U.S. CHAMBER
Institute for Legal Reform

Frequent Filers

The Problems of Shareholder Lawsuits and the Path to Reform

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Executive Summary

Frequent filers—professional plaintiff investors who file lawsuit after lawsuit—have been a long-standing phenomenon in shareholder litigation in both state and federal courts. Nearly twenty years ago, Congress attempted to remove professional plaintiffs from federal securities class actions by adopting the Private Securities Litigation Reform Act (PSLRA) of 1995. Yet, this legislation fell short of achieving its goal of eliminating professional plaintiffs.

Instead, the PSLRA simply encouraged class action law firms to recruit a new type of professional plaintiff—pension funds managed by state and local governments as well as by labor unions. We look at securities class actions filed by two states that have been frequent filers—Mississippi and Louisiana—and show that the frequent filing by these states is fueled by campaign contributions made by class action attorneys to influential state politicians. This pay-to-play culture gives those attorneys an advantage in being selected as counsel in the biggest and highest profile cases.

The problem of professional plaintiffs is not limited to federal lawsuits. Although pension and retirement funds now lead most federal securities class actions, individuals continue to dominate in shareholder lawsuits filed under state law, including merger and acquisition litigation and shareholder derivative suits. Repeat plaintiffs flourish in these suits because states typically do not limit the number of lawsuits that individual plaintiffs are allowed to file. As a result, plaintiffs' lawyers can call upon the same individuals time and again as plaintiffs in their lawsuits. Some individuals have filed 30, 40, or even 50 shareholder lawsuits. Other plaintiffs' lawyers have themselves served as repeat plaintiffs or named close family members as plaintiffs.

Frequent filers, whether induced to bring lawsuits through campaign contributions or other connections, may be less inclined to provide proper litigation oversight. That lack of oversight hurts shareholders in two ways. First, class action attorneys often collect substantial contingency fees that come directly out of the recovery to shareholders. If the named plaintiffs do not carefully oversee fees, the ultimate recovery to shareholders is reduced. Second, without a strong shareholder advocate, class action attorneys are given free rein to bring extortionate suits which corporations feel compelled to settle for nuisance value. The cost of these nuisance settlements, unfortunately, is ultimately borne by shareholders themselves with increased corporate expenses and reduced corporate profits.

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We survey potential reforms to address the frequent filer problem. First, possible conflicts of interest, such as family ties or business connections, between named plaintiffs and the class should be disclosed to the court when it selects a class representative. In addition, politicians associated with named plaintiffs should be required to disclose campaign contributions from class counsel. This ensures that the choice of counsel representing a public entity is not the result of improper influence, and that legal fees are appropriate and proportional to the effort expended.

Second, states should consider steps to ensure that plaintiffs in shareholder litigation have a substantial financial interest in the company being sued. We recommend a standing requirement that imposes a specified dollar value or percentage ownership before a shareholder is authorized to bring suit on behalf of fellow shareholders or the corporation. Given the well-known problems in shareholder litigation, actions should only be brought by active plaintiffs—with a substantial interest in the corporation—who are willing and able to fulfill their obligations to the shareholders they purport to represent.

Third, the legal system needs to directly restrict the worst abuses associated with frequent filing. States need to ban bonus payments to lead plaintiffs, which encourage the filing of frivolous litigation. And both Congress and the states need to do more to restrict the number of lawsuits that can be filed by repeat plaintiffs. For federal courts, we propose eliminating the loophole that has allowed state pension funds to file more than five class action lawsuits in three years. On the state side, we recommend that state courts adopt a limit similar to the one that applies in federal securities class actions (without the loophole). Frequent filers have shown their deficiencies as lead plaintiffs; courts should instead appoint shareholder representatives who are prepared to give the litigation their active and unconflicted attention.

Introduction

The legal system in the United States gives investors a large role in the enforcement of corporate and securities law. Individual investors can sue either in class actions representing other shareholders or derivatively on behalf of the corporation itself. These suits typically seek redress for fraud and breach of fiduciary duty by insiders. Traditionally, these suits were brought by individuals, but with increasing frequency, the shareholder plaintiffs are state or municipal pension funds. Both individuals and government pension funds rely on private law firms hired to pursue the case on a contingency fee basis, meaning the firm is paid a percentage of the judgment or settlement only if its client is successful.

