Frequent Filers Revisited

Professional Plaintiffs in Securities Class Actions

April 2022

U.S. Chamber of Commerce
Institute for Legal Reform

Contents

Stephen J. Choi, Jessica Erickson and Adam C. Pritchard

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Executive Summary

In 1995, Congress attempted to crack down on frequent filers of securities fraud class actions when it adopted the Private Securities Litigation Reform Act (PSLRA).[1] Prior to the adoption of the PSLRA, repeat plaintiffs were common.[2] Plaintiffs' lawyers cultivated stables of potential plaintiffs, sometimes with cash inducements, to lend their names to the lawyers' suits.

Congress worried that these "professional plaintiffs" were not providing appropriate oversight of the lawyers who recruited them. Shareholders pay for this lack of oversight in two ways. First, nominal plaintiffs have little incentive to discourage plaintiffs' lawyers from filing frivolous suits in an attempt to extort attorneys' fees from public companies. Public company shareholders bear this cost in the form of reduced corporate profits. Second, attorneys' fees are typically paid out of the recovery in class action settlements, so if the named plaintiff is not carefully scrutinizing those fees, the pay-out to shareholders is reduced.

In the PSLRA, Congress created a new set of rules for courts to use in selecting the investor to lead these cases. Congress put express limits on frequent filers, providing that no investor shall serve as lead plaintiff in more than five securities class actions in a three-year period.[3] As we show in this study, those limits have not worked as Congress intended:

- Individual frequent filers have exploited a loophole in the PSLRA and now predominate in securities cases challenging mergers or acquisitions. These plaintiffs have turned merger litigation shakedowns into a volume business. They file dozens of cases each year, with the same law firms, relying on cookie-cutter complaints.
- Practice does not make perfect. The cases filed by these individual frequent filers rarely lead to any meaningful benefit for shareholders. Lawsuits are filed, and then quickly voluntarily dismissed, with no settlement paid to the shareholders. In fact, of 127 securities class actions launched by individual frequent filers during the study period, not a single case ended with a settlement or judgment in favor of the class. One hundred twenty-three of those cases were challenges to mergers and acquisitions.
- The suits do, however, produce a steady stream of fees for the lawyers. They receive "mootness" payments from the corporate defendants in exchange for voluntary dismissal of their suits.

We also find that institutional frequent filers—for whom the five-cases-in-three-years limit is routinely waived—continue to serve as lead plaintiff in a substantial number of securities class actions. These institutions vary greatly in their ability to represent the interests of absent class members, agreeing to inflated fee percentages in many of the largest settlements. Again, there is no connection between being a prolific plaintiff and serving the best interests of other shareholders.

The paper proceeds as follows. After an introduction to the topic in Chapter 2, we provide background on securities class actions and the PSRLA in Chapter 3. In Chapter 4, we investigate the role played by individual repeat plaintiffs. We find that individual repeat plaintiffs no longer appear in significant numbers in the standard securities class actions, such as those alleging financial misstatements in annual or quarterly filings. Indeed, for our sample period, no individual lead plaintiff

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appeared in more than three of these cases. Instead, repeat plaintiffs are ubiquitous in a different class of cases—the merger objection cases that were previously filed in state court. Here we find a disturbing resurgence of the abuses that we previously documented in state court cases, now migrated to federal court. We also document recent efforts to circumvent even the minimal safeguards provided by the PSLRA.

Chapter 5 looks at the role that institutional repeat plaintiffs play in securities fraud class actions. We find that three institutions stand out as repeat plaintiffs during our study period—the state retirement systems for Arkansas, Oklahoma, and Mississippi. These three public pension funds averaged substantially more than the 1.67 cases per year implied by the PSLRA's five-cases-in-three-years limit. Taking a closer look at the most prolific frequent filer, Arkansas, we find no evidence that its vast experience with securities class actions correlates with better outcomes for class members. In particular, Arkansas does not appear to negotiate lower attorneys' fees in their cases than their peers.

Finally, in Chapter 6, we suggest a number of reforms that Congress should consider to remedy the abuses associated with repeat plaintiffs. The first set of reforms targets the individual repeat plaintiffs who facilitate the merger objection cases that extort attorneys' fees while producing no tangible benefits for shareholders. We also propose reforms that would discourage the abuse of proxy litigation. For institutional repeat plaintiffs, we suggest ending the PSLRA's loophole for institutions serving in more than five cases in three years.

Chapter

02

Introduction

Looking at the names of plaintiffs in securities class actions, you might think that certain people are awfully unlucky. Certain names show up again and again, with some shareholders filing dozens of cases alleging that they were the victims of fraud. It is possible that these investors have been particularly unfortunate in choosing their investments. Yet many of these unlucky investors are large state and local pension and retirement funds, presumably with the resources to retain experienced money managers to pick their portfolios.

The size of these government funds gives them a leg up in being selected as lead plaintiff in securities fraud class actions. Congress created a presumption that the lead plaintiff should be the one with the largest financial losses. Many of these institutions now show up repeatedly as lead plaintiffs in securities fraud class actions. This opportunity is possible because Congress included an exception to the PSLRA's five-cases-in-three-years limit. The cap applies "except as the court may otherwise permit," meaning the court may override the five-case limit.[4] In practice, courts routinely waive the limit for institutional investors such as government pension funds, relying on legislative history from the PSLRA suggesting that Congress hoped institutional investors would take control of securities fraud class actions.[5] Individual plaintiffs use different tactics to get around this limitation, strategically ending their cases before the court appoints a lead plaintiff, thus never "serving" as lead plaintiff for purposes of the cap while still allowing for payment to their attorneys. With both institutional and individual plaintiffs, however, frequent filers remain common despite Congress's efforts to limit the practice in the PSLRA.

The continued prevalence of frequent filers hurts investors because professional plaintiffs are less likely to provide the oversight Congress intended in creating the PSLRA's lead plaintiff provision. The lead plaintiffs who oversee these claims are charged with looking out for the best interests of the class members that they have been appointed to represent. Despite that mandate, some lead plaintiffs may be more interested in maintaining their connections with plaintiffs' law firms for reasons unrelated to the litigation at hand. Those conflicts mean that, instead of maximizing the recovery for the class, these plaintiffs may be willing to turn a blind eye to the filing of frivolous lawsuits. They may also bless lucrative paydays for class counsel in cases that do have merit. Because attorneys' fees are typically awarded out of the class recovery, compensation paid to shareholders is diminished dollar for dollar.

We explored these conflicts in a white paper published by the U.S. Chamber of Commerce Institute for Legal Reform (ILR) in 2014, *Frequent Filers: The Problems of Shareholder Lawsuits and the Path to Reform.*[6] In that paper, we examined institutional repeat plaintiffs in securities class actions, highlighting the campaign contributions that many plaintiffs' law firms provide to the state officials who oversee certain state pension funds.[7] We also examined individual repeat plaintiffs in state court fiduciary duty cases, demonstrating that many repeat plaintiffs have family or business connections to lawyers who specialize in pursuing corporate and securities claims.[8]

In this paper, we return to the phenomenon of frequent filers. To gain insight on trends among frequent filers, we collected data on all securities fraud class actions filed in federal court from 2005 to 2018.[9] We then used this data to explore the role played by frequent filers in these cases over an extended period. The period of our study also allows us to examine the newer crop of cases challenging mergers and acquisitions.

With both institutional and individual plaintiffs, however, frequent filers remain common despite Congress's efforts to limit the practice in the PSLRA.

Chapter

03

Background: Securities Class Actions and the PSLRA

The interests of shareholder class members and their counsel inevitably diverge in securities fraud class actions, with class counsel typically having a much greater stake in the litigation than any individual class member. This divergence means that the class members will typically have little interest in monitoring the performance of their lawyers. The PSLRA attempted to ameliorate this conflict by creating a presumption that the plaintiff with the largest claimed losses would be appointed to represent the class and choose counsel.

The research to date shows that the PSLRA's lead plaintiff provision has achieved some of its goals in the form of generally smaller attorneys' fees. Those beneficial effects have been limited, however, by the influence of campaign contributions by plaintiffs' firms seeking to ingratiate themselves with large government pension funds. When the politicians overseeing pension funds receive campaign contributions, attorneys' fees are generally higher. Moreover, new abuses have arisen as "merger objection" cases have migrated from state to federal court, facilitated by a new generation of professional plaintiffs.

Monitoring in Securities Class Actions

The interests of the class and their counsel inevitably diverge in securities class actions. The shareholders who comprise the class in these cases are the real parties in interest.[10] They are the ones who suffered financial harm from the alleged fraud, and they receive the bulk of any settlement or judgment obtained in the case. Yet most of the individual shareholders in the class only have a small stake in the outcome because their pro-rata share of the settlement is so small.[11] Class members rarely receive settlement amounts that will affect their overall investment returns in any material way.[12] Moreover, class members typically have no connection to each other and no easy way to identify their fellow class members. Practically speaking, therefore, most class members have neither the financial incentive to

"Practically speaking, therefore, most class members have neither the financial incentive to monitor the litigation nor the opportunity to connect with other class members to coordinate oversight of class counsel."

monitor the litigation nor the opportunity to connect with other class members to coordinate oversight of class counsel.[13]

By contrast, plaintiffs' attorneys have a much greater stake in the case than the class members do individually.[14] If the case settles with a financial award for the class, lead counsel receives a contingency fee. These fees typically range between 15 and 33 percent of the award.[15] As a result, lead counsel have a lot on the line in these cases, while most members of the class do not.

Class members' small stakes undercut any incentive to monitor lead counsel.[16] That absence of monitoring provides an opening for plaintiffs' law firms to make decisions that are in the lawyers' best interests, even if they are not in the interests of the class. For example, plaintiffs' firms can file marginal or even frivolous cases, knowing that the defendants will likely offer a nuisance settlement (and attorneys' fees) to make the cases go away.[17]

These cases do not benefit the shareholder class because they do little to deter actual fraud. Instead, such settlements merely waste corporate resources to shareholders' detriment. For cases that have merit, plaintiffs' lawyers can also request an inflated percentage of the settlement for their fees, trusting that few class members will notice and take the time and effort to object.[18] The defendants, too, are likely to be indifferent to higher fees. The defendants' concern is the bottom-line amount that they have to pay in order to reach settlement, not necessarily how the court allocates this payment between the shareholders and their counsel. Busy judges are unlikely to scrutinize fee awards very closely if no one is before the court to complain. The ability to extract higher fee awards gives plaintiffs' attorneys a strong incentive to recruit plaintiffs who will neither monitor the case too closely nor object to generous fee requests.

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The legal system attempts to address these conflicts of interest in a number of ways, including appointing a lead plaintiff to represent the class. These lead plaintiffs are charged with looking out for the best interests of the class as a whole. Historically, however, courts used a method to select the lead plaintiff that relied more on speed than competence, often choosing the shareholder who was the first to file a securities class action. This approach led to a race to the courthouse, with plaintiffs' lawyers reflexively filing a securities class action whenever a corporation's stock price experienced any significant drop.[19] Certain law firms gained a head start in this race by maintaining a stable of clients who were willing to serve as plaintiffs in securities class actions without asking too many questions. As Congress noted at the time, "lawyers typically rely on repeat, or 'professional,' plaintiffs who, because they own a token number of shares in many companies, regularly lend their names to lawsuits."[20] These suits "are often based on nothing more than a company's announcement of bad news, not evidence of fraud" and "[a]ll too often, the same 'professional' plaintiffs appear as name plaintiffs in suit after suit."[21] Congress wryly stated that these plaintiffs were the "world's unluckiest investors" and speculated that they were being paid for their participation in these lawsuits.[22] That speculation was later confirmed when a number of partners from the Milberg Weiss law firm were convicted for concealing such payments from courts.[23]

PSLRA's Efforts to Promote Shareholder Monitoring of Class Counsel

Congress attempted to curb the abuses associated with frequent filers of securities class actions when it passed the PSLRA in 1995. The PSLRA includes a number of specific provisions aimed at these frequent filers.

