the U.S. securities laws if the securities were purchased on a foreign exchange.

Given the new realities of global securities litigation after *Morrison*, _____ must adapt to the new challenges of monitoring its portfolio to ensure that opportunities to recover assets based on securities fraud are not lost. This includes the analysis of whether to bring a state law action or participate in an action in a foreign jurisdiction.

State Law Action

An option is to bring an action under state law in the U.S. There are numerous issues that must be considered before bringing such an action. [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] will consider the following:

- Whether the Securities Litigation Uniforms Standards Act of 1998 ("SLUSA") could preempt the state law securities action.
- Whether to pursue the claims in state or federal court and whether, if brought in state court, the case is likely to be removed to federal court.
- The potential venues and whether the choice of law analysis (which varies by jurisdiction) supports the application of state law claims.

- Whether a particular state's laws will govern the conduct of a foreign defendant (subject matter jurisdiction).
- Whether the potential courts have personal jurisdiction over any or all of the foreign defendants such that claims can be prosecuted and judgment collected against the defendants.
- Whether the case will be subject to serious *forum non conveniens* or comity challenges if the claims are pursued in the U.S.
- Whether direct reliance is an element of one or more of the claims and, if so, whether this element can be met.
- Whether privity between the plaintiff and the defendant is a requirement of the state securities act claim. If so, whether this element can be met.
- Whether __'s potential recoverable damages justify pursuing state law claims.

Foreign participation

Unlike the U.S. class action process -- where investors can remain absent, receive notice of a settlement, and then decide to make a claim or opt-out of the class case ---, in foreign actions, investors are generally required to join as named plaintiffs or "opt-in" at the commencement of the case. This "opt-in" process requires affirmative decisions early in the process to join the case in order to recover anything on _____'s losses. In many cases, investors may be required to make these decisions before a foreign action is even filed. Thus, since time is of the essence, [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] must be able to prudently evaluate and take the necessary action as is deemed appropriate [after conferring with _____'s Executive Director/Board etc.]
Some of the key issues [GC, EXECUTIVE DIRECTOR OR ADMINISTRATOR] will consider when evaluating foreign actions include:

- How is the action being funded? Are the funders reliable? Who are the investors in the funders? What is the percentage fee that the funder is taking from the case? Is this percentage fee the entire fee to be paid or is the funder also entitled to reimbursement of expenses and any costs award? What law will apply to the relationship between _____ and the funder?
- Is the funding agreement sufficient? In particular, are attorneys' fees, litigation expenses and potential costs covered by the funder without recourse to the investor?
- Can the funder cease to fund the litigation and, if so, under what conditions? Will the funder have any input or control over the prosecution of the litigation?
- Look at the jurisdiction that the action is being brought and evaluate the law in that jurisdiction to identify the potential risks of being involved in a case. In this regard, evaluate the merits of the case in light of the law in that jurisdiction.
- What is the process/cost for opting in?
- Who is the foreign counsel and how are they being paid?
- Identify the risks, (i.e., to what extent is adverse party fees and costs risk covered?). What are the potential discovery burdens?

- What role will _____ play or be allowed to play? No role, active role? How are the decisions made in the case? Does _____ have any say in anything?
- What is the size of _____'s loss? Did the alleged wrongdoing cause the loss?
- Even if __'s FIFO or LIFO losses are large, will ___ be entitled to recoverable damages under the foreign law?
- Does the funder have a minimum loss threshold?
- What time and resources will _ have to devote to the foreign litigation?
- Whether __ can comply with the appropriate deadlines?

Monitoring Procedures

_____ understands the importance of developing a protocol to stay informed and make prudent decisions relating to its involvement in foreign actions. _____ will use _____ to assist in monitoring foreign actions and to ensure that _____ has the greatest possible visibility into applicable deadlines and is aware of the issues listed above so _____ can make a timely and informed decision of whether to participate in the foreign action.

BOARD OF INVESTMENTS
SECURITIES LITIGATION POLICY

PURPOSE

The Board of Investments adopts this policy to establish procedures and guidelines for monitoring and participating in securities class actions when appropriate to protect LACERA's interests.

PRINCIPLES

As a large institutional shareholder, LACERA is frequently a class member in securities class actions that seek to recover damages resulting from alleged wrongful acts or omissions of others.

The enactment by Congress of the Private Securities Litigation Reform Act ("PSLRA") in 1995 allows institutional investors and other large shareholders to seek lead plaintiff status in securities class actions pending within the United States under U.S. federal securities laws. The lead plaintiff gains the right to supervise and control the prosecution of such cases.

Since enactment of the PSLRA, it has been demonstrated that participation as lead plaintiff by large, sophisticated shareholders, particularly institutional shareholders, has resulted in lower attorney's fees and significantly larger recoveries on behalf of shareholders. The United States Securities and Exchange Commission and leaders in the legal community have commented that the governing board of a public pension system has a fiduciary duty to monitor securities class actions in which the system has an interest, and to participate as lead plaintiff where such participation is likely to enhance the recovery by members of the class.

In 2010, the United States Supreme Court in *Morrison v. National Australia Bank* ("Morrison") held that certain investor losses stemming from corporate wrongdoing cannot be pursued under federal securities laws. Specifically, the Supreme Court held that investors cannot bring or participate in a U.S. securities class action if their claims are based on securities they purchased outside the United States. As a result, investors must now identify and evaluate foreign securities actions in order to fully protect their interests, including the right to participate in such actions and share in any recovery.

STATEMENT OF FUNCTIONS AND RESPONSIBILITIES

1. Review of Class Action Filings

The Legal Office shall identify and evaluate securities class actions, brought or pending within the United States and in foreign jurisdictions, in which LACERA may have recognized losses. In this connection, the Legal Office may retain a vendor specializing in identifying and analyzing securities cases to perform this function, and to report its findings to the Legal Office on a timely basis. The Legal Office may also select and retain one or more private law firms to identify and evaluate class action filings and, if the firm determines that LACERA's estimated loss meets the thresholds for Active Participation set forth below in Section 3(b), to report its findings to the Legal Office with a recommendation as to whether

the case would be meritorious and worthy of further investigation or Active Participation by LACERA.

2. Active Case Monitoring

The Legal Office shall actively monitor each case in which the Legal Office has determined the case has merit and LACERA's estimated loss is $2 million or more. Active monitoring may include participation by the Legal Office in significant motions and in settlement discussions when permitted by the parties or the court.

3. Active Participation

The Legal Office shall recommend to the Board of Investments that LACERA take an active role in a securities class action beyond monitoring, which may include, but is not limited to, seeking lead plaintiff status, or opting out of the class action and pursuing an individual action, in cases where:

(a) the Legal Office, after consulting with outside counsel, has determined the case has merit and the best interests of LACERA will be served by taking such action, and;

(b) LACERA's estimated loss is $2 million or more, or LACERA's estimated loss exceeds $1 million and LACERA will join with one or more other public retirement funds in pursuing such action.

Recommendations on whether to take an active role in a securities class action shall be submitted for approval, in advance, to the Board of Investments at a regularly-scheduled meeting or, where immediate approval is necessary, at a specially-called meeting. However, where the Chief Executive Officer determines that immediate approval is required in order to preserve LACERA's rights and/or interests by taking such action, and the matter cannot be timely presented for approval at a regularly-scheduled or special meeting of the Board, or where a quorum cannot be reached at such meeting, the Chief Executive Officer is authorized, after consultation with the Chief Counsel, Chief Investments Officer, and Chair of the Board of Investments, to make the decision. In the event such authority is exercised, the Chief Executive Officer shall instruct the Legal Office to concurrently notify the Board of Investments, and provide a summary of the action at the next regularly-scheduled meeting of the Board. Notwithstanding the foregoing, recommendations on whether to commence new litigation, as in the case of opting out of an existing securities class action and pursuing an individual action, shall be submitted to the Board of Investments for approval.

For purposes of this Policy, a foreign securities action is defined as a lawsuit brought or pending outside the United States involving securities purchased on a foreign securities exchange by LACERA or on its behalf. Participation as a class member in a foreign securities action, if participation in such foreign action requires registration or other affirmative action by LACERA, shall be considered "Active Participation" and shall be submitted to the Board of Investments for approval.

4. Asset Recovery

LACERA's custodial bank shall continue to be responsible for filing all proofs of claim, including the necessary supporting documents and information, necessary to recover

assets in every securities class action brought or pending within the United States in which LACERA has suffered losses. In this connection, the Legal Office shall prepare, and revise as necessary, a statement of work to be included with the custodial agreement setting forth formalized claims filing procedures for the custodial bank to follow, which shall include identifying and reviewing all class action settlements, providing timely notice of each settlement to LACERA, filing claims correctly and timely on LACERA's behalf, and providing quarterly reports regarding its efforts. The Legal Office, in consultation with the Financial Accounting and Services Division, shall monitor the performance of the custodial bank in that regard. The custodial bank shall submit quarterly reports on the securities litigation proceeds recovered, which information shall be shared with the Board.

5. Reports to the Board

The Legal Office shall provide the Board of Investments with annual reports covering its responsibilities under this policy. In addition, the Legal Office shall provide the Board with status reports as needed to keep the Board apprised of major developments in cases in which LACERA is a party.

6. Retention of Outside Counsel

The Legal Office shall retain one or more private law firms with demonstrated expertise and experience in prosecuting securities class actions (the "Securities Litigation Counsel") to advise and/or represent LACERA in securities actions. All retainer agreements shall be negotiated by the Legal Office and submitted for approval, in advance, to the Board of Investments at a regularly-scheduled meeting or, where immediate approval is necessary, at a specially-called meeting. However, where it is determined that immediate approval is required in order to preserve LACERA's rights and/or interests by retaining such counsel, and the matter cannot be timely presented for approval at a regularly-scheduled or special meeting of the Board, or where a quorum cannot be reached at such meeting, the Chief Executive Officer is authorized, after consultation with the Chief Counsel, Chief Investments Officer, and Chair of the Board of Investments, to make the decision. In the event such authority is exercised, the Chief Executive Officer shall instruct the Legal Office to concurrently notify the Board of Investments, and provide a summary of the action at the next regularly-scheduled meeting of the Board.

CHANGES TO CURRENT PRACTICE

The Legal Office has been monitoring securities class actions since passage by Congress of the PSLRA and has been evaluating the merits of LACERA taking an active role in such actions in which LACERA has a significant financial interest. The adoption of this policy will formalize the monitoring function being carried out by the Legal Office, and will create additional responsibilities for the Board of Investments and the Legal Office.

No additional staffing requirements or significant expense will result from the implementation of this policy.

Legal/SecuritiesLit/SecuritiesLitPolicy_Revised_110911

FOR INFORMATION ONLY

March 19, 2015

TO: Each Member
Board of Investments

FROM: Michael D. Herrera
Senior Staff Counsel

FOR: Board of Investments Meeting of April 8, 2015

SUBJECT: **Securities Litigation Report For Calendar Year 2014**

Securities Litigation Policy

In March 2001, the Board of Investments adopted a Securities Litigation Policy to formalize the Legal Office's securities class action monitoring and evaluation function, and implement procedures designed to enhance LACERA's recovery of damages from corporate wrongdoers. As a result of its efforts and success over the past 14 years, LACERA is widely viewed as a leader in this area and its Policy has served as a model for public pension funds throughout the country.

We are pleased to report that as of December 31, 2014, the Legal Office has recovered more than $62 million in securities class action settlement proceeds on behalf of the fund since the Board first adopted its Policy. This includes recoveries obtained through the successful prosecution of securities cases, and our ongoing securities claims filing efforts.

Background

Congress passed the Private Securities Litigation Reform Act (the "PSLRA") in 1995 to address concerns about the influence of "professional plaintiffs" and class action attorneys. To this end, the PSLRA contains provisions intended to encourage participation by sophisticated institutional investors. For example, the PSLRA contains a "lead plaintiff" provision and class notification process aimed at giving the plaintiff(s) with the largest financial interest at stake (presumably, institutional investors) the right to control the course of the litigation and to select, subject to court approval, lead counsel for the class.

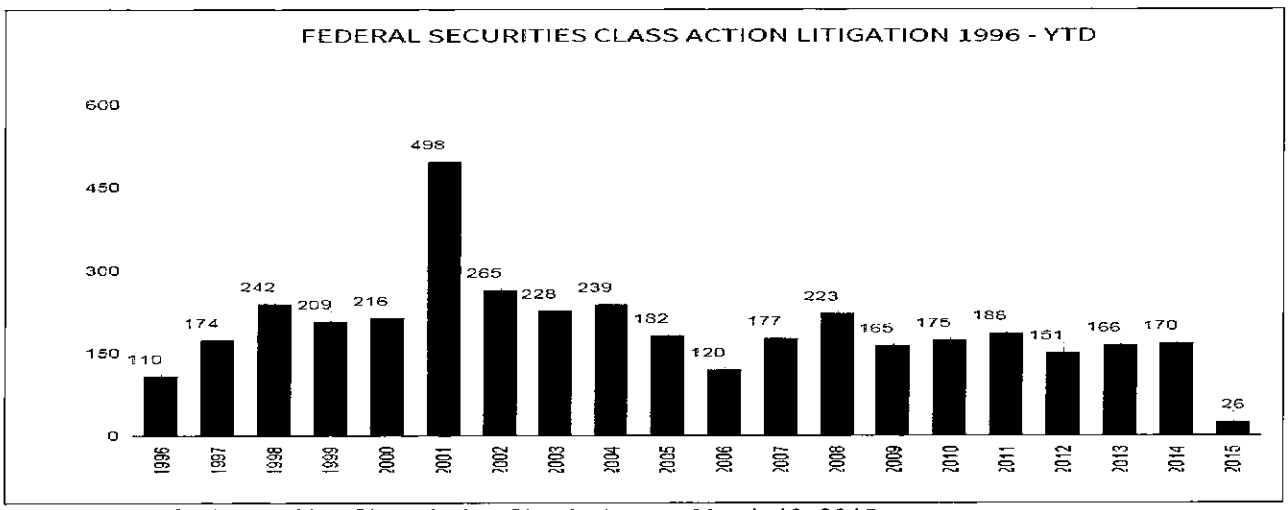
Although Congress intended to encourage institutional investors to serve as lead plaintiff, the PSLRA itself does not create any such duty. However, the United States Department of Labor has since stated that "not only is a fiduciary not prohibited from serving as lead plaintiff, the Secretary believes that a fiduciary has an affirmative duty to determine whether it would be in the interest of the plan participants to do so." The Secretary also affirmed its earlier position that "it may not only be prudent to initiate litigation, but also a breach of a fiduciary's duty to not pursue a valid claim."[1]

[1] Secretary of Laborer's Memorandum of Law as Amicus Curiae in Support of the Florida State Board of Administration's Appointment as lead plaintiff in In re Telxon Corp. Securities Litigation, 67 F.Supp.2d 803 (N.D. Ohio, 1999).

Identification and Evaluation of Securities Cases

To this end, the Policy provides that the Legal Office shall actively monitor, identify and evaluate securities cases on behalf of LACERA and recommend to the Board of Investments that the fund take an active role in those cases where: (i) LACERA's estimated loss is $2 million or more, or $1 million if LACERA will join with one or more other public retirement funds in pursuing such action, and; (ii) the Legal Office has determined the case to be meritorious and the best interest of the fund will be served through active involvement.

As illustrated in the chart below, there have been over 2,900 securities class actions filed since the Board first adopted its Policy in 2001. And with nearly 75% of its portfolio invested in equity and debt securities, LACERA is in a position to seek damages from issuers and others who engage in wrongful acts that diminish the value of these securities.



Source: Stanford Securities Class Action Clearinghouse, March 10, 2015.

Global Coverage

In 2010, the United States Supreme Court decided a case that significantly changed the securities litigation landscape. In that case, titled *Morrison v. National Australia Bank Ltd.,* [2] the Supreme Court for the first time held that investors can only bring federal securities fraud claims in U.S. courts if the securities were purchased or sold in the U.S. and/or listed on a domestic exchange, regardless of where the fraud or wrongdoing occurred. As a result, investors like LACERA who purchase securities outside the U.S. and/or on a foreign exchange can no longer rely on U.S. courts to protect their interests. The Board acted quickly to adopt a "global" policy to ensure LACERA continues to meet its fiduciary duty by identifying, monitoring and evaluating securities actions in which the fund has an interest, *both foreign and domestic*, and pursuing such claims when and in a manner the Board determines is in the best interest of the fund.[3]

[2] 130 S.Ct. 2869 (2010).

[3] For a more detailed discussion of the *Morrison* decision and its impact on LACERA, please see the March 18, 2015 informational memo prepared for the board by the Legal Office and submitted concurrently with this report.

Accordingly, the Legal Office now identifies and evaluates securities actions within the United States and abroad, and determines whether LACERA has an interest in those cases. We accomplish this herculean task in two ways. First, the Legal Office has engaged six U.S. law firms with significant securities litigation experience and expertise to serve as monitoring counsel to the fund. Three firms are dedicated to monitoring U.S. cases, and three focus exclusively on cases filed outside the U.S. – i.e., foreign actions. Monitoring counsel provide this service at no cost to LACERA because they are already performing the work for their own business research. Through an arrangement with LACERA's custodian, the law firms obtain LACERA's trading and holdings data directly from the custodian. In cases where LACERA has suffered a significant loss, the firms will report these cases to us.

The second method involves identifying and analyzing cases through our contract with Financial Recovery Technologies ("FRT"). FRT specializes in identifying and analyzing securities cases for public pension fund clients. When an initial complaint is filed, FRT will obtain LACERA's trading information directly from the custodian and calculate our losses, then send an email notification to us. FRT also maintains a website where we can go to obtain additional case information, trade history for the security, and loss calculations. It has proven to be an extremely useful and cost effective tool.

Once the Legal Office determines that a case satisfies the initial loss threshold, we will then evaluate the case to determine whether it satisfies the second prong of the Policy, namely, whether the case has merit and the best interest of LACERA will be served through active involvement. Since the Board first adopted the Policy, the Legal Office has evaluated or conducted formal requests for proposals in connection with hundreds of significant securities cases.