The economics of these lawsuits means that the plaintiffs' lawyers almost always have a much greater stake in the litigation than the named plaintiff. Even if a case is successful, individual investors stand to gain only their pro rata share of the recovery. In contrast, the plaintiffs' firm will typically receive a contingency fee of between 10 and 25 percent of the recovery, an amount that will generally dwarf the recovery of any individual shareholder. Moreover, in fiduciary duty suits, in which non-monetary settlements are common, attorneys' fees may be the only monetary portion of the settlement. Given the lawyers' dominant economic interest, it is no surprise that they control decision-making in these lawsuits; shareholder plaintiffs serve as mere figureheads who only nominally oversee the lawsuits brought on their behalf.[1]

This divide between the interests of shareholders and their lawyers explains the concerns of the corporate community that shareholder litigation is frequently meritless and always expensive to defend. The reality is that an attorney with no stake in a company other than the lawsuit at hand has a strong incentive to extract a nuisance settlement. Even if the company believes that the litigation is frivolous, it will pay such settlements to avoid the potentially enormous costs of litigation.

The complaints of meritless shareholder litigation ultimately led Congress to enact the Private Securities Litigation Reform Act (PSLRA) in 1995. The PSLRA gave judges additional tools to screen out frivolous actions at an early stage, thereby helping to limit the expense these actions impose on corporate defendants.[2] Congress hoped that screening out weak cases would reduce the ability of the plaintiffs' bar to coerce nuisance settlements. The effectiveness of this reform has been the subject of considerable debate, succeeding in some respects and failing in others.[3]

The PSLRA did little to curb one problem that has long plagued both securities class actions and state fiduciary duty suits: the professional plaintiff, or as we call them here, frequent filers. Frequent filers are investors who appear again and again as representative plaintiffs in class and derivative actions nominally brought on behalf of their fellow shareholders.

Diversified shareholders do not usually worry about the performance of any single investment, even if that investment has lagged as a result of misconduct such as fraud and self-dealing. It is a puzzle, then, why some investors—often state and municipal pension funds, who are presumably reasonably sophisticated—appear repeatedly as representative plaintiffs in securities fraud and fiduciary duty suits. Why do these frequent filers care enough to file so many lawsuits? And what are the consequences of frequent filers for the shareholders they are supposed to represent?

It is possible that some repeat plaintiffs are faithful stewards of shareholder interests. Yet, as Judge Frank Easterbrook has observed, a repeat plaintiff "could be tempted to file suits designed to extract payoffs from the corporation even if the average investor will lose in the process."[4] As one extreme example, some plaintiffs in the past have received kickbacks—monetary incentives paid by plaintiffs' firms—in exchange for filing lawsuits,[5] and there are allegations that such kickbacks may still occur.[6] Courts have found other plaintiffs to be "appallingly ignorant" of the lawsuits filed in their names.[7] Finally, even plaintiffs who want to be active monitors of shareholder interests may find it difficult to monitor multiple pending suits. In short, there is ample reason to be skeptical of repeat plaintiffs who file multiple suits on behalf of their fellow shareholders.

This paper attempts to shed light on the frequent filer phenomenon. We start by providing background on the abuses in securities and fiduciary duty actions that led Congress to adopt the PSLRA. Next, we address the problem of frequent filers in securities class actions and explore the connection between campaign contributions—pay-to-play—and frequent filers. Next, we turn to fiduciary duty litigation and the role of individual frequent filers in filing nuisance lawsuits that are ubiquitous in this area. Finally, we discuss potential solutions to the problem of frequent filers.

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Background: Shareholder Suits and the PSLRA

In theory, shareholder litigation allows investors to hold corporate executives accountable for their misdeeds. Contingency fee arrangements are intended to promote this ostensible goal, giving plaintiffs' lawyers an incentive to pursue meritorious litigation. As numerous commentators have noted, however, these incentives do not always work.