Skin in the Game

First, the PSLRA creates a rebuttable presumption that the lead plaintiff should be the shareholder applicant with the largest financial stake in the litigation.[24] That presumption is subject to rebuttal by competing movants for lead plaintiff status if they succeed in raising questions relating to the presumptive lead plaintiff's adequacy to serve as class representative. The lead plaintiff, in turn, selects the counsel for the class subject to the court's approval.[25]

This lead plaintiff provision was intended to encourage institutional investors to become involved in these cases. The prior rules favored applicants who filed the first complaint, a system that Congress stated "often work[ed] to prevent institutional investors from … serving as lead plaintiff in class actions."[26] In contrast, a system that prioritized the applicants' losses favors institutional investors because these investors tend to be more diversified, trade more, and have greater assets under management. Consequently, institutional investors are likely to experience bigger losses from fraud than individuals. They might also need more time to review the possible allegations in the litigation, which the prior system did not allow. Congress believed that these investors would "represent the interests of the plaintiff class more effectively than class members with small amounts at stake" and that "increasing the role of institutional investors in class actions [would] ultimately benefit the class and assist the courts."[27] Congress also hoped that these institutions would have a stronger incentive to carefully choose and monitor the law firm that represents the class in the litigation. The goal was to create a system in which shareholders with a meaningful financial stake in the lawsuit would call the shots in securities fraud class actions, not plaintiffs' attorneys.

The PSLRA does not require lead plaintiffs to own a minimum number of shares. Under the PSLRA's lead plaintiff provisions, the court chooses the lead plaintiff among those shareholders who seek to serve in this role. Accordingly, if all shareholder applicants own a minimal number of shares, these PSLRA provisions will do nothing to ensure that the lead plaintiff will have sufficient skin in the game to monitor the litigation.

Limit on Number of Class Actions

Second, the PSLRA bars investors from serving as the lead plaintiff in more than five securities class actions during a three-year period.[28] To enforce this limitation, the PSLRA requires lead plaintiff applicants to file a sworn statement with their complaint or lead plaintiff motion identifying any other lawsuits in which the plaintiff sought to serve as lead plaintiff over the past three years.[29] As noted above, however, the court can waive this limitation, and courts frequently do. Indeed, the House report

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that accompanied the PSLRA expressly stated that "institutional investors seeking to serve as lead plaintiff may need to exceed [the limit on lead plaintiffs] and do not represent the type of professional plaintiff this legislation seeks to restrict."[30]

Bar on Financial Inducement

Third, the PSLRA bars all plaintiffs in securities class actions from receiving any financial inducement to serve as lead plaintiffs other than their pro-rata share of the settlement. As a result, side payments to lead plaintiffs, one of the more egregious of the pre-PSLRA abuses,[31] are now explicitly forbidden.[32] The PSLRA does allow, however, for reimbursement of expenses and lost earnings from time spent serving as the class representative.[33] Thus, reimbursing lead plaintiffs for their costs reduces the disincentive from serving as class representative. Given the bar on incentive payments, however, the PSLRA provides no obvious positive incentive for serving as lead plaintiff. Courts vary in the level of scrutiny that they give to such reimbursements. Some courts rubber stamp requested awards for lead plaintiffs, while others ask tough questions at the fairness hearing to approve the settlement. That scrutiny is attempting to ensure that the awards are compensatory for lost time, rather than an incentive to volunteer.[34]

Sworn Certification

The PSLRA also attempts to ensure that lead plaintiff applicants understand their role in these cases by requiring them to attach a sworn certification to their complaint or lead plaintiff motion.[35] In this certification, they must attest that they:

(1) have reviewed and authorized the filing of the complaint;

(2) have not purchased the securities at the direction of counsel or to participate in a lawsuit; and

(3) are willing to serve on behalf of the class.[36]

The certification, among other things, must also list the movant's transactions in the securities covered by the class period, ensuring that the plaintiff is actually a member of the class.[37] Together, these restrictions were designed to confirm the lead plaintiff's financial stake in the litigation and reinforce their independence from class counsel.

Mandatory Rule 11 Inquiry

Finally, the PSLRA instructs the court to conduct a Rule 11 inquiry at the end of every securities class action.[38] Rule 11 requires attorneys to certify that their "claims, defenses, and other legal contentions are warranted by existing law" and that "the factual contentions have evidentiary support." In most civil cases, the court only conducts a Rule 11 inquiry upon motion by the parties. The court can also issue a show-cause order if it has reason to believe that Rule 11 may have been violated.

In securities class actions, however, the court must conduct a Rule 11 inquiry. It must also include in the record "specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion."[39]

Research on Frequent Filers

Since the passage of the PSLRA, a variety of studies have examined its effectiveness. Much of this research has focused on the impact of the lead plaintiff provisions in encouraging institutional investors to lead securities class actions. The PSLRA did prompt more institutional investors to serve as lead plaintiff, with our data showing that 43 percent of cases have at least one institutional investor lead plaintiff.[40] That compares with 15 percent prior to the adoption of the PSLRA.[41] There is some evidence that these institutional investors have lived up to Congress's expectations in certain ways. Research demonstrates that cases with institutional investors as lead plaintiffs tend to have higher settlement amounts, even controlling for other case characteristics.[42] For example, in 2020, the median settlement amount for cases with a public pension plan as lead plaintiff was $20 million, while other cases had a median settlement of only $4 million.[43] Institutional investors are also associated with lower fee requests and greater hours worked, again controlling for case characteristics.[44]

In addition to contributing to the research described above, our own research has examined the phenomenon of frequent filers. We examined this phenomenon in a white paper published by ILR in 2014, *Frequent Filers: The Problems of Shareholder Lawsuits and the Path to Reform.* In that paper, we highlighted the relation between campaign contributions and the selection of plaintiffs' law firms to represent the state pension funds of Louisiana and Mississippi in securities fraud class actions. Plaintiffs' firms contributing to the campaign funds of the politicians overseeing those funds were able to get a leg up in representing the classes in some of the largest and highest-profile cases. Those are the cases that tend to generate the biggest attorneys' fee awards. There is empirical evidence showing a correlation between "pay to play" and a higher percentage of settlements going to the attorneys.[45]

We also examined the phenomenon of frequent filers in state court fiduciary duty cases, finding numerous examples of repeat plaintiffs asserting claims on behalf of shareholders. Moreover, we discovered that many of the repeat plaintiffs had family or business connections to lawyers who specialize in pursuing corporate and securities claims. These frequent filing plaintiffs raised

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particular concerns in "merger objection" cases. In these cases, typically filed within days of a public company announcing a merger, plaintiffs raise objections to the fairness of the merger price or the completeness of the disclosure provided to shareholders. These cases have become ubiquitous. Cornerstone Research reports that between 80 and 95 percent of all merger transactions over $100 million are challenged in court.[46] These cases are almost always resolved with largely cosmetic supplementary disclosures regarding the merger. The lawyers then receive a fee, usually in the hundreds of thousands of dollars, for their efforts in securing the "enhanced" disclosures. These settlements rarely if ever provide monetary relief to the shareholder class members who are supposedly being represented. Despite the lack of tangible recovery for shareholders, these suits persist in mergers and acquisitions involving public companies.

In this paper, we take a fresh look at the role of frequent filers in securities fraud class actions, exploring the changes that have occurred since 2014. One aspect of the shareholder class action landscape that has dramatically changed since we published our 2014 paper is the typical venue for merger objection claims, which have migrated from state court to federal court. The migration was a response to the Delaware Court of Chancery's crackdown on attorneys' fee awards for "disclosure only" settlements, rejecting claims for fees when no monetary recovery was obtained for the class members.[47] Plaintiffs' lawyers quickly shifted their merger objection cases to federal court with a repackaging of the claims so that they could assert federal jurisdiction.[48] Instead of asserting fiduciary duty claims against the target company directors under state law, plaintiffs' lawyers now allege that the disclosures to shareholders explaining the terms of the transaction have material omissions, thereby violating Rule 14a-9 of the federal Securities Exchange Act.[49]

The suits continue to be resolved with the company agreeing to make supplementary disclosures and pay the attorneys a "mootness fee" for their efforts in securing the disclosures. It is cheaper for the defendant company to pay a relatively modest fee to the plaintiffs' lawyers than pay its own lawyers to get the cases dismissed.[50] Moreover, paying the mootness fees avoids any risk of potentially delaying the transaction. As was the practice with the state court fiduciary cases, these federal merger objection cases are resolved with no monetary recovery for the allegedly victimized shareholders. Only the plaintiffs' lawyers get paid. In this paper, we investigate the role of frequent filers in these merger objection cases, as well as the role of institutional investors in the high-stakes cases attracting the most competition to be named lead plaintiff and lead counsel.

Data and Methodology

To conduct our study, we collected information relating to all securities fraud class actions filed in federal court from 2005 through the end of 2018, a total of 2,513 cases. Our data collection included the identity of the lead plaintiffs, their alleged losses, the name of the lead counsel appointed by the court, the allegations in the last-filed complaint, and any dispositive motions. We also collected data for a number of metrics relating to the case outcomes, including dismissals, settlements, attorneys' fee awards, and awards made to lead plaintiffs. The 14 years covered by our study allowed us to identify the repeat plaintiffs who have filed cases for a sustained period.

We also used this data to identify repeat plaintiffs who have played a prominent role in driving the recent wave of merger objection cases being filed in federal rather than state court. We then conducted supplemental data collection focused on securities cases filed by the most prolific of those plaintiffs. For this supplemental collection, we coded the court, the name of the law firm that represented the plaintiff, whether the case challenged a merger or acquisition, whether the case was a class action or an individual action, the number of shares that the plaintiff owned in the target company, and the outcome of the case.

Chapter

04

Individual Repeat Plaintiffs

This chapter first discusses the role of individual frequent filers in securities class actions. The significant trend here is the prevalence of individual frequent filers in mergers and acquisitions litigation, which has migrated recently from state to federal court. After exploring this phenomenon, we look at two specific individual frequent filers as case studies. Overall, the rise of individual frequent filers in merger objection cases represents a disturbing return of some of the abuses that led Congress to adopt the PSLRA in 1995.

Individual Frequent Filers Generally

Individuals do file securities class actions. But outside of the mergers and acquisitions context, no individuals have served as lead plaintiff in more than a handful of securities class actions. Indeed, over our entire dataset, individuals were appointed as lead plaintiff in approximately 62 percent of the cases in which a lead plaintiff was appointed. And yet, aside from the cases challenging mergers and acquisitions, there is not a single individual who served as a lead plaintiff or putative lead plaintiff in more than two cases.

On its face, this is reassuring, especially given Congress's concerns about frequent filers when it enacted the PSLRA. Today, outside of the mergers and acquisitions context, individual frequent filers have disappeared, suggesting that the PSLRA largely succeeded in displacing this type of figurehead plaintiff. Yet the continuing prevalence of individual plaintiffs in securities fraud class actions highlights the fact that it is now easier for plaintiffs' law firms to recruit shareholders to participate in these suits. Twenty-five years ago, law firms had to rely on word-of-mouth or relationships with stockbrokers or financial advisors to find individual investors willing to participate in securities class actions.[51] Today the internet has provided a way for plaintiffs' firms to advertise for plaintiffs on various social media platforms. Their notices also appear on popular financial websites and message boards. As just one example, following a September 2021 announcement that French drug manufacturer Sanofi had entered into a merger agreement with Kadmon Holdings, Inc., a biopharmaceutical company headquartered in New York City, the "Headlines" section on the MarketBeat page for Kadmon listed press releases by nine different plaintiffs' law firms, encouraging shareholders to contact the firms to learn more about their rights.[52] With the enhanced reach provided by the internet, firms no longer need to rely on a small group of repeat plaintiffs.

"One-off individual lead plaintiffs recruited over the internet may be no better monitors than the professional plaintiffs that Congress sought to curtail with the PSLRA."