Active Participation

Since the Board adopted the Policy, LACERA has taken and continues to take an active role in securities cases, either as court-appointed lead or named plaintiff in a class action, or by opting out and bringing an individual action. We will continue to provide reports of LACERA's pending cases under separate cover to keep the Board apprised of significant developments.

Objecting to Attorneys' Fees

One of the benefits derived from the active involvement of institutional investors in federal securities class actions has been a significant decrease in the amount of fees awarded to class counsel. Studies show that the average attorney fee prior to the PSLRA was 31% of the settlement fund. However, fee agreements are now common with percentages in the low 20% range, or even in the teens. Institutional investors, namely public pension funds, have also been able to lower fees in cases in which they have not participated. The Legal Office evaluates securities settlements in which LACERA has an interest, and considers filing objections where appropriate.

In the *Broadwing, Inc. securities litigation*, for example, LACERA was instrumental in getting class counsel to agree to voluntarily reduce their fees from 30% to 23%, thereby saving the

class more than $2.5 million in fees. We achieved a similar result in the *AMF Bowling, Inc. securities litigation*, where we convinced the court to reduce fees from 33% to 25%, saving the class more than $1 million in fees and costs. As a class member eligible to participate in the settlement distributions in each of these cases, LACERA received a direct benefit from these reductions of fees and costs.

Asset Recovery

Virtually every public pension fund with significant funds invested in the U.S. securities markets is a passive member of the numerous securities class actions filed every year, and may be eligible to participate in the resulting settlements. Sadly, as the Wall Street Journal previously reported, "public and corporate pension plans are losing out on hundreds of millions of dollars in class action settlements for which they are eligible simply by neglecting to file claims." We are pleased to report that LACERA is not one of the funds leaving money on the table.

LACERA's custodians have always filed claims on LACERA's behalf, although the requirement to do so was not expressly set forth in its custody agreement. To address this, the Legal Office drafted a revised statement of work setting forth formalized claims filing procedures for LACERA's custodians to follow. As a result, LACERA's current custody agreement provides for its custodian to identify and review all class action settlements in which LACERA has an interest, provide timely notice of those settlements to the Legal Office, submit correct and timely claims on LACERA's behalf, and provide quarterly reports regarding its efforts. The statement of work developed by the Legal Office has since become a model for several public pension funds throughout the country.

As noted above, these efforts have resulted in the recovery by the fund of more than $62 million in securities class action claims, including those obtained through the fund's successful prosecution of securities fraud cases, as well as the fund's ongoing securities claims filing efforts.

Reviewed and Approved:

Steven P. Rice
Chief Counsel

cc: Gregg Rademacher
Robert Hill
John Popowich
David Kushner
Beulah Auten

MDH:kt f:/Legal/SecuritiesLit/BOISecLitReport_2014.doc

Materials concerning

Legislation limiting contingent fee litigation

Select Year: 2014 Go

The 2014 Florida Statutes

Title IV EXECUTIVE BRANCH | Chapter 16 ATTORNEY GENERAL | View Entire Chapter

16.0155 Contingency fee agreements.—

(1) As used in this section, the term:

(a) "Department" means the Department of Legal Affairs.

(b) "Private attorney" means any private attorney or law firm.

(2) The department may not enter into a contingency fee contract with a private attorney unless the Attorney General makes a written determination prior to entering into such a contract that contingency fee representation is both cost-effective and in the public interest. Any written determination shall include specific findings for each of the following factors:

(a) Whether there exist sufficient and appropriate legal and financial resources within the department to handle the matter.

(b) The time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.

(c) The geographic area where the attorney services are to be provided.

(d) The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.

(3) Notwithstanding the exemption provided in s. 287.057(3)(e), if the Attorney General makes the determination described in subsection (2), he or she shall request proposals from private attorneys to represent the department on a contingency-fee basis, unless the Attorney General determines in writing that requesting proposals is not feasible under the circumstances. The written determination does not constitute a final agency action subject to review pursuant to ss. 120.569 and 120.57. For purposes of this subsection only, the department is exempt from s. 120.57(3), and neither the request for proposals nor the contract award is subject to challenge pursuant to ss. 120.569 and 120.57.

(4) In addition to the requirements set forth in s. 287.059(16), any private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the matter in increments of no greater than 1/10 of an hour and shall promptly provide these records to the department, upon request.

(5) Notwithstanding s. 287.059(7)(a), the department may not enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee in excess of:

(a) Twenty-five percent of any recovery of up to $10 million; plus

(b) Twenty percent of any portion of such recovery between $10 million and $15 million; plus

(c) Fifteen percent of any portion of such recovery between $15 million and $20 million; plus

(d) Ten percent of any portion of such recovery between $20 million and $25 million; plus

(e) Five percent of any portion of such recovery exceeding $25 million.

In no event shall the aggregate contingency fee exceed $50 million, exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery.

(6) Copies of any executed contingency fee contract and the Attorney General's written determination to enter into a contingency fee contract with the private attorney shall be posted on the department's website for public inspection within 5 business days after the date the contract is executed and shall remain posted on the website for the duration of the contingency fee contract, including any extensions or amendments thereto. Any payment of contingency fees shall be posted on the department's website within 15 days after the payment of such contingency fees to the private attorney and shall remain posted on the website for at least 365 days thereafter.

(7) By February 1 of each year, the Attorney General shall submit a report to the President of the Senate and the Speaker of the House of Representatives describing the use of contingency fee contracts with private attorneys in the preceding calendar year. At a minimum, the report shall:

(a) Identify all new contingency fee contracts entered into during the year and all previously executed contingency fee contracts that remain current during any part of the year, and for each contract describe:

1. The name of the private attorney with whom the department has contracted, including the name of the attorney's law firm;
2. The nature and status of the legal matter;
3. The name of the parties to the legal matter;
4. The amount of any recovery; and
5. The amount of any contingency fee paid.

(b) Include copies of any written determinations made under subsection (2) during the year.

History.—s. 1, ch. 2010-7; s. 1, ch. 2011-4; s. 11, ch. 2013-154.

1 of 1 DOCUMENT

MICHIE'S ALABAMA CODE ANNOTATED

*** ARCHIVE DATA ***

*** Current through the end of the 2014 Regular Session ***

TITLE 41 State Government
CHAPTER 16 Public Contracts
Article 3A Competitive Bidding on Contracts for Goods and Services

Code of Ala. § 41-16-72 (2014)

§ 41-16-72. Professional services contracts.

Any other provision of law notwithstanding, the procurement of professional services by any agency, department, board, bureau, commission, authority, public corporation, or instrumentality of the State of Alabama shall be conducted through the following selection process:

(1) a. Except as otherwise provided herein, attorneys retained to represent the state in litigation shall be appointed by the Attorney General in consultation with the Governor from a listing of attorneys maintained by the Attorney General. All attorneys interested in representing the State of Alabama may apply and shall be included on the listing. The selection of the attorney or law firm shall be based upon the level of skill, experience, and expertise required in the litigation and the fees charged by the attorney or law firm shall be taken into consideration so that the State of Alabama receives the best representation for the funds paid. Fees shall be negotiated and approved by the Governor in consultation with the Attorney General. Maximum fees paid for legal representation that does not involve a contingency fee contract as defined in subparagraph f.1. of subdivision (1), may be established by executive order of the Governor.

Nothing in this article and nothing in Chapter 15 of Title 36 modifies or repeals the exclusive authority of the governing boards of the public institutions of higher education or public pension funds to direct and control litigation involving their respective universities or public pension fund and to employ and retain legal counsel of their own choice, consistent with their broad powers of management and control set forth in Chapters 47-56 of Title 16 and in the constitution, Chapter 25 of Title 16, and Chapter 27 of Title 36, respectively. Provided further, nothing in this article modifies or repeals the authority of the Attorney General to direct and control litigation involving the state or any agency, department, or instrumentality of the state, or the authority of the Governor to appear in civil cases in which the state is interested.

b. Attorneys retained by any state purchasing entity to render nonlitigation legal services shall be selected by such entity from a listing of attorneys maintained by the Legal Advisor to the Governor. All attorneys interested in

representing any purchasing state entity may apply and shall be included on the listing. The selection of the attorney or law firm shall be based upon the level of skill, experience, and expertise required for the services, but the fees charged by the attorney or law firm shall be taken into consideration so that such state entity shall receive the best representation for the funds paid. Fees for such services shall be negotiated by the state entity requiring the services and shall be subject to the review and approval of the Governor or the Director of Finance when so designated by the Governor.

c. This article shall not apply to the appointment by a court of attorneys or experts.

d. This article shall not apply to the retention of experts by the state for the purposes of litigation, or avoidance of litigation.

e. Nothing in this article shall be construed as altering or amending the Governor's authority to retain attorneys pursuant to Section 36-13-2, however, the Governor shall select such attorneys from three proposals received from attorneys included on the listing maintained by the Attorney General.

f. 1. For the purposes of this paragraph, the following terms shall have the following meanings:

(i) Contingency Fee Contract. An agreement, express or implied, for litigation legal services of an attorney or attorneys, including any associated counsel, under which compensation is contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement. The payment may be in an amount which either is fixed or is to be determined under a formula.

(ii) Contracting Agency. The Governor, Attorney General, or director of a state agency, department, bureau, commission, authority, public corporation, or instrumentality of the State of Alabama that seeks to enter a contingency fee contract.

2. The state may not enter into a contingency fee contract with any attorney or law firm unless the contracting agency makes a written determination prior to entering into a contingency fee contract that contingency fee representation is both cost-effective and in the public interest. Any written determination shall include specific findings for each of the following factors:

(i) Whether there exists sufficient and appropriate legal and financial resources within the state to handle the matter without a contingency contract.

(ii) The expected time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.

(iii) The geographic area where the attorney services are to be provided.

(iv) The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.

3. The state may not enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee calculated from the gross recovery resulting from a judgement or settlement in each action, exclusive of expenses, in excess of:

(i) Twenty-two percent of any recovery of up to ten million dollars ($10,000,000); plus

(ii) Twenty percent of any portion of such recovery between ten million dollars ($10,000,000) and twenty-five million dollars ($25,000,000); plus

(iii) Sixteen percent of any portion of such recovery between twenty-five million dollars ($25,000,000) and fifty million dollars ($50,000,000); plus

(iv) Twelve percent of any portion of such recovery between fifty million dollars ($50,000,000) and seventy-five million dollars ($75,000,000); plus

(v) Eight percent of any portion of such recovery between seventy-five million dollars ($75,000,000) and one hundred million dollars ($100,000,000); plus

(vi) Seven and one-tenth (7.1) percent of any portion of such recovery exceeding one hundred million dollars ($100,000,000).

(vii) The aggregate fee paid to contingency fee counsel shall not exceed seventy-five million dollars ($75,000,000) per action.

4. All litigation expenses incurred by the private attorney shall be paid or reimbursed upon approval on a monthly basis upon presentation of documentation of said expenses to the contracting agency.

5. The Attorney General may certify in writing to the Governor that, in the opinion of the Attorney General, an issue affecting the public health, safety, convenience, or economic welfare of the State of Alabama exists that justifies that the contingency fee limitations set forth in subparagraph 3 be suspended in the case of a particular contingency fee contract. Upon receipt of the written certification, the Governor, by the issuance of an Executive Order, may waive the limitations with respect to the specified contingency fee contract.

6. The state may not enter into a contract for contingency fee attorney services unless all of the following requirements are met throughout the contract period and any extensions thereof:

(i) A government attorney or attorneys retains complete control over the course and conduct of the case.

(ii) A government attorney with supervisory authority is personally involved in overseeing the litigation.

(iii) A government attorney or attorneys retains veto power over any decisions made by a private attorney.

(iv) After giving reasonable notice to the contingency fee counsel, any defendant that is the subject of the litigation may contact the lead government attorney or attorneys directly unless directed to do otherwise by the lead government attorney for the litigation matter. Contingency fee counsel shall have the right to participate in such discussions with the lead government attorney or attorneys unless, after consultation with contingency fee counsel, the lead government attorney agrees to such discussions without contingency fee counsel being present.

(v) A government attorney with supervisory authority for the case shall attend all settlement conferences.

(vi) Decisions regarding settlement of the case shall be reserved exclusively to the discretion of the government attorney or attorneys and the state.

7. The Attorney General shall develop a standard addendum to every contract for contingent fee attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the state, including, without limitation, the requirements listed in subparagraph 6.

8. Copies of any executed contingency fee contract and the contracting agency's written determination to enter into a contingency fee contract with the private attorney and any payment of any contingency fees shall be posted online pursuant to Section 41-4-65(b).

9. Any private attorney under contract to provide services to the state on a contingency fee basis, from the inception of the contract until at least four years after the contract expires or is terminated, shall maintain detailed current records, including documentation of all time records, expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of the attorney services. The private

attorney shall make all the records available for inspection and copying upon request by the Governor, Attorney General, or contracting agency. In addition, the private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the contract in increments not greater than 1/10 of an hour and shall promptly provide these records to the Governor, Attorney General, or contracting agency, upon request.

10. Any contingency fee paid to a private attorney or law firm shall be paid from the State Treasury from the funds recovered as a result of the contingent fee contract within thirty days of receipt thereof unless ordered to do otherwise by a court with jurisdiction over the litigation subject to the contingency contract.

(2) Physicians retained to provide medical services to the state shall be selected by the purchasing state entity from a list of qualified physicians maintained by the Alabama Medical Licensure Commission. All physicians interested in providing medical services to the State of Alabama may apply and shall be included on the listing.

(3) Professional services of architects, landscape architects, engineers, land surveyors, geoscience, and other similar professionals shall be procured in accordance with competitive, qualification-based selection policies and procedures. Selection shall be based on factors to be developed by the procuring state entity which may include, among others, the following:

a. Specialized expertise, capabilities, and technical competence, as demonstrated by the proposed approach and methodology to meet project requirements.

b. Resources available to perform the work, including any specialized services within the specified time limits for the project.

c. Record of past performance, quality of work, ability to meet schedules, cost control, and contract administration.

d. Availability to and familiarity with the project locale.

e. Proposed project management techniques.

f. Ability and proven history in handling special project contracts. Notice of need for professional services shall be widely disseminated to the professional community in a full and open manner. Procuring state entities shall evaluate such professionals that respond to the notice of need based on such state entity's qualification-based selection process criteria. Any such procuring state entity shall then make a good faith effort to negotiate a contract for professional services from the selected professional after first discussing and refining the scope of services for the project with such professional. Where the Alabama Building Commission has set a fee schedule for the professional services sought, fees shall not exceed the schedule without approval of the Director of the Alabama Building Commission and the Governor.

(4) The Director of Finance, through the Division of Purchasing of the Department of Finance, shall establish and maintain lists of professional service providers, other than those specifically named in this section, which may be required from time to time by any state agency, department, board, bureau, commission, authority, public corporation, or instrumentality. When such professional services are needed, the purchasing state entity shall solicit proposals from the professional service providers desiring to receive requests for proposals. The purchasing state entity shall select the professional service provider that best meets the needs of the purchasing entity as expressed in the request for proposals. Price shall be taken into consideration. In the event the fees paid to the selected professional service provider exceed by 10 percent the professional service fee offered by the lowest qualified proposal, the reasons for selecting a professional service provider must be stated in writing, signed by the director of the purchasing state entity, and made a part of the selection record.

(5) Contracts for professional services shall be limited only to that portion of a contract relating to the professional service provided. Goods purchased by the state in conjunction with the contract for professional services

shall be purchased pursuant to Section 41-16-20.

(6) Should an emergency affecting the public health, safety, convenience, or the economic welfare of the State of Alabama so declared in writing under oath to the Governor and the Attorney General by the state entity requiring the professional services arise, the professional services required to alleviate the emergency situation may be procured from any qualified professional service provider without following the process or procedure required by this article.

(7) The process set forth herein for the selection of professional service providers shall not apply to the Legislature, the Alabama State Port Authority, or to colleges and universities governed by a board of trustees or by the Department of Postsecondary Education. The State Department of Education shall not be subject to the provisions of this article, requiring the process set forth herein for the selection of professional service providers, except for the future acquisition of professional services in support of computer technology on a statewide basis which exceeds the amount of expenditures set forth within this chapter. However, if a state agency or department is able to provide the necessary computer networking services, then the services shall be provided by the agency or department without being contracted to an outside provider. In the event the State Department of Education has intervened into the financial operations of a local board of education, the State Department of Education shall follow the provisions of law applicable to local boards of education for services related to the local board of education subject to intervention. The Alabama Medicaid Agency shall not be subject to the provisions of this article requiring the process set forth herein for the selection of professional service providers for contracts with physicians, pharmacists, dentists, optometrists, opticians, nurses, and other health professionals which involve only service on agency task forces, boards, or committees.

(8) Under any contract letting process in this section, all requests for proposals from any state entity purchasing professional services shall be sent to all professional service providers regardless of race that have notified the state of their interest in receiving state business.

(9) Under any contract letting process in this section, all lists containing professional service providers and contractors for contracts under the provisions of this article shall seek the racial and ethnic diversity of the state.

HISTORY: Acts 2001, 3rd Sp. Sess., No. 01-956; Acts 2011, No. 11-577, § 1, June 9, 2011; Acts 2013, No. 13-399, § 2, Aug. 1, 2013.

NOTES: Effective dates.

Acts 2013, No. 13-399, § 3: "This act shall apply to all contracts entered into on or after the effective date of this act [August 1, 2013]."

2011 amendments.

The 2011 amendment added the last sentence of (7).

2013 amendments.

The 2013 amendment, effective August 1, 2013, added "that does not involve a contingency fee contract as defined in subparagraph f.1. of subdivision (1)" in the last sentence of the first paragraph of (1)a.; in the first sentence of the second paragraph of (1)a., added "or public pension fund" or variants and added "Chapter 25 of Title 16, and Chapter 27 of Title 36, respectively"; and added (1)f.

Editor's notes.