Instead, plaintiffs' attorneys may agree to settlements that provide little or no benefit to the shareholder class, but that provide substantial fees for the lawyers.[8] Such settlements are common in shareholder litigation, particularly in state court.[9] Even when a real recovery is obtained for the shareholder class, plaintiffs' attorneys may also seek attorneys' fees that are disproportionately high relative to the value of the settlement. In other words, when left to their own devices, plaintiffs' attorneys do not always make decisions that are in the best interests of the investors they represent.

Given the incentives of plaintiffs' attorneys, shareholder plaintiffs play an important role in protecting their fellow shareholders against opportunistic settlements. That role is reflected in Rule 23 of the Federal Rules of Civil Procedure, which provides that the named plaintiff in a class action must "fairly and adequately protect the interests of the

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class."[10] Frequent filers, however, may not serve effectively in this role.

Concerns about frequent filers were front and center in the early 1990s with corporate America urging litigation reform. Corporations claimed that individuals were filing securities class actions armed with little more than suspicion of bad business decisions.[11] These professional plaintiffs typically owned a small number of shares in a large number of public companies. Such investment portfolios put them in a prime position to file lawsuits against a wide range of companies.[12] Their attorneys monitored their portfolios to allow for the quick filing of multiple lawsuits on their behalf. During the legislative hearings that led to the enactment of the PSLRA, Congress focused on two problems with repeat plaintiffs.

FIRST

Congress believed that many repeat plaintiffs knew little about the lawsuits brought in their name. Shareholder plaintiffs are supposed to monitor class counsel to ensure that litigation decisions reflect the best interests of the class. Shareholder plaintiffs who know little about the underlying claims cannot perform this responsibility. Yet, as Congress noted, "in many cases the lead plaintiff has not even read the complaint."[13] This lack of involvement led to concerns that client control in these cases was "so weak as to make the attorney virtually an independent entrepreneur."[14] Investor groups also argued that these shareholders had little incentive to protect the interests of absent class members.[15]

SECOND

Congress was concerned that shareholders were paid to serve as repeat plaintiffs in securities class actions. In its official legislative report, the House of Representatives concluded that "lead plaintiffs often receive compensation in the form of bounty payments or bonuses."[16] The Senate Report similarly stated that "professional plaintiffs often are motivated by the payment of a 'bonus' far in excess of their share of any recovery."[17] Such payments create a conflict of interest between the shareholder plaintiff and the class. Class members want the highest possible recovery, but a named plaintiff who has been promised a kickback may be more interested in securing their own personal payout than in protecting the class. This concern was particularly salient when it came to the plaintiff negotiating with the attorney over his or her fee.[18]

Congressional suspicion about bounty payments to plaintiffs turned out to be the tip of the iceberg. In 2005, the Department of Justice brought charges against the largest shareholder plaintiffs' firm in the country at that time, Milberg Weiss LLP, and four of the firm's partners. The indictment alleged—and the defendants later admitted—that the firm maintained a roster of shareholders to serve as plaintiffs in securities class actions.[19] The firm paid these shareholders a portion of the contingency fees received, typically ten percent.[20] According to court documents, "[b]y entering into such secret payment arrangements, [the attorneys] were able to secure a reliable source of individuals who were ready, willing, and able to serve as named plaintiffs in [c]lass [a]ctions that Milberg Weiss wanted to bring."[21] Following the indictments, Milberg Weiss agreed to pay $75 million to settle the claims, and several partners went to jail.[22]

In addition to the problems with Milberg Weiss, there were also separate instances of lawyers naming their family members as plaintiffs. Cases were filed with attorneys using their spouses,[23] parents,[24] siblings,[25] and other close relatives[26] as plaintiffs in securities class actions. In many cases, courts expressed concern that the plaintiff would share in the eventual attorneys' fees received by their attorney-relative and that these payouts could influence the plaintiff's representation of the class.

The problems with professional plaintiffs identified by Congress all reflected the same basic concern regarding the ability of these plaintiffs to represent absent class members. Plaintiffs with a conflict of interest in the litigation—whether the promise of a private payment, the hope of future business from class counsel, or familial bonds—could be tempted to put their own interests ahead of the interests of the class. Such conflicts make it difficult, if not impossible, for the named plaintiffs to serve as proper representatives of the class.

Congress attempted to address the problems it had identified with securities class actions by enacting the PSRLA[27] over President Clinton's veto.[28] The PSLRA did not apply to shareholder suits filed under state law, including shareholder derivative suits as well as merger and acquisition class actions, but it did place strict limitations on securities class actions filed under federal law.