The new recruiting strategy, however, raises its own set of concerns. Law firms can now put out blast notices on the internet and attract shareholders who may have little understanding of the underlying allegations in the suits and minimal interest and expertise in monitoring the law firms that file them. One-off individual lead plaintiffs recruited over the internet may be no better monitors than the professional plaintiffs that Congress sought to curtail with the PSLRA.

Mergers and Acquisitions Frequent Filers

The PSLRA did not completely succeed in eliminating individual frequent filers. In securities cases challenging mergers and acquisitions, the repeat plaintiffs hearken back to the pre-PSRLA glory days of professional plaintiffs. To document this trend, we expanded our primary data set, which included the name of the shareholder or shareholders appointed as lead plaintiff or, if the court did not appoint a lead plaintiff, the name of the shareholder or shareholders who filed the first securities class action against a specific company. This approach captured repeat plaintiffs in most of the cases across the period covered by our study. The exception is cases challenging mergers and acquisitions. In these cases, multiple shareholders often file separate cases against the same company, but the cases are typically voluntarily dismissed before the court appoints a lead plaintiff. Our primary data set therefore captures the name of the shareholder who filed the first case, but not the names of other shareholders who file subsequent cases against the same company. Accordingly, we present data below from our primary dataset, but we supplement this data with additional information on the busiest of the individual repeat plaintiffs.

Through our primary dataset, we identified nine

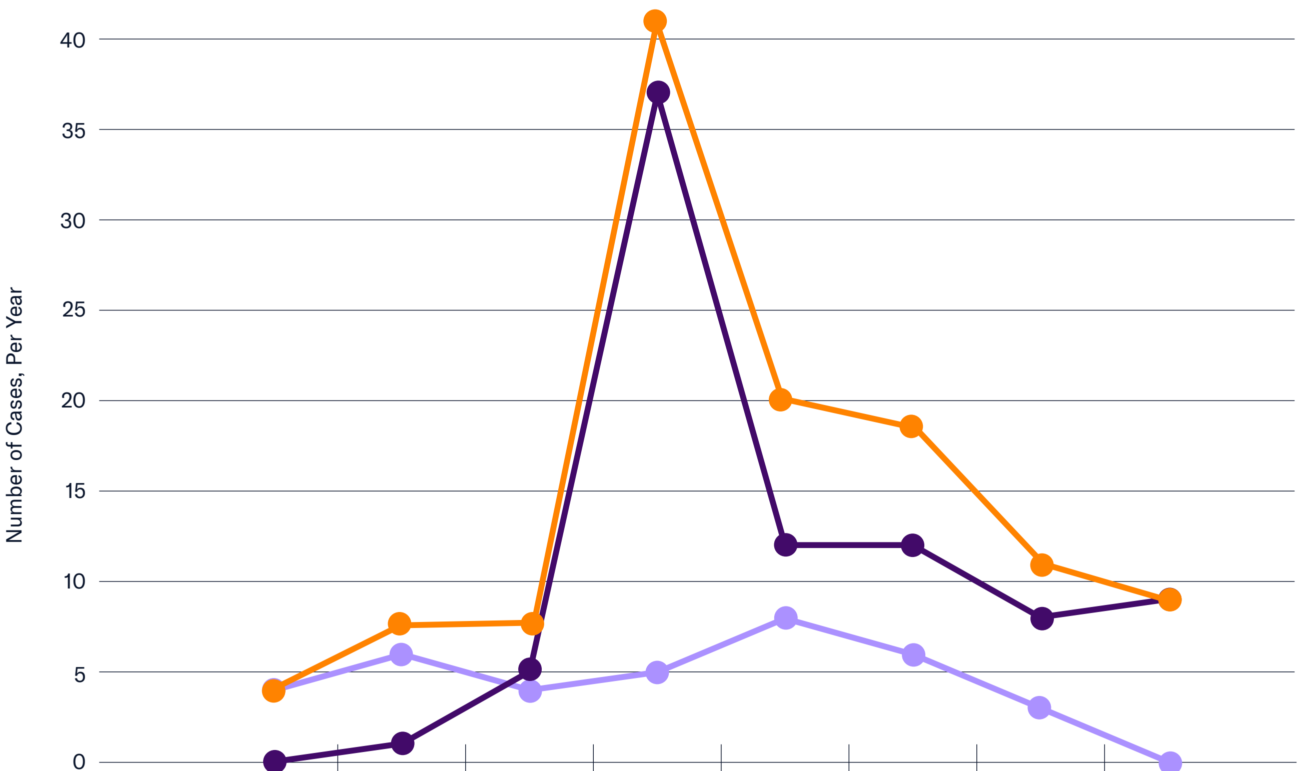
"In securities cases challenging mergers and acquisitions, the repeat plaintiffs hearken back to the pre-PSRLA glory days of professional plaintiffs."

individuals who filed five or more securities class actions in our study period.[53] These plaintiffs almost exclusively filed securities class actions challenging mergers and acquisitions. Specifically, 123 of the 127 cases in our dataset filed by these nine plaintiffs related to a merger or acquisition. Remarkably, none of these 127 cases ended with a settlement or judgment in favor of the class. Instead, these cases almost uniformly ended with voluntary dismissals. The dockets in these cases do not include any data about the terms of these dismissals, as parties do not need to disclose the details of voluntary dismissals, unlike settlements. Nonetheless, it has been widely reported that these voluntary dismissals are accompanied by a payment to the plaintiffs' attorneys as an inducement to dismiss these cases. Indeed, many of the motions for voluntary dismissal indicate that an attorneys' fee is being negotiated.

To better understand the dynamics in these merger objection cases, we expanded our primary data set to look more closely into the filing patterns of individual plaintiffs. We offer here a review of two of these plaintiffs—Paul Parshall and Stephen Bushansky—as illustrative examples of the types of individual plaintiffs who are driving the rise of securities lawsuits challenging mergers and acquisitions.

"Specifically, 123 of the 127 cases in our dataset filed by these nine plaintiffs related to a merger or acquisition. Remarkably, none of these 127 cases ended with a settlement or judgment in favor of the class."

Table 1: Venue for Paul Parshall's Cases, 2014 - 2021



	2014	2015	2016	2017	2018	2019	2020	2021
Federal Cases	**0**	**1**	**5**	**37**	**12**	**12**	**8**	**9**
State Cases	**4**	**6**	**4**	**5**	**8**	**6**	**3**	**0**
Total Cases	**4**	**7**	**9**	**42**	**20**	**18**	**11**	**9**

Year of Filing

Case Study: Paul Parshall

Paul Parshall filed the first-identified complaint in 32 cases in our original dataset, the most first-filed complaints filed by any individual plaintiff. When we expanded the dataset to include later-filed complaints, however, we learned that Parshall has filed a total of 120 cases since the beginning of 2014, with nearly all of these cases challenging mergers and acquisitions. He filed many of his early cases in state court, including the Delaware Court of Chancery. Since 2016, however, he has filed the majority of his cases in federal court, including 37 federal cases in 2017 alone, the year after the Delaware Court of Chancery cracked down on merger objection suits filed under state law. Table 1 illustrates his cases in state and federal court since 2014.

Parshall's filings mirror the broader filing patterns nationwide in cases challenging mergers and acquisitions. As noted above, after the Delaware Court of Chancery started to crack down on merger litigation, plaintiffs' lawyers shifted their filing patterns to file more cases in federal court and state courts other than Delaware.

Throughout this period, Parshall has been fairly consistent in his choice of law firms. His early cases were filed primarily by the law firms of Gardy & Notis or Ryan & Maniskas. His more recent cases have been filed primarily by a combination of RM Law (which appears to be a successor firm to Ryan & Maniskas), Rigrodsky & Long, Long Law (which appears to be a successor firm to Rigrodsky & Long), Levi & Korsinsky, and WeissLaw. These firms are not the firms that represent the top institutional frequent filers. Other research confirms that Rigrodsky & Long and RM Law commonly join together to file merger lawsuits and that these firms were responsible for a majority of first-identified complaints under Section 14(a) challenging mergers and acquisitions in federal court in 2020.[54] Their collaboration with WeissLaw appears to be more recent. It is unclear whether Parshall is choosing among these firms each time he decides to file a new lawsuit or whether the firms themselves are driving this rotation.

"All 83 of these cases ended with a voluntary dismissal or dismissal for failure to prosecute. In other words, we were unable to find a single case filed by Parshall challenging a merger or acquisition that resulted in a settlement or judgment in favor of the shareholder class."

The outcome of these cases has been even more consistent. Using Bloomberg Law, we were able to determine the outcome of 83 of the 100 cases that Parshall has filed since the beginning of 2017. All 83 of these cases ended with a voluntary dismissal or dismissal for failure to prosecute. In other words, we were unable to find a single case filed by Parshall challenging a merger or acquisition that resulted in a settlement or judgment in favor of the shareholder class. Instead, these cases typically end soon after they are filed—generally within weeks—with Parshall voluntarily dismissing the claims before the defendant has filed a motion to dismiss (MTD). These voluntary dismissals occurred after the target corporation made additional disclosures about the merger and then (most likely) paid the plaintiffs' attorneys a mootness fee. In theory, these mootness fees may reflect that the plaintiffs' attorneys were able to get the corporation to make meaningful additional disclosures about the merger. In practice, however, empirical research has shown that these additional disclosures often concern tangential issues that do not materially change the mix of information available to shareholders.[55]

Until recently, nearly all of Parshall's cases were class actions. In these class

> "Parshall is not the first individual plaintiff to make the shift toward individual actions. Instead, it appears to be a recent trend among individual repeat plaintiffs in merger objection cases."

actions, Parshall typically filed the certification required by the PSRLA in which he certified that he had "not moved to serve as a representative party for a class in an action filed under the federal securities laws" during the three years prior to the date of the certification.[56] This certification is meant to ensure compliance with the PSLRA's prohibition against serving as a lead plaintiff in more than five securities class actions brought over a three-year period. Parshall is able to evade this limitation because he almost never "moves" for appointment as lead plaintiff. Instead, his cases typically end before the process of appointing a lead plaintiff has even begun. Parshall and his attorneys have found a significant gap in the PSLRA's efforts to curb the role of professional plaintiffs in filing frivolous securities class actions.

Parshall has now started to file at least some of his cases as individual actions, rather than as class actions. This shift does not appear to have affected the substance of the lawsuits themselves—the complaints still look substantially the same, and the cases still almost always end in voluntary dismissals. Filing these cases as individual actions, however, has three important benefits for shareholder plaintiffs like Parshall. First, individual cases do not need the court's permission to settle or dismiss.[57] Even in class actions, courts rarely exercise significant scrutiny, but filing these cases as individual actions eliminates the possibility that a court will start asking hard questions.

Second, filing individual actions allows shareholder plaintiffs to be paid for their role in these suits without violating the PSRLA. As discussed in Chapter 3, the PSLRA bars plaintiffs in securities class actions from receiving any payment other than their pro-rata share of any recovery and reimbursement for reasonable costs and expenses incurred in serving as lead plaintiff. By filing the case as an individual action, Parshall and his attorneys avoid this restriction.[58] We cannot determine whether Parshall has been paid for serving as plaintiff in these cases because any such payments would not be public.

Third, individual actions are not subject to the PSLRA's mandatory Rule 11 inquiry at the end of the litigation. Although courts routinely skip this purportedly mandatory inquiry, the threat of such an inquiry may steer plaintiffs toward individual actions. As discussed below, however, Parshall is not the first individual plaintiff to make the shift toward individual actions. Instead, it appears to be a recent trend among individual repeat plaintiffs in merger objection cases.