The Code Commissioner edited this section as amended in 2013. The Code Commissioner substituted "subparagraph 6" for "paragraph 4" in (1)f.7.

Related statutes.

Acts 2013, No. 13-399, § 1: "This act shall be known as the Transparency in Private Attorney Contracts Act."

LexisNexis 50 State Surveys, Legislation & Regulations

Professional Services Procurement

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

SESSION LAW 2014-110
SENATE BILL 648

AN ACT TO CREATE TRANSPARENCY IN CONTRACTS BETWEEN THE ATTORNEY GENERAL AND PRIVATE ATTORNEYS, TO PREVENT THE ABUSE OF PATENTS, TO ALLOW FOR SHAREHOLDER ASSENT TO EXCLUSIVE FORUM, AND TO LIMIT ASBESTOS-RELATED LIABILITIES FOR CERTAIN SUCCESSOR CORPORATIONS.

The General Assembly of North Carolina enacts:

PART I. CREATE TRANSPARENCY IN CONTRACTS BETWEEN THE ATTORNEY GENERAL AND PRIVATE ATTORNEYS

SECTION 1.1. Chapter 114 of the General Statutes is amended by adding a new Article to read:

"Article 2A.

"Transparency in Third-Party Contracting by Attorney General.

"**§ 114-9.2. Title.**

This Article shall be known and may be cited as the "Transparency in Private Attorney Contracts Act (TIPAC)."

"**§ 114-9.3. Definitions.**

The following definitions apply in this Article:

(1) Contingency fee contract. – A contract entered into by a State agency to retain private counsel that contains a contingency fee arrangement, including, but not limited to, pure contingency fee agreements and hybrid agreements, including a contingency fee aspect.

(2) Government attorney. – An attorney employed by the State as a staff attorney in a State agency.

(3) Private attorney. – An attorney in private practice or employed by a private law firm.

(4) State. – The State of North Carolina, including State officers, departments, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of State government and any of its agents.

(5) State agency. – Every agency, institution, department, bureau, board, or commission of the State of North Carolina authorized by law to retain private counsel.

"**§ 114-9.4. Procurement.**

(a) A State agency may not enter into a contingency fee contract with a private attorney unless the Attorney General makes a written determination prior to entering into the contract that contingency fee representation is both cost-effective and in the public interest. Any written determination shall include specific findings for each of the following factors:

(1) Whether there exist sufficient and appropriate legal and financial resources within the Attorney General's office to handle the matter.

(2) The time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.

(3) The geographic area where the attorney services are to be provided.

(4) The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.

(b) If the Attorney General makes the determination described in subsection (a) of this section, the Attorney General shall request proposals from private attorneys to represent the State agency on a contingency fee basis and draft a written request for proposals from private attorneys, unless the Attorney General determines that requesting proposals is not feasible under the circumstances and sets forth the basis for this determination in writing. A request for proposals under this provision is not subject to Article 3 of Chapter 143 of the General Statutes. Until the conclusion of the legal proceeding or other matter for which the services of the private attorney were sought, all proposals received shall be maintained by the Attorney General and shall not be deemed a public record within the meaning of Chapter 132 of the General Statutes. All proposals maintained under this subsection shall be made available to the State Auditor for oversight purposes, upon request.

(c) A private attorney who submits a proposal under this section shall simultaneously pay a fee in the amount of fifty dollars ($50.00). All fees collected under this subsection shall be used for the maintenance of the Attorney General's Web site.

"**§ 114-9.5. Contingency Fees.**

(a) The Attorney General may not give permission under G.S. 114-2.3 for a State agency to enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee, exclusive of reasonable costs and expenses, in excess of:

(1) Twenty-five percent (25%) of any damages up to ten million dollars ($10,000,000); plus

(2) Twenty percent (20%) of any portion of such damages between ten million dollars ($10,000,000) and fifteen million dollars ($15,000,000); plus

(3) Fifteen percent (15%) of any portion of such damages between fifteen million dollars ($15,000,000) and twenty million dollars ($20,000,000); plus

(4) Ten percent (10%) of any portion of such damages between twenty million dollars ($20,000,000) and twenty-five million dollars ($25,000,000); plus

(5) Five percent (5%) of any portion of such damages exceeding twenty-five million dollars ($25,000,000).

(b) In no event shall the aggregate contingency fee exceed fifty million dollars ($50,000,000), exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery.

(c) A contingency fee shall not be based on penalties or civil fines awarded or any amounts attributable to penalties or civil fines.

"**§ 114-9.6. Control.**

(a) Decisions regarding disposition of the case are reserved exclusively to the discretion of the State agency in consultation with a government attorney.

(b) The Attorney General shall develop a standard addendum to every contract for contingency fee attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the State agency, including, without limitation, the requirement listed in subsection (a) of this section.

"**§ 114-9.7. Oversight.**

(a) Until the conclusion of the legal proceeding or other matter for which the services of the private attorney have been retained, the executed contingency fee contract and the Attorney General's written determination pursuant to G.S. 114-9.4 shall not be deemed a public record within the meaning of Chapter 132 of the General Statutes. All records maintained under this subsection shall be made available to the State Auditor for oversight purposes, upon request.

(b) The amount of any payment of contingency fees pursuant to a contingency fee contract subject to this Article shall be posted on the Attorney General's Web site within 15 days after the payment of those contingency fees to the private attorney and shall remain posted on the Web site for at least 365 days thereafter.

(c) Any private attorney under contract to provide services to a State agency on a contingency fee basis shall maintain all records related to the contract in accordance with the Revised North Carolina Rules of Professional Conduct.

(d) By February 1 of each year following a year in which a State agency entered into a contingency fee contract with a private attorney, the Attorney General shall submit a report to the President Pro Tempore of the Senate and the Speaker of the House of Representatives

describing the use of contingency fee contracts with private attorneys in the preceding calendar year. To the fullest extent possible without waiving the evidentiary privileges of the State in any pending matters, the report shall:

(1) Identify each new contingency fee contract entered into during the year and each previously executed contingency fee contract that remains current during any part of the year.

(2) Include the name of the private attorney with whom the department has contracted in each instance, including the name of the attorney's law firm.

(3) Describe the nature and status of the legal matter that is the subject of each contract.

(4) Provide the name of the parties to each legal matter.

(5) Disclose the amount of recovery.

(6) Disclose the amount of any contingency fee paid.

(7) Include copies of any written determinations made under G.S. 114-9.4.

"**§ 114-9.8. No expansion of authority.**

Nothing in this Article shall be construed to expand the authority of any State agency or officer or employee of this State to enter into contracts for legal representation where no authority previously existed."

SECTION 1.2. G.S. 114-2.3 reads as rewritten:

"**§ 114-2.3. Use of private counsel limited.**

(a) Every agency, institution, department, bureau, board, or commission of the State, authorized by law to retain private counsel, shall obtain written permission from the Attorney General prior to employing private counsel. This section does not apply to counties, cities, towns, other municipal corporations or political subdivisions of the State, or any agencies of these municipal corporations or political subdivisions, or to county or city boards of education.

(b) Article 2A of this Chapter applies to any contract to retain private counsel authorized by the Attorney General under this section."

SECTION 1.3. Sections 1.1 and 1.2 of this act are effective when they become law and apply to any contract to retain private counsel authorized by the Attorney General entered into on or after that date.

*** * ***

* * *

PART V. SEVERABILITY AND EFFECTIVE DATE

SECTION 5.1. If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid.

SECTION 5.2. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 1st day of August, 2014.

s/ Neal Hunt
Presiding Officer of the Senate

s/ Thom Tillis
Presiding Officer of the House of Representatives

s/ Pat McCrory
Governor

Approved 5:09 p.m. this 6th day of August, 2014

As Passed by the House

131st General Assembly
Regular Session **S. B. No. 38**
2015-2016

Senator Seitz
Cosponsors: Senators Eklund, Jones, Patton, Beagle, Coley, Jordan, LaRose, Representatives Blessing, Butler, Antani, Buchy, Burkley, Conditt, Duffey, Grossman, Hackett, Kraus, LaTourette, Retherford, Romanchuk, Sprague, Terhar, Young

A BILL

To enact sections 9.49, 9.491, 9.492, 9.493, 9.494, 9.495, 9.496, 9.497, and 9.498 of the Revised Code to provide transparency in contracts between the state and private attorneys.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 9.49, 9.491, 9.492, 9.493, 9.494, 9.495, 9.496, 9.497, and 9.498 of the Revised Code be enacted to read as follows:

Sec. 9.49. Sections 9.49 to 9.498 of the Revised Code shall be known as the transparency in private attorney contracts act.

Sec. 9.491. As used in sections 9.49 to 9.498 of the Revised Code:

(A) "Legal matter" means any administrative proceeding, case, group of cases, or legal issue for which the state requires legal representation or advice.

(B) "Private attorney" means any attorney in the private practice of law or a law firm but does not mean an attorney appointed by the attorney general pursuant to section 109.08 of the Revised Code for the purpose of collecting debts certified to the attorney general for collection under any law or debts that the attorney general is authorized to collect.

(C) "State" means this state and any officer, department, board, commission, division, bureau, council, or unit of organization, however designated, of the executive branch of government of this state and any of its agents.

(D) "Securities class action" means an action brought as a class action that includes a violation of the "Securities Act of 1933," 15 U.S.C. 77a and following, or the "Securities Exchange Act of 1934," 15 U.S.C. 78a and following.

Sec. 9.492. (A) The state shall not enter into a contingency fee contract with a private attorney unless the attorney general or the attorney general's designee makes a written determination prior to entering into that contract or within a reasonable time after entering into the contract that private representation is both cost-effective and in the public interest. Any written determination shall include findings for each of the following factors:

(1) Whether there exist sufficient and appropriate legal and financial resources within the attorney general's office to handle the matter involved;

(2) The nature of the legal matter for which private representation is required so long as divulging that information would not violate any ethical responsibility of the attorney general or privilege held by the state.

(B) If the attorney general or the attorney general's designee makes the determination described in division (A) of this section, the attorney general or the attorney general's designee shall request qualifications from private attorneys to represent the state, unless the attorney general or the attorney general's designee determines that requesting qualifications is not feasible under the circumstances and sets forth the basis for this determination in writing.

(C)(1) Except as otherwise provided in division (C)(2) of this section and subject to divisions (C)(3) and (4) of this section, the state shall not enter into a contingency fee contract with a private attorney that provides for the private attorney to receive an aggregate contingency fee in excess of the total of the following amounts:

(a) Twenty-five per cent of any damages up to ten million dollars;

(b) Twenty per cent of any portion of any damages of ten million dollars or more but less than fifteen million dollars;

(c) Fifteen per cent of any portion of any damages of fifteen million dollars or more but less than twenty million dollars;

(d) Ten per cent of any portion of any damages of twenty million dollars or more but less than twenty-five million dollars;

(e) Five per cent of any portion of any damages of twenty-five million dollars or more.

(2) Except as provided in division (D) of this section with respect to security class actions, the aggregate contingency fee under division (C)(1) of this section, exclusive

of reasonable costs and expenses, shall not exceed fifty million dollars, regardless of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery, unless the contract expressly authorizes a contingency fee in excess of fifty million dollars. The attorney general shall not enter into a contract authorizing a contingency fee in excess of fifty million dollars without the approval of the controlling board.

(3) A contingency fee in a contingency fee contract under division (C)(1) of this section shall not be based on penalties or civil fines awarded or on any amounts attributable to penalties or civil fines.

(4) The amount of a contingency fee paid to a private attorney under a contingency fee contract between the state and the private attorney shall be the percentage of the amount of damages actually recovered by the state to which the private attorney is entitled under division (C)(1) of this section.

(D) In any contingency fee contract covering a securities class action in which this state is appointed as lead plaintiff pursuant to section 27(a)(3)(B)(i) of the "Securities Act of 1933," 15 U.S.C. 77z-1(a)(3)(B)(i) or section 21D(a)(3)(B)(i) of the "Securities Exchange Act of 1934," 15 U.S.C. 78u-4(a)(3)(B)(i) or in which any state is a class representative, division (C)(2) of this section applies only with respect to the state's share of any judgment, settlement amount, or common fund and does not apply to the amount of attorney's fees that may be awarded to a private attorney for representing other members of a class certified pursuant to Rule 23 of the Federal Rules of Civil Procedure or state class action procedures.

(E)(1) A contract entered into between the state and a

private attorney under this section shall include all of the following provisions that apply throughout the term of the contract and any extensions of that term:

(a) The private attorney shall acknowledge that the assistant attorney general retains complete control over the course and conduct of the case involved.

(b) An assistant attorney general with supervisory authority shall oversee the litigation of the case.

(c) An assistant attorney general shall retain veto power over any decisions made by the private attorney.

(d) Any opposing party in the case may contact the assistant attorney general directly without having to confer with the private attorney unless the assistant attorney general instructs the opposing party otherwise.

(e) An assistant attorney general with supervisory authority for the case may attend all settlement conferences.

(f) The private attorney shall acknowledge that final approval regarding settlement of the case is reserved exclusively to the discretion of the attorney general.

(2) Nothing in division (E)(1) of this section shall be construed to limit the authority of the client regarding the course, conduct, or settlement of the case.

Sec. 9.493. The state shall not enter into a contract with a private attorney located outside this state unless the attorney general determines that at least one of the following applies:

(A) There are no private attorneys with an office in this state that are willing to accept the legal representation.

(B) All private attorneys with offices in this state that possess the necessary experience or capability are conflicted and unable to represent the state or the attorney general or lack necessary personnel and capacity in the firm to take on the engagement.

(C) The attorney general is prevented from engaging a private attorney with an office in this state under the rules of the controlling board regarding waiver of competitive selection.

(D) There are no private attorneys with offices in this state that possess the necessary experience, capability, or capacity required by the contemplated engagement.

Sec. 9.494. (A) A copy of the executed contingency fee contract between the state and a private attorney pursuant to section 9.492 or 9.493 of the Revised Code and any corresponding submission by the attorney general to the controlling board pursuant to division (C)(2) of section 9.492 of the Revised Code shall be posted on the attorney general's web site and shall remain posted on the web site for the duration of the contract.

(B) A private attorney under a contingency fee contract to provide services to the state pursuant to section 9.492 or 9.493 of the Revised Code shall maintain from the inception of the contract until at least three years after the contract expires or is terminated detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of the attorney services. The private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the legal matter and shall promptly provide these records to the attorney general upon request.

Sec. 9.495. By the first day of September of each year, the attorney general shall submit a report to the president of the senate and the speaker of the house of representatives describing the use of contracts with private attorneys in the preceding fiscal year. The report shall include the following:

(A) Identification of all contracts entered into during the fiscal year and all previously executed contracts that remain current during any part of the fiscal year or that have been closed during any part of the fiscal year, and for each contract a description of all of the following:

(1) The name of the private attorney with whom the state has contracted, including the name of the private attorney's law firm if the private attorney is an individual;

(2) The nature of the legal matter that is the subject of the contract so long as divulging that information would not violate any ethical responsibility of the attorney general or privilege held by the state;

(3) The state entity the private attorney was engaged to represent or counsel;

(4) The total legal fees approved by the attorney general for payment to a private attorney by the state for legal services rendered during the preceding fiscal year.

(B) Copies of any written determinations made pursuant to sections 9.492 to 9.494 of the Revised Code during the fiscal year.

Sec. 9.496. Sections 9.491 to 9.495 of the Revised Code do not apply to contingency fee contracts and renewals thereof that are in existence on the effective date of this section.

Sec. 9.497. Nothing in sections 9.49 to 9.496 of the Revised Code shall be construed to expand the authority of any state agency or state agent to enter into contracts if no such authority previously existed.

Sec. 9.498. The general assembly intends that any limitations on entering into a contingency fee contract, as provided by sections 9.491 to 9.495 of the Revised Code, are to be applied only to contracts with a private attorney retained on a contingency fee basis by the state. These limitations shall not apply to contingency fee contracts between private parties and contracts not involving the state.

Materials concerning

IndyMac and the statute of repose

POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT, individually, POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT, on behalf of all others similarly situated, WYOMING STATE TREASURER, WYOMING RETIREMENT SYSTEM, Plaintiffs, GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, LOS ANGELES COUNTY EMPLOYEES RETIREMENT SYSTEM aka "LACERA," PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI "PERS," Proposed Intervenors-Appellants, v. INDYMAC MBS, INC., DEUTSCHE BANK SECURITIES INC., GOLDMAN, SACHS & COMPANY, MORGAN STANLEY & COMPANY, CREDIT SUISSE SECURITIES (USA) LLC, Defendants-Appellees, RESIDENTIAL ASSET SECURITIZATION TRUST 2006-A5CB, et al., Defendants.*

* The Clerk of the Court is directed to amend the official caption to conform to the listing of the parties above.

Docket Nos. 11-2998-cv(L), 11-3036-cv(CON).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

721 F.3d 95*; *2013 U.S. App. LEXIS 13203*; *Fed. Sec. L. Rep. (CCH) P97,538*; *85 Fed. R. Serv. 3d (Callaghan) 1597

December 5, 2012, Argued
June 27, 2013, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari granted by *Public Emples. Ret. Sys. v. IndyMac MBS, Inc., 2014 U.S. LEXIS 1904 (U.S., Mar. 10, 2014)*

PRIOR HISTORY: [**1]
In re IndyMac Mortg.-Backed Sec. Litig., 793 F. Supp. 2d 637, 2011 U.S. Dist. LEXIS 67781 (S.D.N.Y., 2011)

DISPOSITION: We consider here an appeal from an order of the United States District Court for the Southern District of New York. See *In re IndyMac Mortgage-Backed Sec. Litig., 793 F. Supp. 2d 637(S.D.N.Y. 2011)* ("IndyMac II") (Lewis A. Kaplan, Judge). The lead plaintiff and proposed intervenors in this case allege misrepresentations and omissions in the offering and sale of certain financial instruments which they purchased. This appeal presents an unsettled question of law: whether the tolling rule set forth by the Supreme Court in *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713(1974)* ("American Pipe")--that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," *id. at 554*--applies to the three-year statute of repose in Section 13 of the Securities Act of 1933, as amended, *15 U.S.C. § 77m*. This appeal also requires us to decide whether non- using the "relation back" doctrine of *Federal Rule of Civil Procedure 15(c)* to amend the class complaint and intervene in the action as named parties.