A principal goal of the PSRLA was to "empower investors so that they, not their lawyers, control securities litigation."[29] To remedy the imbalance between investors and lawyers, the PSLRA created a presumption that courts should appoint as lead plaintiff the class member seeking appointment with the largest financial interest in the relief sought.[30] Large shareholders, the theory went, would have a greater incentive and greater ability to oversee lawyers who represent the class. As one representative of institutional investors testified before Congress, "[a]s the largest shareholders in most companies, we are the ones who have the most to gain from meritorious securities litigation."[31] Congress hoped that institutional shareholders serving as lead plaintiffs would negotiate with class counsel over attorneys' fees, ensuring that a larger share of the recovery would accrue to the class members.

The PSLRA also included provisions targeting frequent filers. The Act provides that no plaintiff shall serve as lead plaintiff in more than five securities class actions in a three-year period.[32] This restriction, however, applies "except as the court may otherwise permit," meaning the court may override the limit. Additionally, lead

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plaintiffs are barred from receiving any compensation other than their pro rata share of the recovery and reimbursement for reasonable costs and expenses.[33] Finally, plaintiffs are required to file a sworn statement with the complaint certifying that (1) they have reviewed and authorized the filing of the complaint; (2) they have not purchased the securities at the direction of counsel or to participate in a lawsuit; and (3) they are willing to serve on behalf of the class.[34] The certification must also list any transactions in the securities covered by the class period and identify any other lawsuits in which the plaintiff sought to serve as lead plaintiff over the past three years.[35] These restrictions were designed to confirm and to reinforce the lead plaintiff's independence from class counsel, and thereby effectuate Congress's purpose of enhancing the role of plaintiffs with a real financial stake in the litigation.

In many ways, the PSLRA's lead plaintiff provisions have succeeded. After a slow beginning, institutional investors have stepped forward to serve as lead plaintiffs in a substantial number of cases. Today, institutional investors serve as the lead plaintiff in the majority of securities class actions.[36] These institutions have obtained larger settlements for shareholders.[37] The PSLRA has changed the game for class action lawyers, who must now compete for the favor of institutional investors in order to be selected as counsel.

Many of the institutional investors that have agreed to serve as lead plaintiffs in securities class actions are government-sponsored pension funds.[38] Many of these funds are managed directly by politicians, such as state treasurers, who must campaign to retain their current positions, or who may have their sights set on higher office. Other funds are managed by political appointees who owe their position to the state's governor. In many states, the attorney general (an elected official in most states) is authorized to select outside counsel for state pension funds. A logical question that arises from the political influence over these funds is whether plaintiffs' firms are making campaign contributions to politicians to enhance their chances of being selected to represent the funds. Unfortunately, the available anecdotal evidence raises the warning flag that class action law firms are indeed buying lead counsel status with campaign contributions (i.e., lawyers are paying to play).

There are additional problems arising in the wake of the PSLRA. As noted above, the PSLRA only applies to fraud claims brought under the federal securities laws.[39] Exploiting this statutory loophole, plaintiffs' attorneys took their old tactics to a new venue: state court, where they made essentially the same allegations against public companies under state law.[40] The migration to state court allowed the class action bar to evade the strict requirements of the PSLRA. Although the number of securities fraud cases filed in federal court declined after the PSLRA, there was a corresponding increase in the number of state law securities fraud cases.[41] In California alone, the number of state securities class actions filings in the first six months of 1996 increased nearly five-fold compared to the first six months of 1995, prior to passage of the PSLRA. The SEC called this shift "potentially the most significant development in securities litigation" since passage of the PSLRA.[42] Congress responded by passing the Securities Litigation Uniform Standards Act (SLUSA) in 1998.[43] SLUSA expressly preempted many state law fraud claims, preventing attorneys from filing the same suits under a different body of law. With the passage of SLUSA, Congress gave the necessary teeth to the PSLRA's restrictions targeting abusive practices in securities litigation.