Other than serving as the plaintiff in more than 100 merger lawsuits, how does Paul Parshall occupy his time? He appears to be an 81-year-old man living in Naples, Florida.[59] In addition to filing lawsuits, he also owns or partially owns a company called Sports Beer Brewing Company, which describes itself as an "intellectual property holding company consisting of a portfolio of sports trademarks, registrations, and service marks for sports teams throughout the United States."[60] This company trademarks the names of sports teams, with the word "brewing" or "beer" after them. For example, it claims to own the trademarks for the terms "Chicago Bulls Brewing," "Bulls Beers," "New York Knicks Brewing," and "New York Knicks Beer."[61] It has also trademarked sports team cigar names, such as "Dallas Cowboy Cigar Co." and "New England Patriots Cigar Co."[62]

Not surprisingly, some teams have objected to Sports Beer Brewing's claim to these trademarks. Penn State University sued Parshall and his company for trademark infringement, trademark dilution, and unfair competition.[63] Penn State alleged that "Defendant's business model appears to be to secretly register famous marks with state departments, which do not undertake trademark searches for conflicts and which approve such registrations automatically." According to the case filings, Penn State sent Parshall a cease and desist letter to which he responded:

> in checking your TM with the uspto the name penn state nittany beer is available for filing with the uspto..i always do my home work before i file . i have been doing TM for over 50 yrs.": penn state" has never used the name beer in any of their filings with the state or feds . this holds true for "nittany".i would be willing to work with you and the university.[64]

The case filed by Penn State University is still pending, but according to Penn State, Parshall wanted to be paid before he would cease using these trademarks.[65] His alleged demand here bears no small resemblance to a business model in merger litigation of filing dozens of lawsuits in the hopes of getting the target companies to pay mootness fees.

Case Study: Stephen Bushansky

Stephen Bushansky comes a close second to Paul Parshall as a repeat filer of merger cases. He filed the second-highest number of first-identified complaints (14) by an individual in our original dataset. Expanding the dataset to include later-filed complaints, however, Bushansky has filed at least 95 cases since the beginning of 2018, or approximately one case every two and a half weeks. Nearly all of these cases challenge mergers and acquisitions, and he has been filing shareholder lawsuits since at least 2010. Notably, Bushansky filed one of the cases in federal court challenging forum selection clauses, which were used in early efforts to crack down

Of these 87 cases, 86 were voluntarily dismissed and one case was dismissed for failure to serve process. The cases that were voluntarily dismissed had an average of only nine docket entries, illustrating that his voluntary dismissals come before any significant activity in the lawsuit.

on frivolous merger objection cases.[66]

Bushansky states in court filings that he is a retired math and science teacher and that he has been investing for at least 25 years.[67] Yet his cases follow the same predictable pattern that characterizes cases filed by other repeat plaintiffs. WeissLaw (one of the law firms that has also represented Paul Parshall) has represented Bushansky in all or nearly all of his recent lawsuits. Almost all of his cases since 2018 were filed in federal court. These cases also have a predictable outcome. Using Bloomberg Law, we can identify the outcome of 87 of his more recent cases that have ended. Of these 87 cases, 86 were voluntarily dismissed and one case was dismissed for failure to serve process. The cases that were voluntarily dismissed had an average of only nine docket entries, illustrating that his voluntary dismissals come before any significant activity in the lawsuit.

"Expanding the dataset to include later-filed complaints, however, Bushansky has filed at least 95 cases since the beginning of 2018, or approximately one case every two and a half weeks."

Bushansky's filing patterns differ from Parshall's in one important way. Whereas Parshall only recently shifted away from class actions, Bushansky has been filing primarily individual actions since late 2019. Indeed, since the start of 2020, more than 90 percent of the cases he brought that we can locate on Bloomberg Law were individual actions. As discussed above, this change in litigation tactics offers certain benefits. Bushansky no longer has to disclose his stock holdings in the target corporation,[68] for example, and he no longer risks judicial scrutiny of his voluntary dismissals. Bushansky appears to be an early repeat plaintiff to try this approach, and others may be following suit. From the defendants' perspective, these individual actions are more burdensome than class actions because companies do not get a global release as part of the settlement. Yet companies still appear willing to offer a nuisance payment in exchange for dismissal of these suits, likely because they do not expect other shareholders to challenge the merger or acquisition after the initial rash of litigation.

Mr. Bushansky has also started filing complaints that appear to straddle the line between class actions and individual actions. To understand this point, one must understand how securities class action complaints are typically drafted. A typical securities class action complaint makes clear that it is a putative class action in a number of ways. The title of the document is often "Class Action Complaint," for example, and it has a section alleging how the case meets the various requirements of Rule 23, the federal class

"... [E]xperience does not lead to better litigation outcomes. The plaintiffs who file dozens of securities class actions are not getting financial or other meaningful settlements for their fellow shareholders; instead, they seem to have perfected the art of achieving quick mootness payments in exchange for voluntary dismissal of their suits."

action rule.[69] It also typically states that "Plaintiff, on behalf of himself and those similarly situated, alleges ...," making clear that the case is not just brought on behalf of the named plaintiff.[70] Complaints in individual actions typically do not include these statements.[71]

Yet a number of Mr. Bushansky's recent complaints include just enough similarity to class action complaints to make it unclear whether he is purporting to sue on behalf of other shareholders or just himself. These complaints do not specifically state that they are putative class actions, nor do they have a section devoted to the requirements of Rule 23. Yet he does include a statement in the first few paragraphs stating that he is suing "on behalf of himself and all others similarly situated."[72] On one hand, these complaints do not expressly state that they are putative class actions, as many of his older complaints did.[73] On the other hand, it is unclear how a shareholder can sue "on behalf of himself and all others similarly situated" in an individual action. Perhaps there is a simple explanation for this language, but it does raise the possibility that Mr. Bushansky may be trying to get the negotiating leverage afforded by a class action without the judicial scrutiny that goes along with it.

The examples of Paul Parshall and Stephen Bushansky illustrate several broader lessons about the individual repeat plaintiffs in securities class actions:

- First, these plaintiffs have turned merger litigation shakedowns into a volume business. They file many cases each year, often with the same law firms, relying on complaints that are remarkably similar.
- Second, experience does not lead to better litigation outcomes. The plaintiffs who file dozens of securities class actions are not getting financial or other meaningful settlements for their fellow shareholders; instead, they seem to have perfected the art of achieving quick mootness payments in exchange for voluntary dismissal of their suits.
- Finally, these plaintiffs and their lawyers are inventive in their litigation tactics, even if the cases themselves are cookie-cutter. Plaintiffs shifted from state court to federal court when Delaware started to crack down on these cases. More recently, they have started to file their cases as individual actions, rather than class actions, which allows them to avoid the limitations of the PSLRA.

These tactical innovations show that lawmakers must remain alert to the changes in merger litigation if they want to curb the abuses in these cases.

Chapter

05

Institutional Repeat Plaintiffs

Institutional investors are now the most prolific frequent filers of securities class actions. In this chapter, we identify the top filers and the law firms that represent them. We then examine whether the most frequent filers, pension funds benefiting public employees in the state of Arkansas, do a better job negotiating attorneys' fees on behalf of the class. We find that some of the most prolific frequent filers are paying windfall fees in the largest cases. The excess multipliers over hourly rates in the largest cases are providing plaintiffs' attorneys a greater than risk-adjusted return. Those extravagant fees suggest that the most prolific frequent filers may not be the most vigorous monitors.

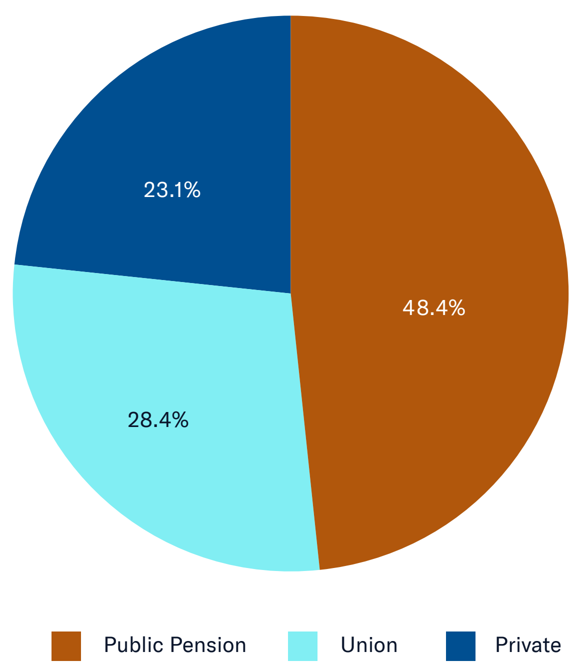
Top Institutional Filers

Frequent Filer Institutional Investors

Institutional investors now dominate the lead plaintiff role in securities class actions with the largest stakes, for which there will typically be multiple movants seeking the lead plaintiff spot. A variety of institutional investors have stepped into this role, as shown in Figure 1.[74]

Public pension funds predominate, followed by union pension funds. Private funds trail behind these other two categories, despite having substantially greater assets under management.

Figure 1: Institutional Lead Plaintiffs, 2005 - 2018



Most mutual funds are reluctant to take on the role of lead plaintiff, leaving state and local pension funds to step in.

Table 2 below identifies all of the lead plaintiffs who filed at least ten cases as lead plaintiff during our study period.[75] We also show

Table 2: Top Repeat Plaintiffs and Their Lawyers, 2005 - 2018

Name	Cases	Primary Lead Counsel
Arkansas Public Employees	55	Bernstein Litowitz Berger & Grossman
Oklahoma Public Employees	52	Labaton Sucharow
Mississippi Public Employees	31	Bernstein Litowitz Berger & Grossman
Boston Retirement System	21	Labaton Sucharow
KBC Asset Management NV	21	Motley Rice
City of Pontiac General Employees	18	Robbins Geller Rudman & Dowd
Detroit Employees	16	Bernstein Litowitz Berger & Grossman
Louisiana Public Employees	15	Bernstein Litowitz Berger & Grossman
Pension Trust Fund for Operating Engineers	15	Robbins Geller Rudman & Dowd
Plymouth County Retirement System	15	Labaton Sucharow
Norfolk County Retirement System	14	Labaton Sucharow
Union Asset Management Holding AG	14	Motley Rice
Inter-Local Pension Fund GCC/IBT	11	Robbins Geller Rudman & Dowd
Iron Workers' Local No. 25	11	Robbins Geller Rudman & Dowd
Plumbers and Pipefitters	11	Robbins Geller Rudman & Dowd
Alaska Electrical	10	Robbins Geller Rudman & Dowd
University of Puerto Rico Retirement System	10	Abraham, Fruchter & Twersky

the law firm most commonly associated with each of these lead plaintiffs.

Together, these institutions served as lead plaintiffs in a total of 295 separate cases, or 12.3 percent of the total number of cases in our primary dataset. As this percentage reflects, the PSLRA certainly did not eliminate the phenomenon of frequent filers; instead, it shifted frequent filing from individuals to institutions.

The law firms that represent these frequent filing institutional plaintiffs tend to be the biggest players in the securities class action business. Table 3 shows the firms that served as lead counsel in securities class actions more than 100 times between 2005 and 2018.

These firms have the financial wherewithal to develop connections with the institutions that typically have the largest losses. Some firms specialize in representing such institutions. Others rely on individual plaintiffs, who predominate in the smaller cases in which there is less competition for the lead plaintiff and lead counsel positions, so the overlap is not complete.