We hold that: (1) American Pipe's tolling rule does [**2] not apply to the three-year statute of repose in

Section 13; and (2) absent circumstances that would render the newly asserted claims independently timely, neither *Rule 24* nor the *Rule 15(c)* "relation back" doctrine permits members of a putative class, who are not named parties, to intervene in the class action as named parties in order to revive claims that were dismissed from the class complaint for want of jurisdiction. In practical terms, the litigants in these cases may not circumvent Section 13's statute of repose by invoking American Pipe or *Rule 15(c)*. Accordingly, we AFFIRM the June 21, 2011 order of the District Court, insofar as it partially denied motions to intervene by proposed intervenors-appellants.

COUNSEL: ROBIN F. ZWERLING (Jeffrey C. Zwerling, Justin M. Tarshis, on the brief), Zwerling, Schachter &Zwerling, LLP, New York, NY, for Proposed Intervenor-Appellant General Retirement System of the City of Detroit.

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Michael J. Miarmi, Joy A. Kruse, Lieff, Cabraser, Heimann & Bernstein, LLP, New York, NY, for Proposed [**3] Intervenor-Appellant Public Employees' Retirement System of Mississippi.

William R. Stein, Scott H. Christensen, Hughes Hubbard & Reed LLP, Washington, DC, for Defendant-Appellee IndyMac MBS, Incorporated.

ROBERT F. SERIO (Aric H. Wu, Jason W. Myatt, Dean J. Kitchens, on the brief), Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Defendants-Appellees Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., Goldman, Sachs & Co., and Morgan Stanley & Co. LLC.

Lawrence M. Rolnick, Thomas E. Redburn, Jr., Sheila Sadighi, Lowenstein Sandler PC, New York, NY, for Amicus Curiae W.R. Huff Asset Management Co., LLC in support of Intervenors-Appellants.

JUDGES: Before: CABRANES, RAGGI, and CARNEY, Circuit Judges.

OPINION BY: JOSÉ A. CABRANES

OPINION

[*100] JOSÉ A. CABRANES, *Circuit Judge*:

This appeal presents an unsettled question of law: whether the tolling rule set forth by the Supreme Court in *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)* ("*American Pipe*")--that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," *id. at 554*--applies to the three-year [**4] statute of repose in Section 13 of the Securities Act of 1933 ("Securities Act"), *15 U.S.C. § 77m*.[1] In addition, we are [*101] called upon to decide whether non-party members of a putative class can avoid the effect of a statute of repose using the "relation back" doctrine of *Federal Rule of Civil Procedure 15(c)* to amend the class complaint and intervene in the action as named parties.[2]

1 Section 13 of the Securities Act states in full:

> No action shall be maintained to enforce any liability created under *section 77k* or *77l(a)(2)* of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section *77l(a)(1)* of this title, unless brought within one year after the violation upon which it is based. *In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale*.

15 U.S.C. § 77m (emphasis supplied). As [**5] we explain below, *see* Part II.B.ii., *post*, the emphasized text is understood to be a "statute of repose," *Fed. Hous. Fin. Agency v. UBS Americas*

Inc., 712 F.3d 136, 140-41 (2d Cir. 2013), meaning that it "extinguishes [a] cause of action . . . after a fixed period of time . . . regardless of when the cause of action accrued," as opposed to a statute of limitations, which "establishes the time period within which lawsuits may be commenced after a cause of action has accrued," *Stuart v. Am. Cyanamid Co., 158 F.3d 622, 627 (2d Cir. 1998)*.

2 *Rule 15(c)(1)* states:

> (1) *When an Amendment Relates Back*. An amendment to a pleading relates back to the date of the original pleading when:
>
> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if *Rule 15(c)(1)(B)* is satisfied and if, within the period provided by *Rule 4(m)* for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received [**6] such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1).

This appeal comes to us from an order of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) denying, in relevant part, proposed intervenors-appellants' motions to intervene.[3] *See In re IndyMac Mortgage-Backed Sec. Lit., 793 F. Supp. 2d 637 (S.D.N.Y. 2011)* ("*IndyMac II*"). The lead plaintiff and other putative class members alleged that defendants had made fraudulent misrepresentations and omissions in the offering and sale of certain financial instruments which they purchased. Following the District Court's dismissal of certain claims, as well as the expiration of the three-year statute of repose under Section 13, several putative class members sought to intervene in the action to revive the dismissed claims on either of two theories: (1) that the *American Pipe* tolling rule operated to preserve their right to sue, or (2) that *Rule 15(c) of the Federal Rules of Civil Procedure* allowed them to [**7] "relate back" their otherwise untimely claims to the surviving claims in the class complaint. The District Court rejected these two theories and denied the motions to intervene as barred under Section 13's statute of repose. This appeal by proposed intervenors-appellants followed.

> 3 This appeal was originally argued in tandem with an appeal from *Int'l Fund Mgmt. S.A. v. Citigroup Inc., 822 F. Supp. 2d 368 (S.D.N.Y. 2011)* ("*IFM*"). The parties in the *IFM* action, however, have since stipulated to a withdrawal of their appeal with prejudice.

We hold that: (1) *American Pipe's* tolling rule does not apply to the three-year statute of repose in Section 13; and (2) absent circumstances that would render the newly asserted claims independently timely, neither *Federal Rule of Civil Procedure 24* nor the *Rule 15(c)* "relation back" doctrine permits members of a putative class, who are not named parties, to intervene in the class action as named parties in order to revive claims that were dismissed from the class complaint for want of jurisdiction. In practical terms, the proposed intervenors may not circumvent Section 13's statute of repose by invoking *American Pipe* or *Rule 15(c)*. Accordingly, we **AFFIRM** [**8] the June 21, 2011 order of the District Court, insofar as it partially denied motions to intervene by the proposed intervenors.

I. BACKGROUND

This appeal arises from two securities class actions, consolidated by the District Court, asserting claims for violations of Sections 11, 12(a) and 15 of the Securities [*102] Act[4] against IndyMac MBS, Inc. ("IndyMac MBS"), an issuer of mortgage-backed securities, and certain of its officers, directors, and underwriters (jointly, "defendants"). As relevant here, IndyMac MBS issued securities known as mortgage pass-through certificates ("Certificates") "in 106 different offerings pursuant to three registration statements and the related prospectuses and prospectus supplements."[5] *IndyMac, 718 F. Supp. 2d 495, 498 (S.D.N.Y. 2010)* ("*IndyMac I*"). The Police and Fire Retirement System of the City of Detroit ("Detroit PFRS") and the Wyoming State Treasurer and the Wyoming Retirement System (jointly, "Wyoming" or "Wyoming entities") commenced two separate putative class actions against the IndyMac defendants on behalf of asserted class members who had purchased Certificates in some of the 106 offerings. The District Court then consolidated the Detroit PFRS and [**9] Wyoming actions, and appointed Wyoming lead plaintiff of the consolidated action, pursuant to the Private Securities Litigation Reform Act ("PSLRA"), *15 U.S.C. § 78u-4*.[6] Although Wyoming was the only plaintiff named in [*103] the consolidated action, the Amended Consolidated Complaint ("Amended Complaint") raised claims on behalf of other asserted class members, who were purchasers of the IndyMac Certificates.

> 4 Section 11 of the Securities Act, codified at *15 U.S.C. § 77k*, provides for civil liability for false or misleading
>
> > registration statements, and states, in relevant part, that [i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue . . . .
>
> *15 U.S.C. § 77k(a)*. Section 12(a)(2) of the Securities Act, codified at *15 U.S.C. § 77l(a)(2)*,

provides for civil liability "in connection with prospectuses [**10] and communication," and states that:

> Any person who . . . offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, . . . shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns [**11] the security.

15 U.S.C. § 77l(a)(2). Section 13 of the Securities Act, codified at *15 U.S.C. § 77o*, extends joint and several liability to persons who "control[ ] any person liable under *[Sections 11* and 12(a)]" of the Securities Act. *See 15 U.S.C. § 77o(a)*.

5 A mortgage pass-through certificate is "a type of mortgage-backed security that entitles its owner to a portion of the revenue stream generated by an underlying pool of residential mortgage loans." *IndyMac II, 793 F. Supp. 2d 637, 640-41 (S.D.N.Y. 2011)*; *see also Am. Int'l Grp. v. Bank of Am. Corp., 712 F.3d 775, 777 (2d Cir. Apr. 19, 2013)*. Judge Kaplan explained that:

> IndyMac Bank originated or acquired the individual mortgage loans that underlie the Certificates. The loans then were transferred to IndyMac MBS, which bundled them into groups, or pools. The pools were transferred to issuing trusts, which created the Certificates. The issuing trusts then transferred the Certificates to IndyMac MBS which, in turn, sold them to the specific underwriters for each offering. After the Certificates were rated by rating agencies, the underwriters offered them to investors.

IndyMac II, 793 F. Supp. 2d at 641.

6 The [**12] PSLRA states, in pertinent part, that "[n]ot later than 90 days after the date on which a notice [to members of the purported plaintiff class] is published . . . [the district court] shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members . . . ." *15 U.S.C. § 78u-4(a)(3)(B)(i)*.

On June 21, 2010, the District Court dismissed for lack of standing all claims in the Amended Complaint arising from the offerings of securities not purchased by the Wyoming entities, who are the lead and sole named plaintiffs. *IndyMac I, 718 F. Supp. 2d at 501*. The District Court explained that, as in any lawsuit, the named plaintiffs must demonstrate constitutional standing, and that the Wyoming entities had failed to make the necessary showing of injury as to the offerings of securities that they did not purchase. *Id.* (relying on an earlier District Court opinion in separate mortgage-backed securities litigation).

The dismissed claims included those involving securities purchased by Detroit PFRS and by other members of the asserted class, none of whom were named plaintiffs. In [**13] addition to Detroit PFRS,

five members of the asserted class--(1) the City of Philadelphia Board of Pensions and Retirement ("Philadelphia"); (2) the Los Angeles County Employees Retirement Association ("LACERA"); (3) the Public Employees' Retirement System of Mississippi ("PERS"); (4) the Iowa Public Employees' Retirement System ("Iowa"); and (5) the General Retirement System of the City of Detroit ("Detroit Retirement")--subsequently moved to intervene in the action, pursuant to *Federal Rule of Civil Procedure 24*,[7] to assert claims with respect to the Certificates that those entities had purchased, but which the named Wyoming plaintiffs had not purchased.[8] Although the three-year period of repose in Section 13 had run on their claims, these putative plaintiffs invoked the tolling rule set forth in *American Pipe*, where, as noted above, the Supreme Court held that "the commencement of a class action suspends the applicable *statute of limitations* as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," *414 U.S. at 554* (emphasis supplied). The putative plaintiffs argued that the *American Pipe* tolling rule, which has [**14] long been accepted in the context of statutes of limitations, applied equally to the statute of repose in Section 13. The putative plaintiffs further argued that, in the event that *American Pipe* tolling did not apply, it could nonetheless "relate back" its proposed amended complaint to the Amended Complaint by operation of *Federal Rule of Civil Procedure Rule 15(c)*, *see* note 2, *ante*, despite the expiration of the three-year period for bringing these claims.

> 7 In relevant part, *Rule 24* provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." *Fed. R. Civ. P. 24(b)(1)(B)*.
>
> 8 It is worth underscoring that Detroit PFRS and Detroit Retirement are distinct legal entities. *See Indymac II, 793 F. Supp. 2d at 649*; *see also* note 18, *post*, and accompanying text.

The District Court denied the motions to intervene in a thorough and careful memorandum opinion of June 21, 2011, reasoning that the Section 13 repose period had expired and could not be tolled under *American Pipe* or extended by operation of *Rule 15(c)*. *See Indymac II, 793 F. Supp. 2d 637*. [**15] [*104] Three of the five putative plaintiffs--Detroit Retirement, LACERA, and PERS--filed a notice of appeal as proposed intervenors to this Court on July 20, 2011.[9]

> 9 Our jurisdiction over the order denying the proposed interventors' motion to intervene is provided by *28 U.S.C. § 1291*. *See* 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1923 (3d ed. 2005) (collecting cases).

II. DISCUSSION

A. Standards of Review

We review *de novo* a district court's denial of a motion to dismiss, *see, e.g., Gollomp v. Spitzer, 568 F.3d 355, 365 (2d Cir. 2009)*, and its denial of a motion to intervene for an "abuse of discretion," *AT & T Corp. v. Sprint Corp., 407 F.3d 560, 561 (2d Cir. 2005)*. To the extent that our analysis requires us to review interpretations of a statute, we do so *de novo. See United States v. Robles, 709 F.3d 98, 99 (2d Cir. 2013)* ("We review *de novo* a district court's decision resolving a question of statutory interpretation."); *In re Sims, 534 F.3d 117, 132 (2d Cir. 2008)* ("A district court has abused its discretion if it based its ruling on an erroneous view of the law . . . ." (alteration and internal quotation marks omitted)).

B. Legal Framework

i. *American Pipe* [**16] tolling

The principal issue before us is whether the tolling rule set forth by the Supreme Court in *American Pipe* and its progeny applies to the three-year statute of repose in Section 13 of the Securities Act. The plaintiffs in *American Pipe* originally instituted a timely putative class-action antitrust suit, which was dismissed by the district court in that case for failing to satisfy the prerequisite of "numerosity," as required for certification of a class under *Rule 23(a)(1) of the Federal Rules of Civil Procedure*.[10] *414 U.S. at 543*. Soon after, the district court denied the motions to intervene--filed pursuant to *Rule 24*, *see* note 7, *ante*, by proposed members of the asserted class--on the ground that the applicable statute of limitations, Section 4B of the Clayton Act,[11] had run during the pendency of the litigation. *See American Pipe, 414 U.S. at 543-44*.

> 10 In relevant part, *Federal Rule of Civil Procedure 23* provides:

> **(a) Prerequisites**. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > **(1)** the class is so numerous that joinder of all members is impracticable;
> >
> > **(2)** there are questions of law or fact common to the class;
> >
> > **(3)** the [**17] claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> >
> > **(4)** the representative parties will fairly and adequately protect the interests of the class.

11 Section 4B of the Clayton Act provides, in pertinent part, that "[a]ny action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued." *15 U.S.C. § 15b*.

The Court of Appeals for the Ninth Circuit reversed the district court's denial of the motions to intervene, concluding that the denial of class certification could not "strand" asserted members of the class for whom the statute of limitations had run while the case was pending. *Id. at 544-45*. The Supreme Court then affirmed the Ninth Circuit's decision, holding that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id. at 554*.

In reaching this conclusion, the *American Pipe* Court relied heavily on *Rule 23*, [*105] reasoning that a contrary holding would "frustrate the principal function of a class [**18] action" and create a "multiplicity of activity which *Rule 23* was designed to avoid."[12] *Id. at 551*; *see also id. at 555* (suggesting that tolling derived from Court's "interpretation of the Rule"). The *American Pipe* Court, however, also seemed to rely on the equitable power of the courts to toll statutes of limitations. For instance, it observed that "[i]n recognizing *judicial power* to toll statutes of limitation in federal courts we are not breaking new ground." *Id. at 558* (emphasis supplied); *see also id. at 558 n.29* (concluding that "judicial tolling of the statute of limitations does not abridge or modify a substantive right"). Ultimately, the *American Pipe* Court stated that "the tolling rule we establish here is consistent both with the procedures of *Rule 23* and with the proper function of the limitations statute." *Id. at 555*.

12 *Rule 23(b)* outlines the types of permissible class actions:

> **(b) Types of Class Actions**. A class action may be maintained if *Rule 23(a)* is satisfied and if:
>
> > **(1)** prosecuting separate actions by or against individual class members would create a risk of:
> >
> > > **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible

[**19] standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense

> of separate actions;
>
> **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> **(D)** [**20] the likely difficulties in managing a class action.

In *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*, the Supreme Court clarified that the *American Pipe* tolling rule applies not only to putative class members who seek to intervene in an action, but also to would-be class members who later file their own independent actions. *Id. at 353-54*; *see also Joseph v. Wiles, 223 F.3d 1155, 1167 (10th Cir. 2000)*. In so doing, the *Crown* Court explained the rationale for the *American Pipe* tolling doctrine:

> The *American Pipe* [**21] Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification was denied. . . . [In the absence of tolling,] [a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of [*106] his own period of limitations. The result would be a needless multiplicity of actions--precisely the situation that *Federal Rule of Civil Procedure 23* and the tolling rule of *American Pipe* were designed to avoid.

Crown, 462 U.S. at 350-51.

Proposed intervenors in this appeal now seek to apply the tolling rule of American Pipe to the statute of repose provision in Section 13.

ii. Section 13 as a Statute of Repose

Although "[s]tatutes of repose and statutes of limitations are often confused[,] . . . they are [nonetheless] distinct" and serve distinct purposes. *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010)*; [**22] *see also City of Pontiac*

Gen. Emps.' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 175 (2d Cir. 2011) (noting a difference in the "basic purpose" of a statute of limitations as contrasted to a statute of repose). As we recently explained:

> Statutes of limitations limit the availability of remedies and, accordingly, may be subject to equitable considerations, such as tolling, or a discovery rule. In contrast, statutes of repose affect the underlying right, not just the remedy, and thus they run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action.

Fed. Hous. Fin. Agency v. UBS Americas Inc., 712 F.3d 136, 140 (2d Cir. 2013) (internal citations and quotation marks omitted). In other words, while statutes of limitations are "often subject to tolling principles," a statute of repose "*extinguishes* a plaintiff's cause of action after the passage of a fixed period of time, usually measured from one of the defendant's acts." *Ma, 597 F.3d at 88 n.4*.