SLUSA, however, included a carve-out that left room for professional plaintiffs to continue to operate: SLUSA exempted all shareholder derivative suits and many acquisition-related cases.[44] A shareholder derivative suit is filed under state law to vindicate alleged wrongs committed against the corporation.[45] The typical claim is that the corporation's managers harmed the corporation by breaching their fiduciary duties to the corporation. Merger and acquisition-related cases are also brought under state fiduciary duty law, but the allegations relate specifically to a proposed merger or acquisition. In these suits, the shareholders typically allege that the corporation's board of directors breached its fiduciary duties by agreeing to sell the corporation for a price that was below the corporation's true value. These gaps in the law allowed many of the problems Congress tried to curtail in federal securities class actions to migrate to state courts.

As the above discussion suggests, the PSLRA solved some of the problems associated with frequent filers but also created new problems. First, the PSLRA created incentives for plaintiffs' attorneys to curry favor with public pension funds' political leadership by making campaign contributions to gain appointment as class counsel. Second, the PSLRA along with SLUSA effectively exempted many state law claims, allowing plaintiffs' attorneys to continue relying on repeat plaintiffs in state fiduciary duty litigation.

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Frequent Filers in Federal Securities Class Actions

The media has reported on political contributions influencing the plaintiff's lead counsel selection for some time, but this reporting includes little systematic analysis and no discussion of the connection between pay-to-play and frequent filing.[46]

For example, *Fortune* magazine ran a story detailing political contributions received by former New York State Comptroller Carl McCall, the sole trustee of the New York State Common Retirement Fund, from the partners at Bernstein, Litowitz, Berger & Grossman (BLBG).[47] McCall received these contributions shortly before McCall chose BLBG to serve as the New York public pension fund's counsel in the WorldCom securities class action.

Courts have generally been skeptical of allegations of pay-to-play in the selection of class counsel, despite the emergence of clear patterns connecting pay-to-play to frequent filing. Most courts dismiss the problem as more theoretical than real. For example, McCall was also involved in perhaps the most frequently cited example of pay-to-play in securities cases, *In re Cendant Corp. Litigation*. The district court in *Cendant* discovered that two law firms selected as lead counsel contributed nearly $200,000 to McCall, who was the sole director of the New York public pension fund that was a lead plaintiff in the case. The district court in *Cendant*, however, found no hard evidence of pay-to-play, and this finding was affirmed by the Court of Appeals for the Third Circuit.[48] The *Cendant* court's skepticism that pay-to-play had an important influence on counsel selection is typical. For example, a district court in California rebuffed as "speculative" arguments that political contributions created a conflict between the attorney and the class.[49] The court noted that "[c]ourts have long been less enamored of securities litigation pay-to-play arguments than litigants and the press."[50] Not surprisingly, courts have shown little interest in a connection between pay-to-play and frequent filers. The data offered below, however, demonstrate that pay-to-play appears to be fueling frequent filing by state pension funds.

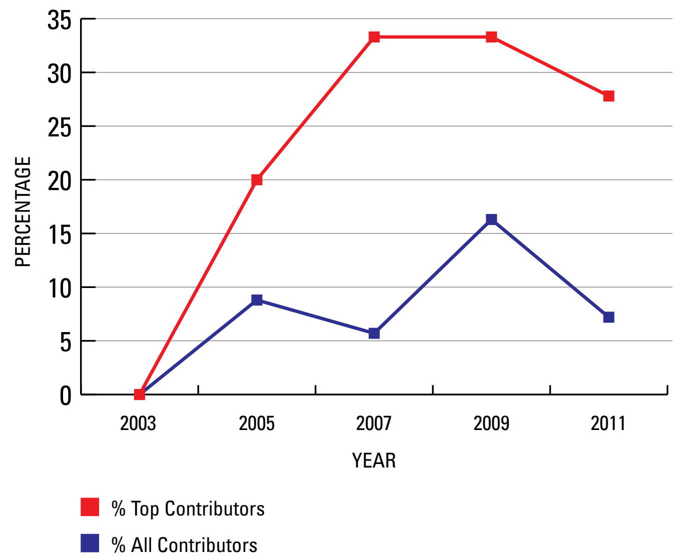
We looked at two frequent filing states: Mississippi and Louisiana. We chose Mississippi and Louisiana because both states were among those whose public pension funds acted as lead plaintiff most frequently for securities class actions filed in the mid-2000s.[51] Our focus was on campaign contributions made by securities class action attorneys to politicians in those states, and we highlighted the connection between those contributions and the involvement of state pension funds from those states in securities class actions. For each state, we compiled the top 20 contributors to the relevant state official for each election year as tracked by followthemoney.org.[52] We then removed single issue and public subsidy contributors,[53] as well as contributions by the candidate, from the top 20 contributors. In order to provide a relevant baseline to put those contributions in context, we also looked at contributions in two states with comparably-sized state pension funds: Massachusetts and Arizona. Those states have been much less involved in securities class actions. The two matched pairs of states are compared below.