Courts routinely waive the PSLRA's five-cases-in-three-years limit for these institutions. For example, in *In re Diamond Foods, Inc. Securities Litigation,* the federal district court appointed one of the plaintiffs on our frequent filer list—the Mississippi Public Employees Retirement System (Mississippi Public Employees)—as the lead plaintiff despite the fact that this institution had already been appointed to lead six securities class actions over the preceding three years.[76] The court held that, even if the professional plaintiff bar applied to institutional investors, Mississippi Public Employees was capable of managing the litigation. The court also noted "the majority of judges in our district who have considered the issue and a judge in a neighboring district have concluded that the 'professional plaintiff' provision of the PSLRA was not intended to apply to institutional investors."[77]

Table 3: Leading Securities Class Action Firms, 2005 - 2018

Primary Lead Counsel	Cases
Robbins Geller Rudman & Dowd	526
The Rosen Law Firm	217
Pomerantz	197
Labaton Sucharow	152
Glancy Prongay & Murray	143
Bernstein Litowitz Berger & Grossman	135
Kessler Topaz Meltzer & Check	115
Levi & Korsinsky	109

Similarly, in *In re Extreme Networks, Inc. Securities Litigation,* the court appointed the Arkansas Teacher Retirement System (Arkansas Teachers)—the top filer in our study—to be the lead plaintiff despite the fact that it had been appointed lead plaintiff in 12 securities class actions over the prior three years.[78] The court first held that "the type of 'professional plaintiff' [Congress] had in mind ... were those who had merely tenuous connections to public companies, who under the old statutory scheme raced to the courthouse to file a securities complaint to collect bounty payments or bonuses."[79] The court then referred to the "the growing and uniform body of case law" allowing institutional investors to circumvent the PSLRA's frequent filer ban.[80] It also noted that

"The court also noted 'the majority of judges in our district who have considered the issue and a judge in a neighboring district have concluded that the "professional plaintiff" provision of the PSLRA was not intended to apply to institutional investors.'"

another court had approved Arkansas Teachers' lead plaintiff motion even though Arkansas Teachers had served as lead plaintiff in 20 other cases over three years prior to that case and had another four lead plaintiff motions pending.[81] As these cases illustrate, there is effectively no limit to the number of securities class actions that a single institutional investor can lead, and some institutional frequent filers have taken full advantage of this apparent gap in the law.

The Public Pension Fund Frequent Filers

Given their outsized role in these cases, it is important to understand who these institutional frequent filers are. Reflecting the overall pool of institutional investors as depicted in Figure 1, the frequent filing institutions fall into three distinct categories—public pension funds, union pension funds, and private funds. Public pension funds, however, dominate the list of frequent filers, taking 10 of the 17 top spots. Recall from Figure 1 that public pension funds make up slightly less than half of institutional investors serving as lead plaintiff, so they are disproportionately represented among the frequent filers.

Many of these institutional frequent filers have close relationships with plaintiffs' attorney law firms across multiple class actions. Bernstein Litowitz Berger & Grossman is the most common lead counsel for several of the largest public pension funds in this list, and is most frequently selected by two of the most prolific frequent filers, the state employee pension funds for Mississippi and Arkansas. Bernstein Litowitz has also regularly represented the Louisiana Public Employees' Retirement System, which has served as a lead plaintiff in 15 cases since 2005. Perhaps not coincidentally, Bernstein Litowitz has an office in New Orleans, despite the fact that few securities class actions are actually filed in federal district court in Louisiana. There appears to be only a single attorney in this office—Tony Gelderman. The firm's website describes Mr. Gelderman as "a trusted advisor to the public pension fund community" who is "responsible for the firm's institutional investor and client outreach." Before joining Bernstein Litowitz, Mr. Gelderman was Chief of Staff and General Counsel to the Treasurer of the State of Louisiana. The Louisiana state treasurer is an ex officio member of the board overseeing the Louisiana state pension fund. In Arkansas and Mississippi, the state treasurer serves on the board of the employee pension funds, while board members in other states are appointed by the governor. Given the oversight role of these state officials over the pension funds that serve as lead plaintiffs in securities class actions, it is not surprising that Bernstein Litowitz has found it advantageous to hire someone with state treasury experience to oversee the firm's relationship with these funds.

The Oklahoma Public Employees Retirement System, which has served as lead plaintiff in 52 cases since 2005, is also popular among plaintiffs' class action law firms. Here too, we see relationships between a public pension fund and plaintiffs' attorneys' firms outside of the securities class action litigation context. The 2021 Oklahoma Public Fund Trustee Education Conference (OPFTEC), held at the Shangri-La Island Resort and Marina Destination, lists nine securities class action firms as "Sponsors" for the event (25 percent of the total sponsors). A panel discussion, "The Role of Securities Litigation in Pension Funds," featured partners from Bernstein Litowitz and Saxena White, another leading securities class action firm.

Five union pension funds also make the top filer list. Robbins Geller Rudman & Dowd is the primary lead counsel for all of these union funds. Robbins Geller's Washington, D.C. office features a number of members from its "Institutional Outreach Team," with extensive prior experience representing Taft-Hartley benefit funds, the typical fund covering union workers. For example, William K. Cavanaugh, Jr., of counsel with Robbins Geller, is a member of the Institutional Outreach Team and worked previously for 28 years as a partner at the firm Cavanaugh and O'Hara. During this 28-year period, Cavanaugh "represented public pension funds, jointly trusteed Taft-Hartley, health, welfare, pension, and joint apprenticeship funds advising on fiduciary and compliance issues …."[82]

Repeat institutional plaintiffs are a fixture in the current landscape of securities fraud class actions, and plaintiffs' firms devote substantial resources to recruiting institutional investors to help them prevail in the competition for lead plaintiff/lead counsel status. But how do repeat institutional investors affect results for the class? We turn to that question in the next section.

Case Outcomes for Top Institutional Filers

Do these prolific institutional lead plaintiffs produce better results for the class? This question is difficult to answer, as these lead plaintiffs may simply have an advantage in being selected as lead plaintiffs in suits with the potential for a large settlement. That selection effect is likely to manifest itself in a high average settlement. From the class's perspective, what matters is the recovery, net of fees. We show that, in the largest cases, plaintiffs' attorneys are being awarded fees that do not reflect the risk of recovery in those suits. These excess fees suggest that these lead plaintiffs are not vigorous monitors and, in many cases, courts are awarding risk multipliers even though the cases appear to have little risk to them.

Table 4: Settlement Averages and Fees by Lead Plaintiff Type, 2005 - 2018

Type	Settled %	Settlement Average ($ millions)	Attorneys' Fees %
Institutional Investor Cases	54.6%	61.3	24.0%
Individual Investor Cases	31.3%	10.2	27.6%
Overall	39.6%	39.8	25.5%

Table 5: Settlement Averages and Fees for Top Repeat Plaintiffs, 2005 - 2018

Name	Cases	Settled %	Settlement Average ($ millions)	Attorneys' Fees %
Arkansas Public Employees	55	72%	43.4	23%
Oklahoma Public Employees	52	46%	39.5	23%
Mississippi Public Employees	31	67%	115.9	19%
Boston Retirement System	21	50%	43.7	24%
KBC Asset Management NV	21	35%	28.5	25%
City of Pontiac General Employees	18	67%	57.4	21%
Detroit Employees	16	63%	56.8	24%
Louisiana Public Employees	15	57%	161.0	19%
Pension Trust Fund for Operating Engineers	15	50%	24.2	24%
Plymouth County Retirement System	15	54%	15.6	23%
Norfolk County Retirement System	14	50%	19.5	25%
Union Asset Management Holding AG	14	80%	131.8	20%
Inter-Local Pension Fund GCC/IBT	11	20%	5.0	29%
Iron Workers' Local No. 25	11	40%	6.9	30%
Plumbers and Pipefitters	11	78%	35.8	23%
Alaska Electrical	10	40%	15.2	27%
University of Puerto Rico Retirement System	10	63%	27.2	25%

To offer relevant baselines for assessing recoveries, in Table 4 we provide descriptive statistics for case outcomes, including settlement percentage, mean settlement size (in millions of dollars) for cases not dismissed, and mean attorneys' fee percentage for those settled cases. We define a case as led by an institutional investor if there are any institutional investors in the lead plaintiff group appointed by the court.[83] Under this definition, individual investor cases have only individual investors in the lead plaintiff group.

"... [T]he fee percentages are relatively high given the average settlement size for these cases. There are substantial fixed costs in litigating securities class actions which make smaller cases more expensive to litigate per dollar of recovery. In cases with larger settlements, we should generally expect lower percentage fees."

As this table demonstrates, institutional investors tend to appear as lead plaintiffs in the largest cases, with a settlement average six times greater than the individual investors' average. Law firms recruit institutional lead plaintiffs because they confer a competitive advantage in securing lead counsel status in the most lucrative cases. By contrast, the average settlement in the individual investor cases is likely smaller than any realistic estimate of defense costs if the case went to trial, suggesting that corporations (and their insurers) are willing to pay in a substantial number of cases for reasons other than the merit of the plaintiffs' claims.[84] Table 5 shows these same numbers for the frequent filing institutional lead plaintiffs during our sample period.

We see that the most prolific filers vary widely in terms of their average settlement size and settlement rates. Two of the state funds, Mississippi and Louisiana, are in the top three for average settlement size. As large funds, these investors are better placed to claim large losses in more cases than small investors, giving them a leg up on appointment as lead plaintiff. The attorneys' fees paid by these repeat plaintiffs are not out of line with the overall average for the sample, and indeed, are typically a lower percentage than the fees awarded in cases led by individual lead plaintiffs. That said, the fee percentages are relatively high given the average settlement size for these cases. There are substantial fixed costs in litigating securities class actions which make smaller cases more expensive to litigate per dollar of recovery. In cases with larger settlements, we should generally expect lower percentage fees.

The other notable fact highlighted by Table 5 is the variation in average settlement rates. The Oklahoma pension funds are near the top in number of filings, but their likelihood of settlement is slightly below the overall average for institutional investor cases.

"The union pension funds among the frequent filers at the top of the list are generally associated with smaller average settlements and correspondingly higher percentage fees. These repeat institutions do not produce results that are significantly better than the results produced in suits led by individual investors."

Arkansas and Mississippi, with comparable numbers of cases, have dramatically higher settlement rates than Oklahoma. Moreover, Mississippi and Louisiana have a considerably greater average settlement size. But the average attorneys' fee percentage paid by Arkansas and Louisiana is only slightly lower than the institutional investor average, despite their larger average settlement amounts. These suits promise very large paydays, but these institutional investors do not appear to be negotiating lower fee percentages on behalf of the class.

The union pension funds among the frequent filers at the top of the list are generally associated with smaller average settlements and correspondingly higher percentage fees. These repeat institutions do not produce results that are significantly better than the results produced in suits led by individual investors. Indeed, the likelihood of settlement for one of them—Inter-Local Pension Fund GCC/IBT—is markedly lower than the suits brought by individuals. This suggests that at least some institutional investors may be doing minimal screening for merit. The presence of an institutional investor does not necessarily signal a strong claim.

To get a better sense of the performance of these frequent filing funds in looking out for the interests of the class, we look at the attorney fee percentage for Arkansas state pension funds, the institutional investor that was lead plaintiff in the greatest number of securities class actions in our sample.

Figure 2 shows the mean attorneys' fee percentage for settlements in the cases brought by the Arkansas state pension funds, based on the size of settlement divided into deciles, comparing those percentages with mean percentages by settlement decile paid in cases with other institutional investors. Recall that the Arkansas retirement system is the most frequent filer in our data set, with settlement likelihood well above average for institutional investors (72 percent). Arkansas has large enough claimed losses that it appears to have a leg up in securing lead plaintiff status in a healthy share of the most desirable cases from the perspective of plaintiffs' lawyers, i.e., those with minimal risk of non-recovery and the possibility of a large settlement.