Thus, in contrast to statutes of limitations, statutes of repose "create[] a *substantive* [**23] right in those protected to be free from liability after a legislatively-determined period of time." *Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996)* (emphasis supplied) (quotation marks omitted); *see also P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102 (2d Cir. 2004)* ("*Stolz*") ("Unlike a statute of limitations, a statute of repose is not a limitation of a plaintiff's remedy, but rather defines the right involved in terms of the time allowed to bring suit."). This conceptual distinction carries significant practical consequences. For instance, "a statute of repose may bar a claim *even before the plaintiff suffers injury*, leaving her without any remedy." *Fed. Hous. Fin. Agency, 712 F.3d at 140* (emphasis supplied) (relying on *Stolz, 355 F.3d at 103*, and *Stuart, 158 F.3d at 627*); *see also McCann v. Hy-Vee, Inc., 663 F.3d 926, 930 (7th Cir. 2011)*. And, as most important here, a statute of repose is "subject [only] to legislatively created exceptions," *Stolz, 355 F.3d at 102* (quotation marks omitted), and not to equitable tolling, *Fed. Hous. Fin. Agency, 712 F.3d at 140* (internal alterations omitted).

Section 13 of the Securities Act contains two limitations [**24] periods.[13] *See* note 1, *ante*. [*107] The first--a statute of limitations--states, in relevant part, that "[n]o action shall be maintained to enforce any liability . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or . . . within one year after the violation upon which it is based." *15 U.S.C. § 77m*. As relevant here, the second limitations period of Section 13--a statute of repose--states that "[i]n no event shall any such action be brought to enforce a liability . . . more than three years after the [underlying] security was bona fide offered to the public, or . . . more than three years after [its] sale." *Id*.

> 13 We note that "[a]lthough statutes of limitations and statutes of repose are distinct in theory, the courts--including the Supreme Court and this Court--have long used the term 'statute of limitations' to refer also to statutes of repose, including specifically with respect to § 13 of the Securities Act." *Fed. Hous. Fin. Agency, 712 F.3d at 142-43 & n.3* (referring, *inter alia*, to *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976)*); *see also In re WorldCom Sec. Litig., 496 F.3d 245, 250 (2d Cir. 2007)* [**25] (referring to both the one-year and three-year periods in Section 13 generically as "statutes of limitations"). This overlapping (and sometimes imprecise) nomenclature, however, does not alter the "distinct" character of the two concepts. *Ma, 597 F.3d at 88 n.4*. Nor does it compel a conclusion that *American Pipe's* reference to tolling "limitations" periods extends to repose periods, a question properly answered on its own merits.

Courts have repeatedly recognized that the three-year limitations period in Section 13 is a statute of repose. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 360, 362, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991)* ("*Lampf*") (referring to Section 13 as a "3-year period of repose"); *Fed. Hous. Fin. Agency, 712 F.3d at 140*; *Stolz, 355 F.3d at 96*. In so doing, they have also emphasized that, as a statute of repose, the three-year period in Section 13 is said to be "absolute" and not subject to equitable tolling. For instance, the Supreme Court in *Lampf* noted that Section 13's three-year limitation "is a period of repose *inconsistent*

with tolling," and reiterated that the "purpose of the 3-year limitation is clearly to serve as a cutoff," to which "tolling principles" [**26] do not apply. *Lampf, 501 U.S. at 363* (emphasis supplied). We have similarly recognized that "a statute of repose begins to run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action." *Stolz, 355 F.3d. at 102-03*; *see also Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 704 (2d Cir. 1994)* ("The three-year period is an *absolute limitation* which applies whether or not the investor could have discovered the violation." (emphasis supplied)); *see generally* 2 T. Hazen, Law of Securities Regulation § 7.10[4] (6th ed. 2011) ("Section 13 is not only a statute of limitations but also operates as a statute of repose. There is an absolute maximum of three years in order to prevent stale claims. The three-year repose period is absolute in that it cannot be extended by applying equitable tolling principles.").

C. Application of *American Pipe* to Section 13's Statute of Repose

The Supreme Court's opinion in *American Pipe* does not explicitly state whether the Court was recognizing "judicial tolling," grounded in principles [**27] of equity, or statutory tolling (or, "legal" tolling), based on *Rule 23*.[14] *See Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414, 1419 n.6, 182 L. Ed. 2d 446 (2012)* (noting that "[a]lthough [*American* [*108] *Pipe*] did not employ the term 'legal tolling,' some federal courts have used that term to describe our holding on the ground that the rule 'is derived from a statutory source,' whereas equitable tolling is 'judicially created'"). Judicial power to toll statutes of limitations arises from an "exercise of a court's equity powers," traditionally used to "relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules." *Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130 (2010)* (internal quotation marks omitted). On the other hand, statutory tolling, as the name suggests, derives from a statutory, or "legal," source. *See Credit Suisse Sec., 132 S. Ct. at 1419 n.6*; *see also Albano v. Shea Homes Ltd. P'ship, 634 F.3d 524, 536 (9th Cir. 2011)*. The parties make much of this distinction because, as explained above, if *American Pipe's* tolling rule is "equitable" in nature, it does not apply to statutes of repose, whereas if it is statutory or "legal" in nature, it may.

14 The [**28] Federal Rules of Civil Procedure, including *Rule 23*, "have 'the force [and effect] of a federal statute.'" *Bright v. United States, 603 F.3d 1273, 1279 (Fed. Cir. 2010)* (alteration in *Bright*) (quoting *Sibbach v. Wilson & Co., 312 U.S. 1, 13, 61 S. Ct. 422, 85 L. Ed. 479 (1941))*.

As discussed in Part II.B.i, *ante*, the *American Pipe* decision contains conflicting indications of the source of authority for its tolling rule, and the Supreme Court's subsequent statements on the matter--all in *dicta*--provide little clarity.[15] The Courts of Appeals are divided on this issue. *See Albano, 634 F.3d at 535* ("Among the issues on which there is no consensus is whether *American Pipe* tolling should be characterized as a legal tolling doctrine or as an equitable one."); *compare Bright v. United States, 603 F.3d 1273, 1282, 1285-86 (Fed. Cir. 2010)* (describing *American Pipe* as "statutory" tolling), *and Joseph, 223 F.3d at 1167 (10th Cir.)* ("legal" tolling), *with Bridges v. Dep't of Md. State Police, 441 F.3d 197, 211 (4th Cir. 2006)* ("The *American Pipe/Crown, Cork & Seal* equitable tolling rule is a limited exception to the universal rule that statutes of limitations are impervious to equitable exceptions."), *and Veltri v. Bldg. Serv. 32B-J Pension Fund, 393 F.3d 318, 322-23 (2d Cir. 2004)* [**29] (referring, *in dicta*, to *American Pipe* as an instance where "equitable tolling has been held appropriate"). Experienced and capable judges of the district courts in our Circuit have similarly drawn disparate conclusions and are without consensus.[16]

15 *Compare Credit Suisse Sec., 132 S. Ct. at 1419 n.6 (2012)* (noting the use of the term "legal tolling" among "some federal courts" to characterize *American Pipe* tolling), *with Smith v. Bayer Corp., 131 S. Ct. 2368, 2379 n.10, 180 L. Ed. 2d 341 (2011)* (noting that *American Pipe's* holding is "specifically grounded in policies of judicial administration,"), *and Young v. United States, 535 U.S. 43, 49, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002)* (citing *American Pipe* for the proposition that limitations periods are "customarily subject to equitable tolling" (internal quotation marks omitted)), *and Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 & n.3 (1990)* (referencing *American Pipe* as a case in which the Supreme Court "allowed equitable tolling"), *and Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 338, 98 S. Ct. 2370, 57 L. Ed. 2d 239*

n. (1978)* (Burger, C.J., concurring) (referring to *American Pipe* while discussing a federal court's authority "to toll a statute [**30] of limitations on equitable grounds").

16 *Compare N.J. Carpenters Health Fund v. Residential Capital, LLC, 288 F.R.D. 290, 294 (S.D.N.Y. 2013)* (legal tolling), *and In re Smith Barney Transfer Agent Litig., 884 F. Supp. 2d 152, 159-60 (S.D.N.Y. 2012)* (legal tolling), *and Int'l Fund Mgmt. S.A. v. Citigroup Inc., 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011)* (legal tolling), *and Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I, No. 08 Civ. 1713(ERK)(WDW), 2011 U.S. Dist. LEXIS 152695, 2011 WL 6182090, at *5 (E.D.N.Y. Dec. 13, 2011)* (legal tolling), *and In re Morgan Stanley Mortgage Pass-Through Certificates Litig., 810 F. Supp. 2d 650, 667-68 (S.D.N.Y. 2011)* (legal tolling), *with John Hancock Life Ins. Co. (U.S.A.) v. JP Morgan Chase & Co., No. F. Supp. 2d , 12 Civ. 3184(RJS), 938 F. Supp. 2d 440, 2013 U.S. Dist. LEXIS 51018, 2013 WL 1385010, at *5 (S.D.N.Y. Mar. 29, 2013)* (equitable tolling), *and In re Lehman Bros. Sec. & ERISA Litig., 800 F. Supp. 2d 477, 482 (S.D.N.Y. 2011)* (equitable tolling), *and Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 625-26 (S.D.N.Y. 2011)* (equitable tolling).

[*109] But we need not try to divine any hidden meanings in *American Pipe*. If its tolling rule is properly classified [**31] as "equitable," then application of the rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable "tolling principles do not apply to that period." *501 U.S. at 363*. Even assuming, *arguendo*, that the *American Pipe* tolling rule is "legal"--based upon *Rule 23*, which governs class actions--we nonetheless hold that its extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act, *28 U.S.C. § 2072(b)*. The Rules Enabling Act provides the Supreme Court "the power to prescribe general rules of practice and procedure," *id. § 2072(a)*, including the Federal Rules of Civil Procedure, which "shall not abridge, enlarge or modify any substantive right," *id. § 2072(b)*. The use of the term "shall" in the statute's language indicates its mandatory nature; federal courts are bound by its dictates, including in the context of *Rule 23*. Accordingly, "the Rules Enabling Act forbids interpreting *Rule 23* to 'abridge, enlarge or modify any substantive right,'" *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561, 180 L. Ed. 2d 374 (2011)* (quoting *28 U.S.C. § 2072(b)*), and "underscores the need for caution[,] . . . counsel[ing] against adventurous application of" [**32] the Rule, *Ortiz v. Fibreboard Corp., 527 U.S. 815, 845, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*.

As we have explained above, *see* Part II.B.ii, *ante*, the statute of repose in Section 13 creates a *substantive* right, extinguishing claims after a three-year period. Permitting a plaintiff to file a complaint or intervene after the repose period set forth in Section 13 of the Securities Act has run would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act.[17] Accordingly, our conclusion is straightforward: *American Pipe's* tolling rule, whether grounded in equitable authority or on *Rule 23*, does not extend to the statute of repose in Section 13.

17 In urging otherwise, the *IndyMac* proposed intervenors focus on the *American Pipe* Court's statement, in rejecting what they contend was an identical Rules Enabling Act challenge to tolling in that case, that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *414 U.S. at 557-58*. The *American Pipe* Court, however, noted the procedural nature of Section 4B of the Clayton Act--the statutory provision there at issue, *see* [**33] Part II.B.i & note 11, *ante*--before concluding "that a judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts." *American Pipe, 414 U.S. at 558 n.29*. It did not consider whether procedural rules authorize tolling of a statute of repose defining a substantive right.

We are cautioned by some of the proposed intervenors that a failure to extend *American Pipe* tolling to the statute of repose in Section 13 could burden the courts and disrupt the functioning of class action litigation. *See* Joint Br. and Special App'x for Proposed Intervenors-Appellants LACERA and PERS at 42-43. We are not persuaded. Given the sophisticated, well-counseled litigants involved in securities fraud class actions, it is not apparent that such adverse consequences will inevitably follow our holding. *See, e.g., Footbridge*

Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 627 (S.D.N.Y. 2011) ("Even without lengthening the repose period, many class actions are resolved [*110] or reach the certification stage within the repose period."). But even if the decision causes some such problem, it is a problem that only Congress can address; judges may not [**34] deploy equity to avert the negative effects of statutes of repose.

D. Rule 15 ("Relation Back") in *IndyMac*

We now turn to the related, but distinct, question of whether the three proposed intervenors--Detroit Retirement, LACERA, and PERS--may intervene to bring certain claims despite the Section 13 statute of repose and the absence of any currently named plaintiff with standing to bring the same claims. In particular, we consider whether the proposed intervenors may "relate back" their proposed amended complaint to a prior, timely complaint pursuant to *Rule 15(c)*.[18] *See* Part I, *ante*.

> 18 We note at the outset our skepticism that proposed intervenors, who were not parties to the proceedings below, may invoke *Rule 15(c)(1)* to become parties by amending the complaint of a party (in this case, the only named plaintiff) in the action. *See Bridges v. Dep't of Md. State Police, 441 F.3d 197, 209 (4th Cir. 2006)* ("We readily reject the [proposed intervenors'] first argument that their claims would, if included in an amended complaint, relate back to the date of filing of the original complaint [because] these would-be plaintiffs, as nonparties, could not have moved to amend the plaintiffs' complaint [**35] and get the benefit of any relation back."); *cf. Fed. R. Civ. P. 15(a)(1), (2)* (permitting "[*a*] *party* [to] amend *its* pleading" (emphases supplied)). Nonetheless, we need not address this issue, or whether *Rule 15(c)* allows "relation back" of claims otherwise barred by a statute of repose, because the proposed intervenors in this case may not create jurisdiction for their claims by intervening as named plaintiffs.

In this case, the statute of repose in Section 13 ordinarily bars the commencement of any new suits after the three-year period has expired. Accordingly, we proceed to consider only whether proposed intervenors may, as asserted class members in the original complaint, press their otherwise expired claims using *Rule 15(c)*. For the reasons discussed below, we hold that the *Rule 15(c)* "relation back" doctrine does not permit members of a putative class, who are not named parties, to intervene in the class action as named parties in order to revive claims that were dismissed from the class complaint for want of jurisdiction.

In analyzing the proposed intervenors' *Rule 15(c)* argument, we reiterate at the outset that after the District Court consolidated the Detroit PFRS and Wyoming [**36] actions, pursuant to the PSLRA, *15 U.S.C. § 78u--4*, *see* note 6, *ante*, and appointed Wyoming to be the lead plaintiff of the consolidated action, no other plaintiffs were named in the consolidated action. The District Court subsequently dismissed for lack of standing all claims in the Amended Complaint arising from any offerings in which the Wyoming entities, as the lead and sole named plaintiffs, had not themselves purchased securities. *IndyMac I, 718 F. Supp. 2d at 501*; *see also In re Initial Pub. Offering Sec. Litig., 214 F.R.D. 117, 122 (S.D.N.Y. 2002)* ("[C]ourts in this circuit have repeatedly held that, in order to maintain a class action, Plaintiffs must first establish that they have a valid claim *with respect to the shares that they purchased*." (alterations omitted) (emphasis supplied)).[19] Notably, Detroit Retirement, [*111] LACERA, and PERS--the three proposed intervenors who are appellants here--were, at all times, members of the asserted class in the consolidated action, but were never named plaintiffs. Thus, as class members, these putative intervenors were represented vicariously but were not litigants themselves.

> 19 After the District Court dismissed the majority of Wyoming's claims [**37] for lack of standing, we decided *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145 (2d Cir. 2012)* (holding that purchaser of securities in particular offering may, in appropriate circumstances, assert class action claims on behalf of purchasers of other tranches of securities within same offering or of securities in other offerings backed by loans from common originators). Wyoming has since moved for partial reconsideration of the District Court's dismissal ruling; our decision today implicates only those claims and defendants as to which Wyoming would lack standing under *NECA-IBEW*.

In these circumstances, the proposed intervenors'

ability to join the suit is foreclosed by the "long recognized" rule that "if jurisdiction is lacking at the commencement of a suit, it cannot be aided by the intervention of a plaintiff with a sufficient claim." *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149, 160 (2d Cir. 2012)* (internal quotation marks and alterations omitted); *see also Town of West Hartford v. Operation Rescue, 915 F.2d 92, 95 (2d Cir. 1990)* ("[I]t is fundamental that an intervening claim cannot confer subject matter jurisdiction [**38] over the action it seeks to join."); 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1917, at 457 (3d ed. 2005) ("Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action.").[20]

20 Indeed, we have recently explained:

> The logic that underlies this rule is clear enough. Intervention is a procedural means for entering an existing federal action. *See Canatella v. California, 404 F.3d 1106, 1113 (9th Cir. 2005)*. The Federal Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts." *Fed R. Civ. P. 82*. That is, *Rule 24* does not itself provide a basis for jurisdiction. Accordingly, "since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Fuller v. Volk, 351 F.2d 323, 328 (3d Cir. 1965)*.

Disability Advocates, 675 F.3d at 160-61; *see also id*. (noting that this rule is "an axiomatic principle of federal jurisdiction," and collecting cases).

Prior to class certification, the District Court dismissed for [**39] lack of constitutional standing all claims in the Amended Complaint arising from offerings that the Wyoming entities, as the only named plaintiffs, had not purchased. In so doing, the District Court ruled that no named plaintiff in the suit had constitutional standing to bring the claims that the proposed intervenors later sought to assert before the District Court and which they now press on appeal.[21] The District Court lacked jurisdiction over certain claims of the original lead plaintiff--the very claims now asserted by the proposed intervenors--and that defect may not be cured by later intervention. *See Disability Advocates, 675 F.3d at 160*. Accordingly, absent circumstances that would render the newly asserted claims independently timely, neither *Rule 24* nor the *Rule 15(c)* "relation back" doctrine permits members of a putative class, who are not named parties, to intervene in the class action as named parties in order to revive claims [*112] that were dismissed from the class complaint for want of jurisdiction.[22]

21 "Where the named plaintiff's claim is one over which 'federal jurisdiction never attached,' there can be no class action." *Crosby v. Bowater Inc. Ret. Plan for Salaried Emps. of Great N. Paper, Inc., 382 F.3d 587, 597 (6th Cir. 2004)* [**40] (citing *Walters v. Edgar, 163 F.3d 430, 432-33 (7th Cir. 1998)*); *see also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)* ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* (explaining that federal courts have no jurisdiction where the plaintiff has no standing to sue).