Mississippi & Massachusetts

Jim Hood was elected Attorney General of Mississippi in 2003. In Mississippi, the attorney general has the final authority regarding selection of outside counsel for the Public Employees' Retirement System of Mississippi (Mississippi PERS).[54] Chart 1 shows contributions from plaintiffs' class action firms, both as a percentage of Hood's top contributors, as well as of his total contributors. Hood received no campaign contributions from securities class actions firms in 2003. Since that time, however, Hood has attracted considerable financial support from a number of plaintiffs' firms: three firms in 2005, twelve in 2007, five in 2009, and nine in 2011.[55]

Chart 1 shows that these firms have provided a significant portion of the financial support for Hood's campaigns.

Chart 1: Percentage of Contributions to Jim Hood by Plaintiffs' Attorney Firms



To offer a relevant baseline, we also analyzed contributions made in 2010 to Martha Coakley, the Massachusetts Attorney General. Massachusetts is not as active as Mississippi as a lead plaintiff in securities litigation.[56] We looked at 2010, which represents the latest election year for the Massachusetts Attorney General and provides the closest comparison contribution year for the 2011 election year for the Mississippi Attorney General. Securities class action firms are a much smaller percentage of the top contributors to Coakley. Only one of the top 20 contributors to Coakley was from an attorney associated with a securities class action firm (Berman DeValerio) who contributed $1,000, representing 0.05% of Coakley's total contributions. Compare that latter number to the 7.2% of all contributions received by Hood in 2011. Notably, securities class action firms that made contributions to Hood likely did not have a general interest in Mississippi politics. For example, his securities class action firm contributors were all out-of-state, and they made no contributions to other candidates for statewide office in Mississippi.

Which securities class action firms were Hood's most ardent supporters? We began with the list of securities class action firms that were listed in the top 20 contributors to Hood for 2005 to 2011. We then added those securities class action firms that were named as lead or co-lead counsel in a class action initially filed from 2005 to 2011 where the Mississippi PERS acted as a lead plaintiff. Using this list of securities class action firms, we then tracked the aggregate contribution to Jim Hood by each firm from 2005 to 2011. Table 1 sets forth the securities class action firms, their aggregate 2005 to 2011 contributions, the first year the firms made a contribution to Hood in the 2005 to 2011 time period, and the number of times those firms appeared in cases representing Mississippi PERS and a shareholder class.

Table 1: Securities Plaintiff Attorney Contributions to Jim Hood, 2005-2011

Firm	Amount	First Contribution	Class Actions
Bernstein Litowitz Berger & Grossmann	$121,006	2005	9
Labaton Sucharow	$90,000	2009	2
Wolf Popper	$67,000	2007	3
Kaplan Fox, Kilsheimer	$51,750	2007	1
Barroway Topaz (f/k/a Shiffrin & Barroway)	$42,530	2007	1
Chitwood Harley Harnes	$31,750	2011	2
Lieff Cabraser Heimann & Bernstein	$32,000	2007	1
Bernstein Liebhard & Lifshitz	$30,000	2005	0
Kirby McInerney & Squire	$30,000	2007	0
Baron & Budd	$19,200	2005	2
Nix, Patterson & Roach LLP	$16,666	2007	1
Grant & Eisenhofer	$15,000	2011	3
Motley Rice	$10,000	2011	1
Cohen Milstein Sellers & Toll	$9,420	2011	2
Zimmerman Reed	$8.950	2007	1
Lockridge Grindal Nauen	$5,500	2007	1
Cauley Bowman Carney & Williams	$5,000	2007	1
Total	**$586,772**		