Arkansas appears to pay around 25 percent in all but the largest cases,

Figure 2: Attorneys' Fee Percentage of Settlement Amount by Decile

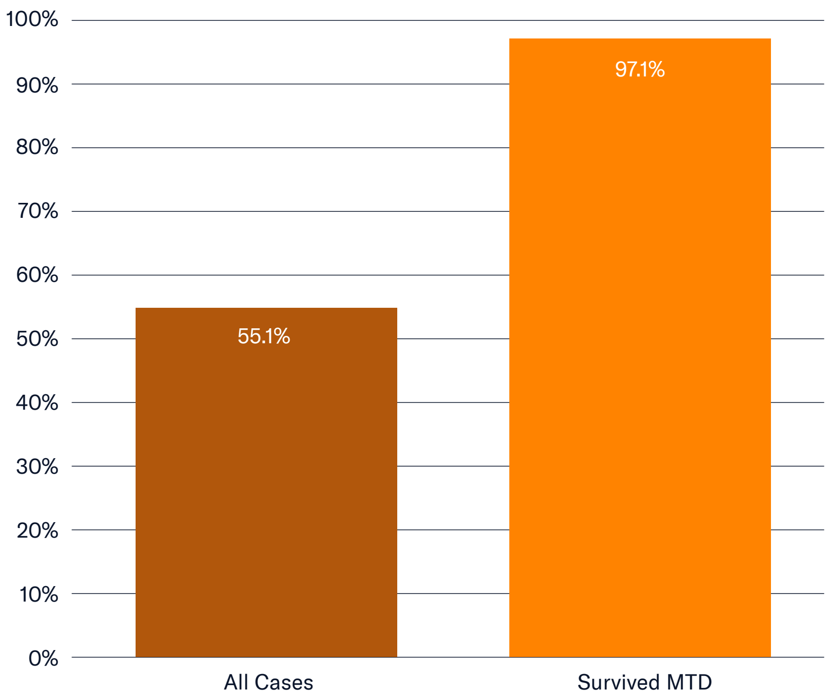
while other institutions—on average—pay slightly more. But this relationship reverses in the largest cases, with Arkansas paying more in cases for which the dollar amounts of attorneys' fees are greatest. For example, Arkansas pays an average of 25 percent in cases in decile 4, for which the settlement average is slightly more than $4.4 million, while other institutions pay slightly more than 27 percent. This translates to plaintiffs' attorney firms receiving approximately $104,700 less in fees in cases in decile 4 where Arkansas is a lead plaintiff compared with class actions with other institutional lead plaintiffs. In settlement decile 10, by contrast, the average settlement amount is $297.1 million. The 22 percent paid by Arkansas in these cases translates to roughly $65 million. Other institutions average slightly more than 19 percent for cases in this decile. The difference amounts to $7.7 million higher fees per case in the top decile where Arkansas is a lead plaintiff. This pattern suggests that Arkansas may be paying windfall attorneys' fees in cases that produce the largest recovery, despite the relatively modest risk in its portfolio.

To the extent Arkansas and other frequent filer institutional investors agree to a fixed attorney fee percentage across a wide number of cases, this may have two different effects on securities class actions. First, for smaller settlements, the 25 percent attorney fee may limit the ability of plaintiffs' attorney firms to recoup the value of their time spent on the litigation. A class action that settles for $4 million, for example, will offer the plaintiffs' attorneys in the litigation a maximum of $1 million in fees at 25 percent. The marginal benefit of pushing for a $5 million settlement is only $250,000 for the plaintiffs' attorney. Plaintiffs' attorney firms may respond by curtailing their work in such actions.

Second, for larger class actions, the 25 percent attorney fee may exceed any reasonable valuation of the plaintiffs' attorneys' time if time spent does not increase in lockstep with the size of the settlement. A class action that settles for $1 billion, for example, will offer the plaintiffs' attorneys a maximum of $250 million in fees at 25 percent. Plaintiffs' attorneys may respond by increasing their hours and asking for higher risk adjustment (the multiplier) from fees computed based on standard hourly rates for similar attorneys (the lodestar). For example, a plaintiffs' attorney may compute that he or she worked 1,000 hours and that the average hourly rate for similar attorney work in the local area is $500 per hour, giving a lodestar of $500,000. To the extent the $500,000 is below 25 percent of the settlement amount, the plaintiffs' attorney will have greater room to argue for a multiplier to the lodestar (for example a 2x multiplier) and ask for higher corresponding fees ($1,000,000 in this example).

In other research, we have examined the incentive of plaintiffs' attorneys to load up on hours, particularly for cases resulting in larger settlements.[85] For this white paper, we examine the multiplier that plaintiffs' attorneys receive based on their reported lodestar. We assume for these purposes that the lodestar reported by the law firms in their fee requests is equal to the number of hours worked times the standard hourly rates for similar attorney work in the locality of the litigation. The multiplier is equal to the attorney fees award divided by the lodestar. This multiplier represents the amount of compensation paid to the plaintiffs' attorneys for the risk of non-payment. When cases are dismissed, plaintiffs' attorneys receive nothing, so courts award a premium to them in cases in which there is a recovery in order to compensate them for the risk of non-payment. But cases vary substantially in their risk. In theory, the court should be adjusting this multiplier to calibrate it to the facts of the particular case. For example, a case with egregious facts, such as the CEO or CFO being indicted, would pose little risk of non-recovery, while other cases

Figure 3: Likelihood of Recovery with at Least One Institutional Investor Lead Plaintiff



may be more speculative. Awarding the same multiplier in both kinds of cases confers a windfall on firms that are able to secure the lead counsel position in the cases with the least risk.

The risk of recovery varies not only across cases, but also within a case. The risk of non-settlement is much higher at the beginning of the litigation; if the complaint survives the final motion to dismiss, the likelihood of settlement increases substantially.

For class actions in our dataset with at least one institutional investor lead plaintiff, 55.1 percent result in settlement. Among those cases, if the case survives the final motion to dismiss, 97.1 percent result in settlement. In other words, the risk is front-loaded, where the costs of litigation are relatively slight: drafting a complaint, and then briefing and arguing in opposition to the motion to dismiss filed by the defendants. Fee percentages, however, do not appear to vary much with the amount of risk. The average fee percentage for cases surviving a motion to dismiss is 24.1 percent, while the average for all cases is 24 percent.

For each class action that settles, we compute an implied multiplier that would compensate the plaintiffs' attorneys for the risk of non-settlement. To compute the implied multiplier that compensates for the risk of non-settlement, we assume that hours worked by an attorney firm prior to surviving the final motion to dismiss are distributed proportionally to the number of docket entries before the final motion to dismiss order. We compute the implied multiplier as follows:

> Implied Multiplier = (Docket Entries up to the Final MTD Order/Total Docket Entries) x (55.1%) + (Post-MTD Docket Entries/Total Docket Entries) x (97.1%)

We then compute the "excess" multiplier representing the difference

Table 6: Arkansas Fee Multipliers, 2005 - 2018

	Mean Atty Fee Award ($ millions)	Mean Hours (thousands)	Mean Multiplier	Mean Implied Multiplier	Excess Multiplier
Arkansas – Mega Cases	41.9	76.8	1.40	1.28	0.12
Arkansas – Non-Mega Cases	6.4	14.8	1.17	1.43	-0.26

between the actual multiplier awarded in the litigation and the implied multiplier. A positive "excess" multiplier indicates that the attorney firm receives a risk adjustment above the amount required due to the risk of the litigation. A negative "excess" multiplier indicates that the plaintiffs' attorney firm receives an insufficient risk adjustment.

For our tests, we define a mega case as those cases where the corporate defendant is in the top decile of defendant companies in our sample based on market capitalization (measured as of the end of the class period). Larger market capitalization typically corresponds to greater potential damages in litigation as well as more litigation resources, raising the stakes of the litigation for lead plaintiffs and their associated plaintiffs' attorney firms.

We first examine the Arkansas pension funds for mega cases and non-mega cases in Table 6. Note that attorney firms associated with litigation in which the Arkansas funds are a lead plaintiff correspond with a positive excess multiplier for the mega cases, indicating that the law firms receive compensation above that necessary to compensate for the risk of non-settlement. The mean positive excess multiplier of 0.12 corresponds to a mean additional $4.5 million of fees per settled class action in a mega case not justified based on risk. In contrast, attorney firms receive a negative excess multiplier for the non-mega cases, consistent with the 25 percent attorney fee constraining law firms in smaller cases.

We next focus specifically on the mega cases and frequent institutional lead plaintiff filers. If the mega cases offer more room to submit multipliers to the court that provide greater than warranted risk compensation, which frequent filers do so? We posit that attorney firms that invest more hours in a specific class action will have a correspondingly greater incentive to increase the multiplier. More hours mean more potential return if the law firm can persuade the court to award a generous multiplier. From the following table, note that those frequent filers associated with class actions with the greatest hours also have the largest excess multipliers. In addition, certain law firms most frequently associated with these filers (Bernstein

Table 7: Fee Multipliers for Mega Settlements, 2005 - 2018

Plaintiff	Mean Atty Fee Award ($ millions)	Mean Hours (thousands)	Mean Multiplier	Mean Implied Multiplier	Excess Multiplier	Primary Lead Counsel
Louisiana Public Employees	42.0	126.7	2.05	1.44	0.61	Bernstein Litowitz
Detroit Employees	60.2	105.3	1.34	1.11	0.23	Bernstein Litowitz
Arkansas Public Employees	41.9	76.8	1.40	1.28	0.12	Bernstein Litowitz
Mississippi Public Employees	31.3	69.6	0.77	1.23	-0.46	Bernstein Litowitz
Union Asset Management Holding AG	29.0	46.7	1.57	1.29	0.28	Motley Rice
Oklahoma Public Employees	16.1	44.7	0.95	1.32	-0.37	Labaton Sucharow
Norfolk County Retirement System	14.4	32.5	0.89	1.20	-0.31	Labaton Sucharow
Plymouth County Retirement System	14.4	32.5	0.89	1.20	-0.31	Labaton Sucharow
City of Pontiac General Employees	4.8	18.6	0.68	1.15	-0.48	Robbins Geller
Pension Trust Fund for Operating Engineers	3.1	5.9	1.01	1.54	-0.52	Robbins Geller

Litowitz and Motley Rice) seem more likely to submit large multipliers compared with firms representing frequent filers that have negative excess multipliers (Labaton Sucharow and Robbins Geller).

The pattern of these excess multipliers suggests that securities class actions have a lottery aspect to them, albeit one with very favorable odds: windfall paydays in the largest cases, but less generous returns outside the top tier. Not surprisingly, law firms are willing to invest in relationships with the largest public pension funds to gain access to the cases that generate the windfall returns. But the excess multipliers in the largest cases, providing plaintiffs' attorneys a greater than risk-adjusted return, suggest that these lead plaintiffs are not vigorous monitors. Economies of scale in these cases do not seem to be accruing to the benefit of the class, which is paying risk multipliers in many cases that appear to have little risk to them.

Chapter

06

Proposed Reforms

In this chapter, we suggest a number of reforms to deal with the problem of frequent filers in securities fraud class actions. Congress should close the loopholes in the PSLRA that have enabled an extortionate business model in merger objection cases. More broadly, Congress should rethink securities litigation rules in light of the current model of shareholder suits alleging misleading proxy statements in order to bring these suits under court supervision and ensure that plaintiffs have a substantial interest in the suit.

Finally, to address abuses by institutional frequent filers, Congress should task courts with evaluating prior performance by lead plaintiff candidates when faced with an institution seeking a waiver from the PSLRA's five-cases-in-three-years limit on filing.

Reforms in Merger Objection Cases

The abuses of the merger objection cases call for strong medicine. The vast majority of these cases offer investors zero protection. They amount to little more than legalized extortion, albeit at a relatively low level. Plaintiffs' lawyers make up for the modest fees in merger objection cases by dealing in volume. Pleading standards are of no use when defendants are willing to settle for a mootness fee rather than file a motion to dismiss. Nor are the PSLRA's lead plaintiff provisions of much use—these cases are voluntarily dismissed before courts have even begun the lead plaintiff appointment process. And if the cases are filed as individual actions, there is no lead plaintiff, because there is no class. What can be done to get rid of these nuisance suits?

Close Loopholes in the PSLRA

First, at a minimum, Congress should amend relevant portions of the PSLRA to cover individual securities cases, at least if those individual actions challenge a merger or acquisition. The provisions on permissible fee awards are a natural place to start. The PSLRA limits fee awards to a "reasonable percentage of any damages and prejudgment interest actually paid to the class."[86] A reasonable percentage of zero is zero, so there should be no fee awarded when there is no recovery for shareholders. Plaintiffs' lawyers have proved too wily for this straightforward math. The bar on fee awards only applies if there is a class. As discussed in Chapter 4, by filing the suits as

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individual actions, rather than class actions, the PSLRA's limit is avoided. Moreover, filing individual actions also evades the minimal court oversight provided under Fed. R. Civ. P. 23.