22 We note that our analysis here, dealing with a putative class action prior to certification, is distinct from standing post-certification. As one of our sister circuits has explained:

> After a suit is certified as a class action, a loss of standing by the named plaintiff does not destroy or (if it affects just one of several claims) curtail the federal court's jurisdiction; he can be replaced by a member of the class who has standing. But until certification, the jurisdiction of the district court depends upon its having jurisdiction over the claim of the named plaintiffs when the suit is filed and continuously thereafter

> until certification because until certification there is no class action but merely the prospect of one; the only action is the suit by the named plaintiffs.
>
> *Morlan v. Universal Guar. Life Ins. Co., 298 F.3d 609, 616 (7th Cir. 2002)* [**41] (citations omitted).

Our holding here is consistent with the structure and purposes of the PSLRA. That statute provides that a district court should appoint as lead plaintiff "the member or members of the purported plaintiff class that [are] most capable of adequately representing the interests of class members." *15 U.S.C. § 78u--4(a)(3)(B)(i)*; *15 U.S.C. § 77z-1(a)(3)(B)(i)*. However, "[n]othing in the PSLRA indicates that district courts must choose a lead plaintiff with standing to sue on every available cause of action. . . . [I]t is inevitable that, in some cases, the lead plaintiff will not have standing to sue on every claim." *Hevesi v. Citigroup Inc., 366 F.3d 70, 82 (2d Cir. 2004)*. Nor do we think it necessary "that a different lead plaintiff be appointed to bring every single available claim," as such a requirement "would contravene the main purpose of having a lead plaintiff--namely, to empower one or several investors with a major stake in the litigation to exercise control over the litigation as a whole." *Id. at 82 n.13*. Rather, there must be a named plaintiff sufficient to establish jurisdiction over each claim advanced. *See id. at 82-83*.

Our holding today merely reemphasizes [**42] that "the [PSLRA] was . . . certainly not intended to excuse sophisticated parties [such as proposed intervenors] from being diligent and keeping abreast of developments in the case, especially when the class is not certified." *Emp'rs-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors, 498 F.3d 920, 925 (9th Cir. 2007)*. The proposed intervenors, through minimal diligence, could have avoided the operation of the Section 13 statute of repose simply by making timely motions to intervene in the action as named plaintiffs, or by filing their own timely actions and, if prudent, seeking to join their claims under *Federal Rule of Civil Procedure 20* (joinder).[23]

> 23 Indeed, Judge Kaplan noted as much in his opinion. *See IndyMac II, 793 F. Supp. 2d at 641* (noting that no entity objected to naming Wyoming as the sole plaintiff); *cf. id. at 644* (observing that Detroit PFRS, one of the proposed intervenors, might have saved its claims through timely intervention).

CONCLUSION

To summarize, we hold that:

> (1) The tolling rule set forth by the Supreme Court in *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*, does not apply to the three-year statute of repose in Section 13 [**43] of the Securities Act of 1933, *15 U.S.C.A. § 77m*; and
>
> (2) Absent circumstances that would render the newly asserted claims independently timely, neither *Rule 24* nor the *Rule 15(c)* "relation back" doctrine permits members of a putative class, who are not named parties, [*113] to intervene in the class action as named parties in order to revive claims that were dismissed from the class complaint for want of jurisdiction.

For these reasons, we **AFFIRM** the June 21, 2011 order of the District Court, insofar as it partially denied the motions to intervene by proposed intervenors.

Public Employees' Retirement System of Mississippi, Petitioner v. IndyMac MBS, Inc., et al.

No. 13-640.

SUPREME COURT OF THE UNITED STATES

134 S. Ct. 1515*; *188 L. Ed. 2d 449*; *2014 U.S. LEXIS 1904*; *82 U.S.L.W. 3527

March 10, 2014, Decided

SUBSEQUENT HISTORY: Later proceeding at *Public Employees' Ret. Sys. v. IndyMac MBS, Inc., 135 S. Ct. 41, 189 L. Ed. 2d 893, 2014 U.S. LEXIS 4891 (U.S., Sept. 23, 2014)*
US Supreme Court certiorari dismissed by *Public Employees' Ret. Sys. v. Indymac MBS, Inc., 135 S. Ct. 42, 189 L. Ed. 2d 893, 2014 U.S. LEXIS 4893 (U.S., Sept. 29, 2014)*

PRIOR HISTORY: *Police & Fire Ret. Sys. v. Indymac MBS, Inc., 721 F.3d 95, 2013 U.S. App. LEXIS 13203 (2d Cir. N.Y., 2013)*

JUDGES: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted.

Public Employees' Retirement System of Mississippi, Petitioner v. IndyMac MBS, Inc., et al.

No. 13-640.

SUPREME COURT OF THE UNITED STATES

135 S. Ct. 41; 189 L. Ed. 2d 893; 2014 U.S. LEXIS 4891; 83 U.S.L.W. 3145

September 23, 2014, Decided

PRIOR HISTORY: *Pub. Emples. Ret. Sys. v. IndyMac MBS, Inc., 134 S. Ct. 1515, 188 L. Ed. 2d 449, 2014 U.S. LEXIS 1904 (U.S., 2014)*

JUDGES: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

Parties are directed to file letter briefs addressing the following question: "What should be the effect, if any, of the proposed settlement agreement now pending before the district court on the matter pending before this Court?" The briefs, limited to 10 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before noon, Thursday, September 25, 2014.

Public Employees' Retirement System of Mississippi, Petitioner v. IndyMac MBS, Inc., et al.

No. 13-640.

SUPREME COURT OF THE UNITED STATES

135 S. Ct. 42; 189 L. Ed. 2d 893; 2014 U.S. LEXIS 4893; 83 U.S.L.W. 3145

September 29, 2014, Decided

PRIOR HISTORY: *Pub. Emples. Ret. Sys. v. IndyMac MBS, Inc., 134 S. Ct. 1515, 188 L. Ed. 2d 449, 2014 U.S. LEXIS 1904 (U.S., 2014)*

JUDGES: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

Writ of certiorari to the United States Court of Appeals for the Second Circuit dismissed as improvidently granted.

TITLE 15 - COMMERCE AND TRADE
CHAPTER 2A - SECURITIES AND TRUST INDENTURES
SUBCHAPTER I - DOMESTIC SECURITIES

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77l (a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l (a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l (a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l (a)(2) of this title more than three years after the sale.

(May 27, 1933, ch. 38, title I, § 13, 48 Stat. 84; June 6, 1934, ch. 404, title II, § 207, 48 Stat. 908; Pub. L. 105–353, title III, § 301(a)(3), Nov. 3, 1998, 112 Stat. 3235.)

Amendments

1998—Pub. L. 105–353 substituted “77l(a)(2)” for “77l(2)” in two places and “77l(a)(1)” for “77l(1)” in two places.

1934—Act June 6, 1934, substituted “one year” for “two years”, “three years” for “ten years”, and inserted “or under section 77l (2) of this title more than three years after the sale”.

Materials concerning

Corporate bylaws changing the rules for litigation

ATP TOUR, INC., ETIENNE DE VILLIERS, CHARLES PASARELL, GRAHAM PEARCE, JACCO ELTINGH, PERRY ROGERS, and IGGY JOVANOVIC, Appellants, v. DEUTSCHER TENNIS BUND (GERMAN TENNIS FEDERATION), ROTHENBAUM SPORT GMBH, and QATAR TENNIS FEDERATION, Appellees.

No. 534, 2013

SUPREME COURT OF DELAWARE

91 A.3d 554*; *2014 Del. LEXIS 209

February 19, 2014, Submitted
May 8, 2014, Decided

SUBSEQUENT HISTORY: Motion for Rehearing filed 5/7/14; Denied 5/9/14. Case Closed May 27, 2014.

PRIOR HISTORY: [**1]

Certification of Questions of Law from the United States District Court for the District of Delaware. C.A. No. 07-178 (GMS).

Deutscher Tennis Bund v. ATP Tour, Inc., 2013 U.S. Dist. LEXIS 120041 (D. Del., Aug. 20, 2013)

DISPOSITION: CERTIFIED QUESTIONS ANSWERED.

COUNSEL: Philip Trainer, Jr., Esquire, Toni-Ann Platia, Esquire, Ashby & Geddes, Wilmington, Delaware; Of Counsel: Bradley I. Ruskin, Esquire (argued), Charles S. Sims, Esquire, Jennifer R. Scullion, Esquire and Jordan B. Leader, Esquire, Proskauer Rose LLP, New York, New York for Appellants.

David M. Powlen, Esquire and Kevin G. Collins, Esquire, Barnes & Thornburg LLP, Wilmington, Delaware; Of Counsel: Robert D. MacGill, Esquire (argued), Peter J. Rusthoven, Esquire and Hamish S. Cohen, Esquire, Barnes & Thornburg LLP, Indianapolis, Indiana for Appellees.

JUDGES: Before STRINE, Chief Justice,* HOLLAND, BERGER, JACOBS and RIDGELY, Justices, constituting the Court en Banc.

* Formerly Chancellor as of the date of this argument and designated pursuant to art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4(a) to fill up the quorum as required.

OPINION BY: BERGER

OPINION

[*555] **BERGER**, Justice:

This Opinion constitutes the Court's response to four certified questions of law concerning the validity of a fee-shifting provision in a Delaware non-stock corporation's [**2] bylaws. The provision, which the directors adopted pursuant to their charter-delegated power to unilaterally amend the bylaws, shifts attorneys' fees and costs to unsuccessful plaintiffs in intra-corporate litigation. The United States District Court for the District of Delaware found that the bylaw provision's validity was an open question under Delaware law and certified four questions to this Court, asking it to decide whether, and under what circumstances, such a provision is valid and enforceable. Although we cannot directly address the bylaw at issue, we hold that fee-shifting provisions in a non-stock corporation's bylaws can be valid and

enforceable under Delaware law. In addition, bylaws normally apply to all members of a non-stock corporation regardless of whether the bylaw was adopted before or after the member in question became a member.

FACTUAL AND PROCEDURAL BACKGROUND

The following undisputed facts are drawn from the District Court's Certification of Questions of Law.[1] ATP Tour, Inc. (ATP) is a Delaware membership corporation that operates a global professional men's tennis tour (the Tour). Its members include professional men's tennis players and entities that own and [**3] operate professional men's tennis tournaments. Two of those entities are Deutscher Tennis Bund (DTB) and Qatar Tennis Federation (QTF, and collectively, the Federations). ATP is governed by a seven-member board of directors, of which three are elected by the tournament owners, three are elected by the player members, and [*556] the seventh directorship is held by ATP's chairman and president.

1 Certification of Questions of Law from the United States District Court for the District of Delaware (Oct. 4, 2013) [hereafter "Certification"].

Upon joining ATP in the early 1990s, the Federations "agreed to be bound by ATP's Bylaws, as amended from time to time."[2] In 2006, the board amended ATP's bylaws to add an Article 23, which provides, in relevant part:

> (a) In the event that (i) any [current or prior member or Owner or anyone on their behalf ("Claiming Party")] initiates or asserts any [claim or counterclaim ("Claim")] or joins, offers substantial assistance to or has a direct financial interest in any Claim against the League or any member or Owner (including any Claim purportedly filed on behalf of the League or any member), and (ii) the Claiming Party (or the third party that received substantial [**4] assistance from the Claiming Party or in whose Claim the Claiming Party had a direct financial interest) does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought, then each Claiming Party shall be obligated jointly and severally to reimburse the League and any such member or Owners for all fees, costs and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses) (collectively, "Litigation Costs") that the parties may incur in connection with such Claim.[3]

2 Certification at 4.
3 *Id*. at 4-5.

In 2007, ATP's board voted to change the Tour schedule and format. Under the board's "Brave New World" plan, the Hamburg tournament, which the Federations own and operate, was downgraded from the highest tier of tournaments to the second highest tier, and was moved from the spring season to the summer season. Displeased by these changes, the Federations sued ATP and six of its board members in the United States District Court for the District of Delaware, alleging both federal antitrust claims and Delaware fiduciary duty claims.

After a ten-day jury trial, the District [**5] Court granted ATP's and the director defendants' motion for judgment as a matter of law on all of the fiduciary duty claims, and also on the antitrust claims brought against the director defendants. The jury then found in favor of ATP on the remaining antitrust claims. Thus, the Federations did not prevail on any claim. ATP then moved to recover its legal fees, costs, and expenses under *Rule 54 of the Federal Rules of Civil Procedure*. ATP grounded its motion on Article 23.3(a) of ATP's bylaws. The District Court denied ATP's *Rule 54* motion because it found Article 23.3(a) to be contrary to the policy underlying the federal antitrust laws.[4] The District Court effectively ruled that "federal law preempts the enforcement of fee-shifting agreements when antitrust claims are involved."[5]

4 *Deutscher Tennis Bund v. ATP Tour, Inc., 2009 U.S. Dist. LEXIS 97851, 2009 WL 3367041, at *4 (D. Del. Oct. 19, 2009)*.
5 *Deutscher Tennis Bund v. ATP Tour Inc., 480 Fed. Appx. 124, 126 (3d. Cir. 2012)*.

ATP appealed, and the United States Court of Appeals for the Third Circuit vacated the District Court's

order. The Third Circuit found that the District Court should have decided whether Article 23.3(a) was enforceable as a matter of Delaware [**6] law before reaching the federal [*557] preemption question.[6] On remand, the District Court reasoned that the question of Article 23.3(a)'s enforceability was a novel question of Delaware law that should be addressed in the first instance by this Court.[7] The District Court certified the following four questions of law:

> 1. May the Board of a Delaware non-stock corporation lawfully adopt a bylaw (i) that applies in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member (ii) pursuant to which the claimant is obligated to pay for "all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)" of the party against which the claim is made in the event that the claimant "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought"?
>
> 2. May such a bylaw be lawfully enforced against a member that obtains no relief at all on its claims against the corporation, even if the bylaw might be unenforceable in a different situation where the member obtains some relief?
>
> 3. Is such a bylaw rendered [**7] unenforceable as a matter of law if one or more Board members subjectively intended the adoption of the bylaw to deter legal challenges by members to other potential corporate action then under consideration?
>
> 4. Is such a bylaw enforceable against a member if it was adopted after the member had joined the corporation, but where the member had agreed to be bound by the corporation's rules "that may be adopted and/or amended from time to time" by the corporation's Board, and where the member was a member at the time that it commenced the lawsuit against the corporation?[8]

We accepted the certified questions based on principles of comity,[9] and will address each question in turn.

> 6 *Id. at 127-28*.
> 7 Certification at 7-8.
> 8 *Id*. at 9.
> 9 *See State Farm Mut. Auto. Ins. Co. v. Dann, 953 A.2d 127, 128 (Del. 2001)* (accepting certified questions from the District Court "as a matter of comity").

DISCUSSION

1. Fee-shifting bylaws are permissible under Delaware Law.

The first certified question asks whether the board of a Delaware non-stock corporation[10] may lawfully adopt a bylaw that shifts all litigation expenses to a plaintiff in intra-corporate litigation who "does not obtain a judgment on the merits that [**8] substantially achieves, in substance and amount, the full remedy sought."[11] Under Delaware law, a corporation's bylaws are "presumed to be valid, and the courts will construe the bylaws in a manner consistent with the law rather than strike down the bylaws."[12] To be facially valid, a bylaw must be authorized by the Delaware General Corporation Law (DGCL),[13] consistent with the corporation's [*558] certificate of incorporation, and its enactment must not be otherwise prohibited.[14] That, under some circumstances, a bylaw might conflict with a statute, or operate unlawfully, is not a ground for finding it facially invalid.

> 10 Under *8 Del. C. § 114*, the provisions of the Delaware General Corporation Law, including *§ 109(b)*, apply to non-stock corporations and all references to the stockholders of a corporation are deemed to apply to the members of a non-stock corporation.
> 11 Certification at 9.
> 12 *See Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985)*.
> 13 *8 Del. C. Ch. 1*.
> 14 *8 Del. C. § 109(b)* ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation . . . ."); *see also Crown EMAK Partners, LLC v. Kurz, 992 A.2d*

377, 398 (Del. 2010) ("[A] bylaw [**9] provision that conflicts with the DGCL is void.").

A fee-shifting bylaw, like the one described in the first certified question, is facially valid. Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws. A bylaw that allocates risk among parties in intra-corporate litigation would also appear to satisfy the DGCL's requirement that bylaws must "relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[15] The corporate charter could permit fee-shifting provisions, either explicitly or implicitly by silence.[16] Moreover, no principle of common law prohibits directors from enacting fee-shifting bylaws.

15 *8 Del. C. § 109(b)*.

16 *8 Del. C. § 102(a)* does not require that fee-shifting provisions be included in the charter.

Delaware follows the American Rule, under which parties to litigation generally must pay their own attorneys' fees and costs.[17] But it is settled that contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party's fees.[18] Because corporate bylaws are "contracts among a [**10] corporation's shareholders,"[19] a fee-shifting provision contained in a non-stock corporation's validly-enacted bylaw would fall within the contractual exception to the American Rule. Therefore, a fee-shifting bylaw would not be prohibited under Delaware common law.

17 *Mahani v. Edix Media Grp., Inc., 935 A.2d 242, 245 (Del. 2007)* ("Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs.").

18 *See Sternberg v. Nanticoke Mem'l Hosp., Inc., 62 A.3d 1212, 1218 (Del. 2013)* ("'An exception to [the American R]ule is found in contract litigation that involves a fee shifting provision.'") (citation omitted).

19 *Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010)*.