Notably, none of these firms have offices in Mississippi. BLBG and its lawyers are the leading contributors among securities class action firms to Attorney General Hood, and between 2005 and 2011, the firm represented Mississippi PERS in nine separate class actions. Also note that only three firms contributed to Hood in 2005, with most firms commencing contributions in 2007, the first election year in which Hood, who was initially elected in 2003, was an incumbent candidate. Four more plaintiffs' firms commenced contributions in 2011. We also looked at 2003, the initial election year for Hood. Tellingly, none of the securities plaintiffs' firms in Table 1 contributed to Hood in 2003 before he became an incumbent.

In conjunction with the plaintiffs' firm contributions, Table 2 sets out the participation by Mississippi PERS as lead plaintiff in securities class actions between 2005 and 2011, along with the firms that represented the pension fund and the class in those lawsuits. Table 2 also shows whether any of those firms made a contribution to Hood's campaign prior to their selection as lead counsel, the attorneys' fee requested in the case, and the value of the settlement.

Table 2: Mississippi PERS Lawsuits and Lead Counsel

Defendant Company	Filing Year	Lead Counsel	Pre-Filing Donor?	Requested Atty Fee %	Settlement ($ Million)
Visteon	2005	Baron & Budd	Y	—	Dismissed
Delphi	2005	Nix, Patterson & Roach BLBG Schiffrin & Barroway	Y	18	342.1
Boston Scientific	2005	Zimmerman Reed Lockridge Grindal Nauen	N	—	Dismissed
Sears Holdings	2006	Grant & Eisenhofer Lerach Coughlin et al. Gardy & Notis	N	—	Dismissed
Semtech	2007	Cauley Bowman Carney & Williams Baron & Budd	Y	17	20
Ambac Financial	2008	BLBG Kaplan Fox, Kilsheimer	Y	17	33
Schering-Plough	2008	Labaton Sucharow BLBG	Y	17	473
Maxim Integrated	2008	BLBG Chitwood Harley Harnes	Y	17	173
J.P. Morgan Acceptance	2008	Wolf Popper BLBG	Y	—	Pending
Credit-Based Asset Servicing	2008	BLBG	Y	17	315
Satyam	2009	Grant & Eisenhofer BLBG	Y	17	301
Royal Bank of Scotland	2009	Labaton Sucharow Wolf Popper Cohen Milstein Sellers & Toll	Y	—	Dismissed
State Street	2009	Berman DeValerio et al. BLBG Motley Rice	Y	—	Pending
Amedisys	2010	BLBG Wolf Popper	Y	—	Dismissed (on appeal)
Diamond Foods	2011	Chitwood Harley Harnes Lieff Cabraser Heimann & Bernstein	Y	14	11 Cash 96 Shares

In only two cases did firms representing Mississippi PERS in a securities class action not make a contribution to Hood's election campaign before being selected as lead counsel. However, the firms from both of those cases subsequently became Hood contributors. Notwithstanding this pattern, courts have rejected challenges to Mississippi PERS' participation as lead plaintiff based on allegations that the state selects lead counsel due to pay-to-play. Absent direct and specific evidence linking the selection of counsel to campaign contributions, courts are reluctant to question the lead plaintiff's selection of counsel, despite the court's obligation to protect the interests of absent class members.[57]

The rewards for the firms selected by Mississippi PERS have been substantial. Six of the nine cases in which BLBG—Hood's largest donor among the class action firms—has participated as lead counsel have settled, with an average settlement of $272.9 million. The fees requested by BLBG and other firms representing Mississippi PERS in those cases average $46.4 million per settlement. The Mississippi class action settlements do not substantially vary the attorney fee percentage based on the size of the settlement amount. Mississippi submitted an attorney fee request to the court of 17% for settlements ranging from $20 million up to $473 million. Despite the fact that in class actions, larger settlements tend to correlate with smaller attorney fee requests as a percentage of the settlement amount,[58] Mississippi maintained its attorney fee award percentage.