Congress should address these concerns by expressly extending the PSLRA's reach to cover individual actions that challenge mergers or acquisitions. Under current law, courts only approve settlements and fee awards in cases that are certified as class actions. The PSLRA's provisions regarding fees should apply to all merger objection lawsuits filed under the federal securities laws, whether filed as individual or class actions. Parties may still enter into out-of-court deals that ignore these provisions, but corporate general counsel would steer clear of violating an explicit federal law. That should crack down on the "voluntary" mootness payments. Congress should also consider extending the other provisions of the PSLRA to cover these individual actions, including the PSLRA's mandate for judicial review of settlements and dismissals as well as its mandatory Rule 11 inquiries.

Further Limit Frequent Filers

Second, Congress should broaden the PSLRA's limitation on repeat filers. The PSLRA currently prohibits individual shareholders from serving as the lead plaintiff in more than five securities class actions within a three-year period. Yet shareholders can circumvent this limit by either (i) settling or dismissing the case before the court appoints a lead plaintiff or (ii) filing the case as an individual action, rather than as a class action. The data presented here show the shortcomings of these repeat filers rules and offer a compelling reason for precluding any one plaintiff from filing dozens of merger objection lawsuits. Congress should extend the prohibition to bar any shareholder from filing more than five merger objection lawsuits, whether filed as individual or class actions, in a three-year period. A limit that applies only to cases in which a court appoints a lead plaintiff has proven too easy to circumvent. This prohibition should be backed up with stiff sanctions for shareholders who ignore this limitation or misrepresent their filings to the court.

"Congress should extend the prohibition to bar any shareholder from filing more than five merger objection lawsuits, whether filed as individual or class actions, in a three-year period."

Rethink Shareholder Voting Suits

Congress should consider adopting more stringent standing requirements in shareholder voting cases. For example, Congress could amend the PSLRA to require a reasonable share ownership requirement—"skin in the game"—to file a proxy claim under § 14(a)

"There is no more direct way of ensuring sufficient incentive to promote the interests of the class as a whole than requiring that the plaintiff have a substantial interest in the company."

of the Exchange Act. The evidence relating to the PSLRA discussed in Chapter 3 shows that plaintiffs with skin in the game: (1) screen for good cases, and (2) produce better results. Why not harness this expertise to make proxy claims more useful in promoting accurate disclosure? There is no more direct way of ensuring sufficient incentive to promote the interests of the class as a whole than requiring that the plaintiff have a substantial interest in the company. Under this proposal, those incentives would be tapped to ensure that plaintiffs are bringing only meritorious cases that should be brought.

Picking the appropriate number of shares for eligibility to file a proxy claim is an imprecise task, but it seems obvious that the correct number has to be substantially more than five shares, the smallest number we found in our review of Paul Parshall and Stephen Bushansky's cases. There may be individuals and small institutions with sufficient stakes to encourage them to be active monitors. It is hard to imagine, however, that the number required to provide sufficient incentive is one. Obviously, imposing a minimum share ownership requirement would mean that some cases would not be brought. Eliminating low-value cases, however, is the point. If a plaintiffs' lawyer cannot persuade even a single shareholder with more than a nominal interest to file suit, why should a court spend valuable judicial time resolving it? And why should a defendant bear the expense of litigating the action? These nuisance suits impose costs on the legal system and society more generally, and they should be subject to greater scrutiny.

Additional Reforms to Lead Plaintiff Appointment

We also propose additional reforms that would apply in all securities class actions.

Modify Waiver Provision

First, we propose that Congress modify the waiver provision allowing plaintiffs to exceed the five-cases-in-three-years limit. Instead of allowing what amounts to a de facto automatic waiver of the limit for institutional investors, courts should condition the waiver on demonstrated results for class members, using the criteria we suggest below. The trend toward increasing fee percentages for the most prolific institutional frequent filers does not suggest that experience leads to more vigorous monitoring. Given the language of the PSLRA, which grants courts discretion as long as it is exercised "consistent with the purposes of this section,"[87] courts have latitude to impose this condition on their own. Considering courts' demonstrated indifference to supervising the lead counsel selection process, however, implementing this reform may require a statutory directive from Congress.

Encourage Competition

Second, limiting repeat appearances by frequent filers is not enough on its own to ensure the rigorous monitoring that Congress hoped for when it enacted the lead plaintiff provision of the PSLRA. We also suggest that Congress should re-channel competition among plaintiffs' lawyers. That competition is currently focused on gaining access to the largest institutions with the largest losses; the "pay-to-play" that we documented in our earlier work is a symptom of the dysfunction in that dynamic. Rather than having a system that encourages pay-to-play, Congress should harness competition to focus on producing better results for the class.

Instead of the current mechanical presumption favoring the plaintiff with the largest losses for appointment as lead plaintiff, Congress could instruct courts to review the fee agreements entered into by the competing movants for the lead plaintiff role. Congress should direct courts to favor movants that have tailored fee arrangements with their proposed lead counsel to incentivize greater recoveries for the class rather than advantaging the class counsel.

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Chapter

07

Conclusion

The lead plaintiff provision of the PSLRA was an experiment when Congress adopted it in 1995, and two and a half decades of experience have revealed its strengths and weaknesses. The agency costs imposed by some plaintiffs' attorney firms—extortionate settlements and inflated fees in the largest cases—have persisted. In enacting the PSLRA, Congress took important steps toward curtailing the "professional plaintiffs" that had previously predominated in securities fraud class actions.

Our research shows, however, that frequent filers are alive and well in some corners of securities fraud practice. The reforms proposed here could help crack down on some of the more egregious abuses associated with frequent filers. The proposals would also better align the interests of class members and the lawyers who are supposed to be acting on their behalf.

The PSLRA worked to discourage individual professional plaintiffs in traditional securities class actions. Unfortunately, individual frequent filers remain common in merger objection lawsuits filed in federal court. Our research shows that some individual frequent filers file an average of 20 or more cases each year and that these cases end with voluntary dismissals that offer little or no benefit to the shareholder class. Their lawyers walk away with a mootness payment, but the shareholders get nothing. Congress should step in to reduce the opportunities for extortionate settlements that are simply a drag on shareholder returns.

In other cases, individuals have been displaced by institutional frequent filers. Congress had high hopes for institutional investors when it adopted the lead plaintiff provision of the PSLRA. It expected them to select skilled lead counsel, negotiate carefully calibrated fee awards, and oversee the litigation and any settlement negotiations. The evidence suggests that institutional investors have fulfilled some of these expectations, yet our research demonstrates that the PSLRA created new issues, too. Some institutional investors have embraced their new role with enthusiasm, filing dozens of securities class actions and often relying on the same select group of law firms. These firms court institutional frequent filers with campaign contributions and other perks that call into question the independence of these institutions.

Our research here shows that institutional frequent filers are not all created equal, with some providing less than vigorous monitoring.

Some institutional investors are doing less than Congress may have hoped to negotiate with counsel for fee awards that will maximize the classes' net recovery. Congress should direct courts to do more to promote competition among plaintiffs' attorneys to encourage those lawyers to serve the best interests of shareholders.

The reforms proposed here would not solve all of the waste and abuse associated with securities fraud class actions. They would, however, help ensure that securities class actions are in the hands of investors whose allegiance is to the class, rather than to the law firm that recruited them. By closing the loopholes in the PSLRA that facilitate merger objection lawsuits and encourage institutional frequent filers, Congress would be taking important steps toward a legal system that better aligns the interests of lead plaintiffs and their fellow shareholders.

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Endnotes

1 Pub. L. No. 104067, 109 Stat. 737 (1995) (codified at 15 U.S.C. §§ 77a et seq.).

2 *See infra* at 8-9.

3 15 U.S.C. § 77z-1(a)(3)(B)(vi).

4 *Id.*

5 H.R. Conf. Rep. No. 104-369, at 35 (stating that "[i]nstitutional investors ... may need to exceed this limitation and do not represent the type of professional plaintiff this legislation seeks to restrict").

6 See Stephen J. Choi, Jessica M. Erickson & Adam C. Pritchard, *Frequent Filers: The Problems of Shareholder Lawsuits and the Path to Reform*, Institute for Legal Reform (2014). This paper followed another, *Frequent Filers: Repeat Plaintiffs in Shareholder Litigation,* Institute for Legal Reform (2013).

7 *See id.* at 10-16.

8 *See id.* at 17-23.

9 Ending in 2018 allows us to collect data on the resolution of the vast majority of these suits, which frequently take years to litigate.

10 *See, e.g.,* Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 Okla. L. Rev. 237, 241 (2017) ("In securities and merger class actions, the real party in interest is a much larger class of shareholders.").

11 *See, e.g.,* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 Colum. L. Rev. 669, 677–78 (1986) ("Yet, in the context of class and derivative actions, it is well understood that the actual client generally has only a nominal stake in the outcome of the litigation. Empirical studies have shown this, and courts, when dissatisfied with the performance of plaintiff's attorneys, are prone to emphasize that the plaintiff's attorney has no 'true' identifiable client.").

12 A.C. Pritchard, *Who Cares?*, 80 Wash. U. L. Q. 883 (2002).

13 *See* Coffee, *Understanding*, *supra* note 11, at 679 (recognizing that, because of the "substantial transaction costs of coordination," ... "litigation would be predictably underfunded, from the clients' perspective, if the clients had to take collective action").

14 *See, e.g.,* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action,* 54 U. Chi. L. Rev. 877, 884 (1987) ("in many settings, few plaintiffs expect a recovery sufficient to justify the cost of monitoring"); *see also* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 Vand. L. Rev. 133, 135 (2004) ("Plaintiffs' lawyers are the dominant players in representative shareholder litigation, whether derivative actions, securities fraud class actions, or state acquisition-oriented class actions.").

15 *See* Stephen J. Choi, Jessica M. Erickson & A.C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions*, 17 J. Empirical Leg. Stud. 438 (2020).

16 *See* Jonathan R. Macey Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 19 (1991) (discussing the economic and logistical disincentives for shareholders to monitor their attorneys in a securities class action).

17 *See* Jessica Erickson, *Investing in Corporate Procedure*, 99 B.U. L. Rev. 1367, 1380 (2019) ("[O]n the front end, attorneys can file lawsuits that may not be in their clients' best interests. These lawsuits may be financially lucrative for the plaintiffs' attorneys, even though they do not ultimately benefit the shareholders or the plaintiff corporation.").

18 *Id.* ("[O]n the back end, if shareholders are not monitoring the litigation, it opens the door for attorneys to seek a higher fee.").

19 James D. Cox et al., *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 Colum. L. Rev. 1587, 1597-98 (2006) ("Before 1995, courts usually selected the attorneys who were first to file a securities fraud complaint as the lead counsel for the class. This judicial practice led to a 'race to the courthouse,' as the lead counsel position can be quite lucrative for the firm that is chosen.").

20 S. REP. 104-98, 6, 1995 U.S.C.C.A.N. 679, 685.

21 *Id.* at 2.

22 H.R. CONF. REP. 104-369, 32, 1995 U.S.C.C.A.N. 730, 731. Courts agreed, with one judge stating that these repeat plaintiffs were "the unluckiest and most victimized investors in the history of the securities business." *In re Urcarco Secs. Litig.,* 148 F.R.D. 561, 563 (N.D. Tex. 1993).

23 Patrick Dillon and Carl Cannon, Circle of Greed: The Spectacular Rise and Fall of the Lawyer Who Brought Corporate America to its Knees (2011).

[24] 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

[25] *Id.* § 78u-4(a)(3)(B)(v).

[26] Senate Report No. 104-98.

[27] *Id.* at 11.

[28] 15 U.S.C. § 77z-1(a)(3)(B)(vi).

[29] 15 U.S.C. § 78u-4(a)(2).

[30] H.R. Conf. Rep. No. 104–369, at 35.