Whether the specific ATP fee-shifting bylaw is enforceable, however, depends on the manner in which it was adopted and the circumstances under which it was invoked. Bylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose. In the landmark *Schnell v. Chris-Craft Industries* [20] decision, for example, this Court set aside a board-adopted bylaw amendment that moved up the date of an annual stockholder meeting to [**11] a month earlier than the date originally scheduled.[21] The Court found that the board's purpose in adopting the bylaw and moving the meeting was to "perpetuat[e] itself in office" and to "obstruct[] the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management."[22] The *Schnell* Court famously stated that "inequitable action does not become permissible simply because it is legally possible."[23]

20 *285 A.2d 437 (Del. 1971)*.

21 *Id. at 438-40*.

22 *Id. at 439*.

23 Ibid.

[*559] More recently, in *Hollinger International, Inc. v. Black*,[24] the Court of Chancery addressed bylaw amendments, enacted by a controlling shareholder, that prevented the board "from acting on any matter of significance except by unanimous vote" and "set the board's quorum requirement at 80%," among other changes.[25] The Court of Chancery found, and this Court agreed, that the bylaw amendments were ineffective because they "were clearly adopted for an inequitable purpose and have an inequitable effect."[26] That finding was based on an extensive review of the facts surrounding the controller's decision to amend the bylaws.[27]

24 *844 A.2d 1022 (Del. Ch. 2004), aff'd sub. nom., Black v. Hollinger Int'l Inc., 872 A.2d 559 (Del. 2005)*.

25 *Id. at 1077*.

26 *Id. at 1080*.

27 *See* [**12] *id. at 1030-57*.

Conversely, this Court has upheld similarly restrictive bylaws that were enacted for proper purposes. In *Frantz Manufacturing Co. v. EAC Industries*,[28] a majority stockholder amended the corporation's bylaws by written consent in order to "limit the [] board's anti-takeover maneuvering after [the stockholder] had gained control of the corporation."[29] The amended bylaws, like those invalidated in *Hollinger*, increased the board quorum requirement and mandated that all board actions be unanimous. The Court found that the bylaw amendments were "a permissible part of [the

stockholder's] attempt to avoid its disenfranchisement as a majority shareholder" and, thus, were "not inequitable under the circumstances."[30]

28 *501 A.2d 401 (Del. 1985)*.
29 *Id. at 407*.
30 *Id. at 407, 409*.

In sum, the enforceability of a facially valid bylaw may turn on the circumstances surrounding its adoption and use.[31] The Certification does not provide the stipulated facts necessary to determine whether the ATP bylaw was enacted for a proper purpose or properly applied. Moreover, because certifications by their nature only address questions of law,[32] we are able to say only that a bylaw of the type at issue [**13] here is facially valid, in the sense that it is permissible under the DGCL, and that it may be enforceable if adopted by the appropriate corporate procedures and for a proper corporate purpose.

31 *See, e.g., Stroud v. Grace, 606 A.2d 75, 83 (Del. 1992)* (upholding bylaw amendments against claims of entrenchment because "there [was] no evidence that the board adopted the Amendments as defensive measures," and the "record clearly indicate[d]" that "there was no threat to the board's control"); *Datapoint Corp. v. Plaza Sec. Co., 496 A.2d 1031, 1036 (Del. 1985)* (invalidating board-adopted bylaw amendments because the "underlying intent" behind them was "to give management an opportunity distribute 'opposing solicitation material'" to challenge written stockholder consents); *In re Osteopathic Hosp. Ass'n of Del., 41 Del. Ch. 206, 191 A.2d 333, 336 (Del. Ch. 1963), aff'd, 41 Del. Ch. 369, 195 A.2d 759 (Del. 1963)* (invalidating a membership bylaw because a "change of so fundamental a character" to the "structure of this rather unique organization" was improper without the consent of "the group whose interests are adversely affected," *i.e.*, the association's members).
32 *Supr. Ct. R. 41(a)*.

2. The bylaw, if valid and enforceable, [**14] could shift fees if a plaintiff obtained no relief in the litigation.

The second certified question essentially asks whether a more limited version of the ATP bylaw would be valid. Article 23.3(a) states that it can be invoked against any plaintiff who does not obtain a judgment "that substantially achieves, in substance [*560] and amount, the full remedy sought."[33] Since there might be difficulty applying the "substantially achieves" standard, the District Court asks whether the bylaw would be enforceable, at least, where plaintiff obtains "no relief at all against the corporation."[34] Subject to the limitations set forth in our answer to the first certified question, we answer the second question in the affirmative.

33 Certification at 5.
34 *Id*. at 9.

3. The bylaw would be unenforceable if adopted for an improper purpose.

The third certified question asks whether the bylaw is "rendered unenforceable as a matter of law if one or more Board members subjectively intended the adoption of the bylaw to deter legal challenges by members to other potential corporate action then under consideration."[35] Again, we are unable to respond fully. Legally permissible bylaws adopted for an improper purpose are [**15] unenforceable in equity. The intent to deter litigation, however, is not invariably an improper purpose. Fee-shifting provisions, by their nature, deter litigation. Because fee-shifting provisions are not *per se* invalid, an intent to deter litigation would not necessarily render the bylaw unenforceable in equity.

35 *Ibid*.

4. Generally, a bylaw amendment is enforceable against members who join the corporation before its enactment.

The fourth certified question asks whether a fee-shifting bylaw provision is enforceable against members who joined the corporation before the provision's enactment and who agreed to be bound by rules "that may be adopted and/or amended from time to time" by the board.[36] Assuming the provision is otherwise valid and enforceable, as a statutory matter the answer is yes. The DGCL permits a corporation to, "in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors."[37] If directors are so authorized, "stockholders will be bound by bylaws adopted unilaterally by their boards."[38]

36 *Ibid*.
37 *8 Del. C. § 109(a)*.

38 *Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 956 (Del. Ch. 2013)*; *see also Kidsco Inc. v. Dinsmore, 674 A.2d 483, 492-93 (Del. Ch. 1995)*, [**16] *aff'd, 670 A.2d 1338 (Del. 1995)*.

CONCLUSION

Under Delaware law, a fee-shifting bylaw is not invalid *per se*, and the fact that it was adopted after entities became members will not affect its enforceability. But we cannot say, as a matter of law, that the ATP fee-shifting provision was adopted for a proper purpose or is enforceable in the circumstances presented.

From: Jay Chaudhuri
Sent: Monday, November 24, 2014 11:55 AM
To: Jacobs, Matthew (Matthew_Jacobs@CalPERS.CA.GOV); Astleford, Warren; Brian Bartow; Anne Sheehan; Adam Franklin; mike.mccauley@sbafla.com; LaMarr, Catherine; emack@hmeps.org; Chris Supple (csupple@mapension.com); tgibson@middlesexretirement.org; Van Eysden, Inga (Law); Garland, Michael; Simon, Richard (rsimon@comptroller.nyc.gov); Peet Jennifer J; Reagan, Elaine; Meryl Murtagh; Tim Viezer; Greg RIDEOUT; Matthew Leatherman; Blake Thomas
Cc: 'Ann Yerger' (Ann@cii.org); Jeff Mahoney (Jeff@cii.org)
Subject: Letters Regarding Fee-Shifting Bylaw Legislation
Attachments: Letter to Glass Lewis (Final).pdf; Letter to Governor Markell (Final).pdf; Letter to ISS (Final).pdf; Letter to Norm Monahit (Final).pdf; Letter to Senator Bryan Townsend (Final).pdf

Dear Colleagues:

I am attaching copies of letters that have been sent to the following parties this morning:

State of Delaware
Governor Jack Markell of Delaware
Senator Bryan Townsend of the Delaware General Assembly
Norm Monhait, Chair, Delaware Corporation Law Council

Proxy Advisory Firms
Martha Carter, ISS
Robert McCormick, Glass Lewis

You will note that we have included three international funds bringing out total AUM to $2 trillion. In addition, there were a few minor edits made to both letters. Many thanks to everyone who submitted comments and agreed to sign these letters. And, special thanks to Ann Yerger and Jeff Mahoney at CII for hosting a call on this topic a few weeks ago.

Happy Thanksgiving.

Best,

Jay J. Chaudhuri
General Counsel & Senior Policy Advisor
North Carolina Department of State Treasurer
325 North Salisbury Street, Raleigh, North Carolina 27603-1385
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APG Asset Management NV * California Public Employees' Retirement Systems * California State Teachers' Retirement Systems * Colorado Public Employees' Retirement Association * Connecticut State Treasurer's Office * Florida State Board of Administration * Houston Municipal Employees Pension System * Massachusetts Pension Reserve Investment Management Board * Middlesex County Retirement System * MN Services * The New York City Employees' Retirement System * The New York City Police Pension Fund * The Board of Education Retirement System of the City of New York * The Teachers' Retirement System of the City of New York * The New York City Fire Department Pension Fund * The Teachers' Retirement Systems' Variable A * North Carolina Department of State Treasurer * Oregon State Treasurer's Office * PGGM Investments * San Diego City Employees' Retirement System

November 24, 2014

The Honorable Jack Markell
Office of the Governor
150 Martin Luther King Jr. Blvd South, 2nd Floor
Dover, Delaware 19901

RE: Legislation on "Fee Shifting" Bylaws

Dear Governor Markell:

As institutional investors collectively managing assets of almost $2 trillion that represent millions of current and retired teachers, first responders, and government employees, we write asking for swift legislative action to curtail the spread of so-called "fee shifting" bylaws, which have been adopted by more than 30 companies this summer.

While lobbyists hired by corporate interests are trying to portray these bylaws as protecting shareholders, the exact opposite is true. These bylaws effectively make corporate directors and officers unaccountable for serious wrongdoing. The General Assembly must act promptly to restore confidence in Delaware's credibility in developing a balanced corporate law, preserve stockholders' access to the court system, and make clear that directors and officers cannot insulate themselves from accountability under the guise of unilateral bylaw or charter provisions.

On May 8, 2014, the Delaware Supreme Court issued an opinion in *ATP Tour, Inc., et. al. v. Deutscher Tennis Bund,* in which the Court held that directors *of a non-stock corporation* may adopt a bylaw requiring any member who commences litigation against that *non-stock corporation* or its directors, or derivatively on behalf of that corporation, to be personally liable for the legal expenses of the company and its officers

and directors unless the member "obtain[s] a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought" in the litigation.[1]

Although decided in the context of a *non-stock corporation*, lobbyists and lawyers representing the interest in entrenched directors of *publicly traded Delaware corporations* have seized on this language to urge their clients to use this opportunity to immunize their conduct from any meaningful judicial oversight by imposing liability for corporate expenses directly on stockholders. The Council of the Corporation Law Section of the Delaware Bar Association responded to the *ATP* ruling by proposing legislation that would appropriately limit the ruling's application in the public company context. Specifically, the General Assembly was asked to approve Senate Bill 236 of the 147th General Assembly, which would have limited the application of *ATP Tour* to the context in which it was decided, a non-stock corporation, and reaffirmed the limited liability nature of publicly traded corporations by making clear that corporate directors cannot impose financial liability on stockholders by unilaterally adopting a bylaw purporting to do so.

Corporate lobbyists responded by presenting a campaign that wrongly characterized "fee-shifting" bylaws as somehow protective of stockholder interests. We must make clear that these lobbyists do not speak for the interests of the nation's public investors. The "Institute for Legal Reform" (the "Institute") acting in concert with the U.S. Chamber of Commerce, sent at least two letters to the members of the General Assembly suggesting that this content-neutral legislation "would only protect frivolous lawsuits" and that fee-shifting bylaws unilaterally adopted by corporate directors "gives corporations a way to protect shareholders against these costs of abusive litigation." In response, the General Assembly did not act on Senate Bill 236, but instead the Senate of the State of Delaware adopted Resolution No. 12, which calls for continued consideration of these important issues.

The Institute's arguments are directly contrary to the interests of investors in publicly traded Delaware corporations. Far from protecting corporations from "frivolous litigation," these fee-shifting provisions effectively bar any judicial oversight of misconduct of corporate directors. They undermine the most fundamental premise of the corporate form – that stockholders, simply by virtue of their investment, cannot be responsible for corporate debts.

First, the fee-shifting bylaw approved by in *ATP Tour*, if applied to stock corporations, essentially removes judicial oversight over corporate wrongdoing by effectively foreclosing stockholders' access to courts. The fundamental premise of Delaware corporate law is that while stockholders contribute capital and own the equity

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1 *ATP Tour, Inc., et. al. v. Deutscher Tennis Bund, et. al.*, 91 A.3d 554 (Del. Supr. 2014).

of a corporation, the directors and officers are delegated the statutory responsibility for managing the business affairs of the enterprise and are charged with the corresponding fiduciary obligation to act in the best interests of the stockholders and the company. These statutory and fiduciary obligations are meaningful, however, only to the extent they can be enforced by the Delaware courts. Fee-shifting bylaws will foreclose meritorious stockholder claims render illusory the fiduciary obligations of corporate directors.

To be clear, the kind of fee-shifting bylaw approved in *ATP Tour* does not further stockholders' interests by protecting corporations from "frivolous litigation." Instead, such provisions bar all judicial oversight by making it economically unfeasible for stockholders to seek redress in Delaware courts to protect their rights. Without adequate protections and reasonable access to the courts to hold corporate fiduciaries accountable when they violate their obligations to stockholders, investor confidence diminishes and market participation suffers, hurting investors and the businesses in which they invest.[2] In other words, closing the courthouse doors to investors could very directly and materially impair the Delaware economy. Moreover, depriving investors of access to the courts will eliminate an important check-and-balance on the behavior of corporate fiduciaries, and will predictably cause and increase unlawful or disloyal conduct by directors and officers, with a corresponding negative effect on our investment portfolios and the public markets generally.

Second, Delaware has a substantial interest in the development of its corporate law, and the inevitable widespread adoption of fee-shifting bylaws will impair the development of that law. For more than one hundred years, the Delaware judiciary has provided a fair forum for the resolution of intra-corporate disputes. The Delaware Court of Chancery is generally considered the nation's "pre-eminent" business court,[3] and virtually every state in the country looks to Delaware law in the development of its own corporate law.[4] If Delaware corporations adopt fee-shifting bylaws, however, the

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[2] Notably, while many commentators have linked the need for fee-shifting bylaws with the fact that some companies have incurred expenses defending non-meritorious litigations, the courts already have the ability to dismiss such suits and award sanctions if the action is truly frivolous.

[3] http://courts.delaware.gov/chancery/index.stm ("The Delaware Court of Chancery is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted. Its unique competence in and exposure to issues of business law are unmatched.").

[4] *See, e.g.*, *Billings v. GTFM, LLC*, 449 Mass. 281, 292 (2007); *Achey v. Linn County Bank*, 261 Kan. 669, 676 (1997*); Davidson v. Ecological Science Corporation*, 266 So.2d 71 (Fla. 3d DCA 1972); *In re Comverse Tech., Inc*., 56 A.D.3d 49, 56 (N.Y. App. 1st Dep't 2008); *Ward v. Idsinga*, 2013 Mich. App. LEXIS 1427 at *12-13; *Oakland Raiders v. Nat'l Football League*, 93 Cal. App. 4th 572, 586 n. 5 (Cal. App. Ct. 2001); *Sound Infiniti, Inc., ex. rel. Pisheyar v. Snyder*, 169 Wash. 2d 199, 209 (2010); *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 338 n.14 (2009); *Nev. Classified Sch. Emples. Ass'n v. Quaglia*, 124

Delaware judiciary will be relegated to the sidelines and a major justification for investing in Delaware corporations will disappear.

Finally, allowing directors to impose on stockholders personal liability for corporate expenses without the stockholders' express consent is the antithesis of the corporate form. Investors rely on the shield from corporate liability created by the corporate form, and corporations could not provide the products and services they provide without adequate access to investor capital. How can a stockholder reasonably invest limited capital in a corporation, if the directors of that corporation could adopt a bylaw that would impose personal liability on that stockholder for corporate debts that would greatly exceed the value of the original investment? And in the context of fee-shifting bylaws in particular, how could the stockholder-owners of corporations place trillions of dollars in the hands of fiduciaries who immunize themselves from legal challenge? Allowing directors to impose personal liability on stockholders through bylaw amendments would make continued investment in Delaware corporations untenable. Such unilateral authority by corporate directors eliminates the protections commonly understood to be provided by the corporate form, and threatens to turn a common investment in a Delaware corporation into a guarantee of unlimited corporate debt.

In sum, requiring stockholders to bear the expenses a corporation may incur in fighting stockholders' efforts to protect their interests effectively eliminates the ability of stockholders to look to Delaware courts to protect their rights as the owners of corporations. Allowing corporate directors to disregard the limited liability nature of the corporate form through the unilateral adoption of bylaws threatens continued public investment in Delaware corporations. Immediate action is necessary to ensure that Delaware maintains its preeminence in the field of corporate law, and to protect the very underpinnings of our publicly traded financial markets.

If you have any questions, please feel free to contact Jay Chaudhuri, General Counsel & Senior Policy Advisor at the North Carolina Department of State Treasurer, at (919) 508-1024 or jay.chaudhuri@nctreasurer.com.

Nev. 60, 63-64 (2008); *Crandon Capital Partners v. Shelk*, 342 Ore. 555, 567 (2007); *Katz Corp v. T.H. Canty & Co*., 168 Conn. 201, 208-09, 362 A.2d 975 (1974).