[31] H.R. Rep. No. 104-369, at 33 (Conf. Rep.).

[32] 15 U.S.C. 78u-4(a)(4) ("The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class.").

[33] *Id.* ("Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.").

[34] Regardless of the level of scrutiny, lead plaintiff awards—typically in the four-figure range, sometimes a bit more—are unlikely to be producing a windfall for lead plaintiffs. As a result, lead plaintiffs share in the pro-rata recovery from any settlement, just like the rest of the class members, but not much more. Insofar as they produce a better outcome for the class—either by negotiating better terms with lead counsel, or monitoring the lead counsel's efforts to ensure vigorous prosecution of the suit—those benefits are also shared pro rata with other class members. Those investors are essentially freeriding on the lead plaintiff's good efforts, which is the rational choice under the circumstances.

[35] 15 U.S.C. 78u-4(a)(2).

[36] *Id.*

[37] *Id.*

[38] 15 U.S. Code § 78u–4(c).

[39] *Id.*

[40] This percentage may be falling, however, with recent data from Cornerstone Research reporting that institutional investors only served as lead plaintiff in 40-50 percent of core securities class actions filed since 2014. *See* Securities Class Action Filings: 2019 Year in Review, Cornerstone Research, at 18. They define "core securities class actions" to include all securities class actions other than those challenging a merger or acquisition. *See id.* at 1.

[41] Laura E. Simmons & Ellen M. Ryan, Post–Reform Act Securities Lawsuits: Settlements Reported through December 2003, Cornerstone Research.

[42] James D. Cox, Randall S. Thomas & Lynn Bai, *There Are Plaintiffs and ... There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 Vand. L. Rev. 355, 379 (2008) (finding "positive and significant impact on settlement size from the presence of a public pension fund"); Michael Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, 9 J. Empirical Legal Stud. 368, 369-70 (2012) (finding A positive correlation between attorneys' fees and settlement size, as well as a negative correlation between fees and public-pension cases).

[43] *See* Securities Class Action Settlements: 2020 Review and Analysis, Cornerstone Research, at 12.

[44] *See, e.g.,* Stephen J. Choi, *Motions for Lead Plaintiff in Securities Class Actions*, 40 J. Legal Studs. 205 (2011); Michael Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, 9 J. Empirical Legal Stud. 368 (2012).

[45] Stephen J. Choi, Drew T. Johnson-Skinner & A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, 8 J. Empirical Legal Stud. 650 (2011).

[46] *See* Shareholder Litigation Involving Acquisition of Public Companies: Review of 2018 M&A Litigation, Cornerstone Research, at 2. Since 2009, there has only been one year in which less than 80 percent of large merger transactions were challenged in court—2017, the year immediately following the Delaware Court of Chancery's crackdown on these cases in *In re Trulia Inc. Stockholder Litigation*.

[47] *In re Trulia Inc. Stockholder Litigation,* 129 A.3d 884 (Del. Ch. 2016).

[48] Matthew D. Cain et al., *The Shifting Tides of Merger Litigation,* 71 Vand. L. Rev. 603, 608 (2018) ("Of the deals completed in 2016, only 34% were challenged in Delaware, while 61% were challenged in other states and 39% in federal court. During the first ten months of 2017 the trend accelerated, with only 9% in Delaware compared to 87% in federal court. The latter number, which represents a significant increase in the percentage of cases filed in federal court, seems to be an attempt to avoid the impact of forum selection bylaws."). The numbers here sum to more than 100% because many deals were challenged in more than one forum.

[49] *See id.*

[50] *See* Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 Vand. L. Rev. 1777 (2019).

[51] *See, e.g.,* Coffee, *Understanding, supra* note 11, at 682–83 (1986) (stating in the pre-PSLRA period, that "[a]lthough the payment of a forwarding fee is generally forbidden by legal ethics, there is reason to believe in some fields that nonspecialist attorneys often direct a client who has legal standing to a plaintiff's attorney in return for such a fee (or for a nominal role in the case that will entitle the nonspecialist attorney to a share of any court awarded attorney's fees."))

[52] *See* Kadmon News Headlines, MarketBeat, at https://www.marketbeat.com/stocks/NASDAQ/KDMN/news/. Similar press releases appeared on sites such as Financial Buzz, Markets Insider, and Stocks Earning.

[53] These individual plaintiffs were Paul Parshall, Stephen Bushansky, Robert Berg, Louis Scarantino, Anthony Franchi, Adam Franchi, Michael Rubin, Richard Scarantino, and Vladimir Gusinsky.

[54] *See* Securities Class Action Filings: 2020 Year in Review, at 16 ("Rigrodsky & Long P.A. and RM Law P.C. have commonly been co-counsel. They were co-counsel on all 85 of their filings and were responsible for an absolute majority of federal first identified M&A complaints in 2020.").

[55] *See* Jill Fisch, et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform,* 93 Tex. L. Rev. 557, 561 (2015) (presenting empirical evidence that "disclosure-only settlements do not appear to affect shareholder voting in any way").

[56] The PSRLA requires that a plaintiff filing a securities class action complaint file a certification in which the plaintiff "identifies any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class." 15 U.S.C. 78u-4(a)(2)(A)(v).

[57] *See, e.g., Andrews v. Blick Art Materials, LLC,* 286 F. Supp. 3d 365, 386 (E.D.N.Y. 2017) (stating that an "individual settlement agreement ... does not ordinarily require court approval").

[58] *See* 15 U.S.C.A. § 78u-4(a)(1) (stating that the PSLRA covers all "private action[s] arising under this chapter that [are] brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure").

[59] *See* Complaint for Violation of the Securities Exchange Act of 1934, *Parshall v. WGL Holdings, Inc., et al.,* Case No. 1:17-cv-00560 (Mar. 28, 2017 D.D.C.), at 1 (listing a Naples, Florida address in the case caption); *see also* Paul Parshall, Florida Residents Directory, at https://www.floridaresidentsdirectory.com/person/103054120/parshall-paul (listing address and age).

[60] About Us, Sports Beer Brewing, at http://www.sportsbeerbrewing.com/about-us.html. The Paul Parshall who owns Sports Beer Brewing lists the same residential address as the Paul Parshall who has filed numerous shareholder lawsuits, supporting a conclusion that they are the same person. *Compare* Civil Cover Sheet, *Parshall v. Bank Mutual Corp.,* Case No. 17-cv-1209 (Sept. 6, 2017 E.D. Wis.) (listing an address in Naples, Florida for Mr. Parshall in the cover sheet for a shareholder lawsuit that he filed) with Exhibit #1, Motion to Dismiss, *The Pennsylvania State University v. Parshall,* Case No. 4:19-cv-01299 (M.D. Pa. Sept. 20, 2019) (listing the same address in a Registration of Trademark or Service Mark filed with the Pennsylvania Department of State).

[61] Claim Your Brand, Sports Beer Brewing, at http://www.sportsbeerbrewing.com/claim-your-brand-.html.

[62] Sports Teams Cigars, Sports Beer Brewing, at http://www.sportsbeerbrewing.com/sports-team-cigars.html.

[63] *The Pennsylvania State University v. Paul L. Parshall, d/b/a/ Sports Beer Brewing Co.,* Case 4:19-cv-01299 (M.D. Pa. July 26, 2019).

[64] Complaint, *The Pennsylvania State University v. Paul L. Parshall, d/b/a/ Sports Beer Brewing Co.,* Case 4:19-cv-01299 (Sept. 24, 2019), at ¶ 82.

[65] *Id.* at ¶ 3 ("In fact, when Penn State contacted Defendant about his infringement of the famous Penn State Marks, Defendant wanted a buy out: to sell Penn State's own Marks back to Penn State.").

[66] *See Bushanksy v. Armacost,* Case No. 12–cv–01597 (N.D. Cal. March 30, 2012).

[67] *See* Declaration of Stephen Bushansky in Support of the Unopposed Motion of Plaintiffs Employees' Retirement System of Rhode Island and Stephen Bushansky, *Bushansky v. Silbermann,* Case No. 3:20-cv-08331 (N.D. Cal. Dec. 22, 2020), at ¶ 2 ("I am a retired school teacher of math and science and for more than 25 years have been a full-time professional investor registered as a 'trader in securities' with the Internal Revenue Service.").

[68] In the 23 cases in our sample in which Bushansky did disclose his stock holdings, almost all of which were class actions, he stated that he held on average approximately 145 shares in the target corporation.

[69] *See, e.g.,* Class Action Complaint, *Bushansky v. Forescout Technologies, Inc., et al.,* Case No. 5:20-cv-05283 (N.D. Cal. July 31, 2020).

[70] *See id.*

[71] *See, e.g.,* Complaint for Violations of the Federal Securities Laws, *Bushansky v. VICI Properties Inc.,* Case No. 1:21-cv-18429 (D.N.J. Oct. 12, 2021); Complaint for Violations of the Federal Securities Laws, *Bushansky v. Vine Energy Inc.,* Case No. 1:21-cv-08383 (S.D.N.Y. Oct. 11, 2021); Complaint for Violations of the Federal Securities Laws, *Bushansky v. Covanta Holding Co.,* Case No. 2:21-cv-17427 (D.N.J. Sept. 23, 2021).

[72] *See, e.g.,* Complaint for Violations of the Federal Securities Laws, *Bushansky v. JMP Group, LLC,* Case No. 3:21-cv-08318 (N.D. Cal. Oct. 26, 2021), at 1; Complaint for Violations of the Federal Securities Laws, *Bushansky v. Square, Inc.,* Case No. 3:21-cv-08013 (N.D. Cal. Oct. 13, 2021), at 1; Complaint for Violations of the Federal Securities Laws, *Bushansky v. Medallia, Inc.,* Case No. 3:21-cv-07336 (N.D. Cal. Sept. 21, 2021), at 1; Complaint for Violations of the Federal Securities Laws, *Bushansky v. Mobileiron, Inc.,* Case No. 5:20-cv-07675 (N.D. Cal. Oct. 30, 2020), at 1. It is perhaps noteworthy that the complaints with this language are typically filed in California federal courts, raising the possibility that they may be a drafting choice by a particular California lawyer or a response to particular requirements of these courts.

[73] The cover sheets to these complaints often leave the “Class Action” box unchecked, supporting a conclusion that the complaints are not class actions.

[74] The percentages in Figure 1 are computed based on the percent a particular type of lead plaintiff (i.e., public pensions) constitutes within the total number of institutional lead plaintiffs in our sample.

[75] Note that, for public pension funds, we group funds that are under common control. For example, we group all of the Arkansas state pension funds together.

[76] *In re Diamond Foods, Inc. Sec. Litig.,* 281 F.R.D. 405 (2012).

[77] *Id.* at 410.

[78] Order Appointing Lead Plaintiff and Lead Counsel, *In re Extreme Networks Inc. Securities Litigation,* 15-cv-04883 (N.D. Cal. June 28, 2016).

[79] *Id.* at *6.

[80] *Id.* at *7.

[81] *Id.* at *8.

[82] *See* https://www.rgrdlaw.com/attorneys-William-K-Cavanagh-Jr.html (visited on October 30, 2021).

[83] Courts sometimes appoint a single lead plaintiff, but frequently appoint groups of investors assembled by plaintiffs’ lawyers as the representative of the class.

[84] Estimates of defense costs are hard to come by, but when JDS Uniphase prevailed at trial in defending a securities fraud class action, it was reported that the company paid nearly $50 million in legal fees. Ashby Jones, *JDS Wins Investor Lawsuit, Bucking a Trend,* Wall Street Journal, June 2, 2008, at B4.

[85] *Working Hard or Making Work? Plaintiffs’ Attorney Fees in Securities Class Actions,* 17 J. of Empirical Leg. Stud. 438 (2020).

[86] 15 U.S.C. § 78u-4(a)(6).

[87] 15 U.S.C.A. § 78u-4(3)(B)(vi).

202.463.5724 main
1615 H Street, NW
Washington, DC 20062
instituteforlegalreform.com

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