Very truly yours,

/s/

Guus Warringa, Chief Counsel
APG Asset Management NV

/s/

Matthew Jacobs, General Counsel
California Public Employees' Retirement System

/s/

Brian Bartow, General Counsel
California State Teachers' Retirement System

/s/

Adam Franklin, General Counsel
Colorado Public Employees' Retirement Association

/s/

Catherine LeMarr, General Counsel
Office of Connecticut State Treasurer's Office

/s/

Michael McCauley, Senior Officer, Investment Programs & Governance
Florida State Board of Administration

/s/

Rhonda Smith, Executive Director
Houston Municipal Employees Pension System

/s/

Chris Supple, Executive Director and General Counsel
Pension Reserve Investment Management Board Commonwealth of Massachusetts

/s/

Thomas F. Gibson, Chairman
Middlesex County Retirement Board

/s/

Antaoli van der Krans, Senior Advisor Responsible Investment & Governance
MN Services

/s/

Board of Trustees
The New York City Employees' Retirement System

/s/

Board of Trustees
The New York City Police Pension Fund

/s/

Board of Trustees
The Board of Education Retirement System of the City of New York

/s/

Board of Trustees
The Teachers' Retirement System of the City of New York

/s/

Board of Trustees
The New York City Fire Department Pension Fund

/s/

Board of Trustees
The Teachers' Retirement Systems' Variable A

/s/

Jay J. Chaudhuri, General Counsel & Senior Policy Advisor
North Carolina Department of State Treasurer

/s/

Tom Rhinehart, Chief of Staff
Oregon State Treasurer’s Office

/s/

Mark Hovey, Chief Investment Officer
San Diego City Employees' Retirement System

APG Asset Management NV * California Public Employees' Retirement Systems * California State Teachers' Retirement Systems * Connecticut State Treasurer's Office * Florida State Board of Administration * Houston Municipal Employees Pension System * Massachusetts Pension Reserve Investment Management Board & MN Services * The New York City Employees' Retirement System * The New York City Police Pension Fund * The Board of Education Retirement System of the City of New York * The Teachers' Retirement System of the City of New York * The New York City Fire Department Pension Fund * The Teachers' Retirement Systems' Variable A * North Carolina Department of State Treasurer * Oregon State Treasurer's Office * PGGM Investments * San Diego City Employees' Retirement System

November 24, 2014

Martha Carter, Global Head of Research
Institutional Shareholder Services, Inc.
1177 Avenue of Americas, 2nd Floor
New York, NY 10036

Dear Ms. Carter:

As institutional investors collectively representing nearly $2 trillion of assets under management, we write as follow-up from on conference call with Mr. Chris Cernich of Institutional Shareholders Services, Inc. ("ISS") on October 14. As you know, we are concerned with a recent trend among corporate directors to act unilaterally to impair the ability of shareholders to enforce their rights as owners of corporations through litigation. We respectfully urge you to promptly adopt a policy to oppose any effort by corporate directors to insulate themselves from accountability under the guise of bylaw or charter provisions that expose stockholders to personal liability for corporate expenses. Specifically, we urge you to make clear that ISS will recommend that stockholders exercise their voting rights to immediately remove any directors who adopt bylaws stripping investors of their rights.

As you may know, on May 8, 2014, the Delaware Supreme Court issued an opinion in *ATP Tour, Inc., et. al. v. Deutscher Tennis Bund*, that presents grave implications for investors in Delaware corporations. The Court held that corporate directors can, without stockholder approval, unilaterally adopt a bylaw requiring any stockholder who commences (or supports) litigation against a corporation or its directors, or derivatively on behalf of that corporation, to be personally liable for the legal expenses of the company and its officers and directors unless the stockholder "obtain[s] a judgment on the merits that substantially achieves, in substance and amount, the full remedy

sought" in the litigation.[1] The consequences of this ruling are so severe and detrimental to the integrity of the capital markets that decisive action is required. Indeed, since the decision, over 30 public companies have adopted provisions purporting to impose personal liability on shareholders for corporate debts.

First, the fee-shifting bylaw approved by the Supreme Court removes judicial oversight over corporate wrongdoing by effectively foreclosing stockholders' access to courts. The fundamental premise of corporate law is that while stockholders contribute capital and own the equity of a corporation, the directors and officers are responsible for managing the business affairs of the enterprise. The directors, thus, are charged with the corresponding fiduciary obligation to act in the best interests of the stockholders and the company. These statutory and fiduciary obligations are meaningful, however, only to the extent they can be enforced. Fee-shifting bylaws foreclose the filing of even the most meritorious of stockholder claims and effectively close the courthouse doors to investors, eliminating their ability to bring suit to prevent and remedy unlawful conduct among corporate fiduciaries.

Second, allowing directors to impose on stockholders personal liability for corporate expenses without the stockholders' express consent is the antithesis of the corporate form. Investors rely on the shield from corporate liability created by the corporate form, and corporations could not provide the products and services they provide without adequate access to investor capital. How could the stockholder-owners of corporations place trillions of dollars in the hands of fiduciaries who immunize themselves from legal challenge? Allowing directors to tear apart this corporate veil by imposing personal liability on stockholders who seek to protect their rights threatens the very underpinnings of our financial markets and upsets the balance between the interests of fiduciaries and the shareowners who they serve.

Finally, the failure to date of the judicial system, legislators, and regulators to protect stockholders from the opportunistic and self-interested adoption of bylaw provisions has opened the door to further and rapidly expanding abusive conduct, and calls for immediate intervention by ISS to provide much-needed market discipline. Now that the Delaware Supreme Court has opened the door to abusive fee-shifting bylaws, there is a significant risk that ever-increasing numbers of corporate boards will choose to exploit the current state of affairs to remove themselves from accountability through the court system. If corporations adopt fee-shifting bylaws in large numbers, the judiciary will be relegated to the sidelines.

In response to the *ATP* decision, in June 2014 the Delaware legislature was poised to pass legislation to make clear that corporate directors cannot use bylaws to require

[1] *ATP Tour, Inc., et. al. v. Deutscher Tennis Bund, et. al.*, ___ Del. ___,2014 WL 1847446 (Del. May 8, 2014).

shareholders to bear personal liability for corporate debts. However, on June 19, the U.S. Chamber of Commerce, through lobbyists and paid legal advisors, successfully fought to delay consideration of the legislation until the early 2015 session. The reason for the Chamber's delay tactics has now become clear: to allow companies the time to adopt these bylaws. In fact, in the short time since the Chamber persuaded the Delaware legislature to delay taking action, over 30 companies have adopted one form of fee shifting bylaw or another. Some of these companies, like Biolase Inc. and Echo Therapeutics, Inc., adopted these bylaws in the wake of or in anticipation of proxy solicitation efforts.[2]

In fact, if a unilaterally adopted bylaw can be used to target stockholder litigants, then there may be no distinction to prevent boards from using bylaws to impose fee shifting against stockholders who merely pursue proxy solicitations against the board. Allowing corporate directors to require stockholders to bear the expenses a corporation may incur in fighting stockholder litigation, even if the suit has merit, effectively eliminates the ability of stockholders to look to Delaware courts to protect their rights as the owners of corporations.

We believe that it would be appropriate for ISS to adopt a policy recommending that shareholders vote against the reelection of any director who uses bylaw amendments as a weapon to eliminate stockholder rights. We believe such a policy would serve as a strong deterrent to discourage corporate boards from using bylaw amendments to remove accountability over directors render their fiduciary obligations illusory.[3]

If you have any questions, please feel free to contact Jay Chaudhuri, General Counsel & Senior Policy Advisor at the North Carolina Department of State Treasurer, at (919) 508-1024 or jay.chaudhuri@nctreasurer.com.

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[2] To be sure, any public recommendation by ISS regarding contemplated or ongoing proxy solicitations involving companies who adopt fee shifting provisions should provide you a clear opportunity to take a decisive stance that directors who adopt such provisions will face a recommendation that stockholders support those directors' ouster at the next election.

[3] To be sure, while it is our intent to vote to remove such directors whether or not ISS announces the requested policy, we believe it critical that ISS in communicating unanimity on this issue. The Council of Institutional Investors already has stated that bylaws that limit accountability of corporate directors are not consistent with best governance practices.

Very truly yours,

/s/

Guus Warringa, Chief Counsel
APG Asset Management NV

/s/

Matthew Jacobs, General Counsel
California Public Employees' Retirement System

/s/

Brian Bartow, General Counsel
California State Teachers' Retirement System

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Jay J. Chaudhuri, General Counsel & Senior Policy Advisor
North Carolina Department of State Treasurer

/s/

Tom Rhinehart, Chief of Staff
Oregon State Treasurer’s Office

/s/

Dr. Marcel Jeucken, Managing Director Responsible Investment
PGGM Investments

/s/

Mark Hovey, Chief Investment Officer
San Diego City Employees' Retirement System

SPONSOR:

[HOUSE OF REPRESENTATIVES/DELAWARE STATE SENATE]
148th GENERAL ASSEMBLY

[HOUSE/SENATE] BILL NO. ___

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend § 102(a)(1), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 102 Contents of certificate of incorporation.

(a) The certificate of incorporation shall set forth:

(1) The name of the corporation, which (i) shall contain 1 of the words "association," "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate," or "limited," (or abbreviations thereof, with or without punctuation), or words (or abbreviations thereof, with or without punctuation) of like import of foreign countries or jurisdictions (provided they are written in roman characters or letters); provided, however, that the Division of Corporations in the Department of State may waive such requirement (unless it determines that such name is, or might otherwise appear to be, that of a natural person) if such corporation executes, acknowledges and files with the Secretary of State in accordance with § 103 of this title a certificate stating that its total assets, as defined in § 503(i) of this title, are not less than $10,000,000, or, in the sole discretion of the Division of Corporations in the Department of State, if the corporation is both a nonprofit nonstock corporation and an association of professionals, (ii) shall be such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names that are reserved on such records and from the names on such records of each other corporation, partnership, limited partnership, limited liability company or statutory trust organized or registered as a domestic or foreign corporation, partnership, limited partnership, limited liability company or statutory trust under the laws of this State, except with the written consent of the person who has reserved such name or such other foreign corporation or domestic or foreign partnership, limited partnership, limited liability company or statutory trust, executed, acknowledged and filed with the Secretary of State in accordance with § 103 of this title, or except that, without prejudicing any rights of the person who has reserved

such name or such other foreign corporation or domestic or foreign partnership, limited partnership, limited liability company or statutory trust, the Division of Corporations in the Department of State may waive such requirement if the corporation demonstrates to the satisfaction of the Secretary of State that the corporation or a predecessor entity previously has made substantial use of such name or a substantially similar name, that the corporation has made reasonable efforts to secure such written consent, and that such waiver is in the interest of the State, (iii) except as permitted by § 395 of this title, shall not contain the word "trust," and (iv) shall not contain the word "bank," or any variation thereof, except for the name of a bank reporting to and under the supervision of the State Bank Commissioner of this State or a subsidiary of a bank or savings association (as those terms are defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. § 1813), or a corporation regulated under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 et seq., or the Home Owners' Loan Act, as amended, 12 U.S.C. § 1461 et seq.; provided, however, that this section shall not be construed to prevent the use of the word "bank," or any variation thereof, in a context clearly not purporting to refer to a banking business or otherwise likely to mislead the public about the nature of the business of the corporation or to lead to a pattern and practice of abuse that might cause harm to the interests of the public or the State as determined by the Division of Corporations in the Department of State;

Section 2. Amend § 102, Title 8 of the Delaware Code, by adding a new section, § 102(f), shown by underline as follows:

(f) The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an intracorporate claim, as defined in § 115 of this title.

Section 3. Amend § 109(b), Title 8 of the Delaware Code, by making insertions as shown by underline as follows:

(b) The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees. The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an intracorporate claim, as defined in § 115 of this title.

Section 4. Amend § 114(b), Title 8 of the Delaware Code, by making insertions as shown by underline as follows:

(b) Subsection (a) of this section shall not apply to:

(1) Sections 102(a)(4), (b)(1) and (2), 109(a), 114, 141, 154, 215, 228, 230(b), 241, 242, 253, 254, 255, 256, 257, 258, 271, 276, 311, 312, 313, 390, and 503 of this title, which apply to nonstock corporations by their terms;

(2) Sections 102(f), 109(b) (last sentence), 151, 152, 153, 155, 156, 157(d), 158, 161, 162, 163, 164, 165, 166, 167, 168, 203, 204, 205, 211, 212, 213, 214, 216, 219, 222, 231, 243, 244, 251, 252, 267, 274, 275, 324, 364, 366(a), 391 and 502(a)(5) of this title; and

(3) Subchapter XIV and subchapter XVI of this chapter.

Section 5. Amend Title 8 of the Delaware Code by adding a new section, § 115, shown by underline as follows:

§ 115. Forum selection provisions.

The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all intracorporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Intracorporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.

Section 6. Amend § 245(c), Title 8 of the Delaware Code, by making insertions as shown by underline as follows:

(c) A restated certificate of incorporation shall be specifically designated as such in its heading. It shall state, either in its heading or in an introductory paragraph, the corporation's present name, and, if it has been changed, the name under which it was originally incorporated, and the date of filing of its original certificate of incorporation with the Secretary of State. A restated certificate shall also state that it was duly adopted in accordance with this section. If it was adopted by the board of directors without a vote of the stockholders (unless it was adopted pursuant to § 241 of this title or without a vote of members pursuant to § 242(b)(3) of this title), it shall state that it only restates and integrates and does not further amend (except, if applicable, as permitted under § 242(a)(1) and §

242(b)(1) of this title) the provisions of the corporation's certificate of incorporation as theretofore amended or supplemented, and that there is no discrepancy between those provisions and the provisions of the restated certificate. A restated certificate of incorporation may omit (a) such provisions of the original certificate of incorporation which named the incorporator or incorporators, the initial board of directors and the original subscribers for shares, and (b) such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective. Any such omissions shall not be deemed a further amendment.

Section 7. Amend § 363(a), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 363 Certain amendments and mergers; votes required; appraisal rights.

(a) Notwithstanding any other provisions of this chapter, a corporation that is not a public benefit corporation, may not, without the approval of ~~90%~~2/3 of the outstanding ~~shares of each class of the~~ stock of the corporation ~~of which there are outstanding shares, whether voting or nonvoting~~entitled to vote thereon:

(1) Amend its certificate of incorporation to include a provision authorized by § 362(a)(1) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign public benefit corporation or similar entity.

The restrictions of this section shall not apply prior to the time that the corporation has received payment for any of its capital stock, or in the case of a nonstock corporation, prior to the time that it has members.

Section 8. Amend § 363(c), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(c) Notwithstanding any other provisions of this chapter, a corporation that is a public benefit corporation may not, without the approval of 2/3 of the outstanding ~~shares of each class of the~~ stock of the corporation ~~of which there are outstanding shares, whether voting or nonvoting~~entitled to vote thereon:

(1) Amend its certificate of incorporation to delete or amend a provision authorized by § 362(a)(1) or § 366(c) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the public benefit or public benefits pursuant to § 362(a) of this title or imposing requirements pursuant to § 366(c) of this title.

Section 9. Amend § 391(c), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(c) The Secretary of State may issue photocopies or electronic image copies of instruments on file, as well as instruments, documents and other papers not on file, and for all such photocopies or electronic image copies which are not certified by the Secretary of State, a fee of $10 shall be paid for the first page and $2.00 for each additional page. ~~The Secretary of State may also issue microfiche copies of instruments on file as well as instruments, documents and other papers not on file, and for each such microfiche a fee of $2.00 shall be paid therefor.~~ Notwithstanding Delaware's Freedom of Information Act [Chapter 100 of Title 29] or any other provision of law granting access to public records, the Secretary of State upon request shall issue only photocopies~~, microfiche~~ or electronic image copies of public records in exchange for the fees described ~~above~~in this section, and in no case shall the Secretary of State be required to provide copies (or access to copies) of such public records (including without limitation bulk data, digital copies of instruments, documents and other papers, databases or other information) in an electronic medium or in any form other than photocopies or electronic image copies of such public records in exchange, as applicable, for the fees described in this section or § 2318 of Title 29 for each such record associated with a file number.

Section 10. Sections 1through 8 shall be effective on August 1, 2015. Section 9 shall be effective upon its enactment into law.

Ssynopsis

Section 1. Section 1 amends Section 102(a)(1) to enable the Division of Corporations in the Department of State to waive the requirement under Section 102(a)(1)(ii) in certain limited circumstances.

Section 2. In *ATP Tours, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), the Delaware Supreme Court upheld as facially valid a bylaw imposing liability for certain legal fees of the nonstock corporation on certain members who participated in the litigation. In combination with the amendments to Sections 109(b) and 114(b)(2), new subsection (f) does not disturb that ruling in relation to nonstock corporations. In order to preserve the efficacy of the enforcement of fiduciary duties in stock corporations, however, new subsection (f) would invalidate a provision in the certificate of incorporation of a stock corporation that purports to impose liability upon a

stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an intracorporate claim, as defined in new Section 115. New subsection (f) is not intended, however, to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.

Section 3. Like the concurrent amendment to Section 102, the new last sentence of subsection (b) would invalidate a provision in the bylaws of a stock corporation that purports to impose liability upon a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an intracorporate claim, as defined in new Section 115. The new last sentence of subsection (b) is not intended, however, to prevent the application of any provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.

Section 4. The amendment to Section 114 has the effect of avoiding the application to nonstock corporations of new Section 102(f) and the new last sentence of Section 109(b).

Section 5. New Section 115 confirms, as held in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.2d 934 (Del. Ch. 2013), that the certificate of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation, or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State. Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which intracorporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, or an arbitral forum, if it would preclude litigating such claims in the Delaware courts. Section 115 is not intended, however, to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced. Section 115 is not intended to foreclose evaluation of whether the specific terms and manner of adoption of a particular provision authorized by Section 115 comport with any relevant fiduciary obligation or operate reasonably in the circumstances presented. For example, such a provision may not be enforceable if the Delaware courts lack jurisdiction over indispensable parties or core elements of the subject matter of the litigation. Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.

Section 6. The amendment to Section 245(c) clarifies that a restated certificate is not required to state that it does not further amend the provisions of the corporation's certificate of incorporation if the only amendment thereto is to change the corporation's name without a vote of the stockholders.

Section 7. Section 7 amends Section 363(a) to change the approval required under that Section.

Section 8. Section 8 amends Section 363(c) to change the approval required under that Section.

Section 9. Section 9 amends Section 391(c) to confirm that in exchange for the fees described the Secretary of State may issue public records in the form of photocopies or electronic image copies and need not provide public records in any other form.

Section 10. Section 10 provides that the effective date of Sections 1 through 8 is August 1, 2015, and that Section 9 shall be effective upon its enactment into law.

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