The Mississippi legislature has attempted to address the pay-to-play phenomenon in part by passing legislation in 2012 to ensure transparency in the use of outside counsel to represent the state. Mississippi law now places a number of conditions on the state's retention of outside counsel, including requiring a written finding that the assistance of outside counsel is in the public interest and cost-effective; imposing tiered limits on contingency fees, with an aggregate cap, and prohibiting outside counsel from receiving a fee based on the amount of penalties or civil fines; mandating public posting of contracts with and payments to outside counsel on the Internet; and requiring outside counsel to maintain detailed records of the actual time and expenses incurred during the representation.[59]

“Six of the nine cases in which BLBG—Hood's largest donor among the class action firms—has participated as lead counsel have settled, with an average settlement of $272.9 million. The fees requested by BLBG and other firms representing Mississippi PERS in those cases average $46.4 million per settlement.”

Louisiana & Arizona

John Kennedy was first elected State Treasurer of Louisiana in 1999, and he was reelected without opposition to his fourth term in 2011. He sits (*ex officio*) on the board of a number of state pension funds, including the Louisiana State Employees' Retirement System, the Firefighters' Retirement System of Louisiana, the Municipal Police Employees' Retirement System, and the Teachers' Retirement System of Louisiana. Although others also sit on the board of these state pension funds,[60] John Kennedy's position as State Treasurer puts him on the board of a large number of funds, all of which have appeared as plaintiffs in federal securities class actions during Kennedy's tenure as state treasurer.[61]

Kennedy has been popular with securities class action attorneys during that period as well. In 2005, plaintiffs' firms provided a very substantial portion of Kennedy's support: 27% of contributions from his top 20 contributors, and 20% of his total contributions. Indeed, excluding Kennedy's own contributions to his campaign war chest, plaintiffs' firms placed first, second, third, and fourth on Kennedy's list of top contributors that year. His donors' interest was quite focused; they did not appear to make contributions to any other Louisiana candidate.

Which securities plaintiffs' class action firms were Kennedy's most ardent supporters? We started with the list of securities plaintiffs' firms that were listed in the top 20 contributors to Kennedy for 2005 to 2011. We then added those securities plaintiffs' firms that were named lead or co-lead counsel in class actions initially filed from 2005 to 2011 where a Louisiana public pension fund acted as a lead plaintiff. Using this list of securities plaintiffs' firms, we then tracked the aggregate contribution to Kennedy by each of the firms from 2005 to 2011. Table 3 sets forth the securities class action firms, their aggregate 2005 to 2011 contributions, the first year the firms made a contribution to Kennedy in the 2005 to 2011 time period, and the number of times those firms appeared in cases representing a Louisiana public pension fund and a shareholder class.

Table 3: Securities Plaintiff Attorney Contributions to John Kennedy, 2005-2011

Firm	Amount	First Contribution	Class Actions
Bernstein Litowitz Berger & Grossmann	$19,700	2005	3
Grant & Eisenhofer	$12,000	2005	1
Berman DeValerio & Pease	$11,350	2005	1
Baron & Budd	$10,000	2005	0
Pomerantz Haudek Block & Grossman	$7,000	2005	0
Bernstein Liebhard & Lifshitz	$2,000	2005	0
Kirby McInerney & Squire	$2,000	2005	0
Lerach, Coughlin, Stoia, Geller, Rudman & Robbins	$0	--	1
Labaton Sucharow	$0	--	1
Total	**$586,772**		

Note that Labaton Sucharow and BLBG were co-lead counsel in a class action filed against Wellcare; Lerach, Coughlin, Stoia, Geller, Rudman & Robbins and BLBG were co-lead counsel in a class action filed against HCA, Inc.

No securities class action firms made contributions after 2005. Why the difference? Unlike Mississippi, Louisiana has not been as active in recent years in serving as a lead plaintiff in securities class actions, although Louisiana state pension funds did serve as class representative in five separate class action suits from 2005 to 2011. Two of those cases were dismissed,[62] but in the three that produced settlements, the attorneys chosen to represent the class were amply rewarded.[63] The requested attorneys' fees in those cases are enlightening. In the smallest and the largest settlements ($20 million and $730 million), the requested attorneys' fees were 20% of the settlement. In the third, the requested settlement percentage was 17% of a $200 million settlement. There was little effort to reduce the percentage of requested fees to reflect the magnitude of the settlement, as is typically the case for large dollar amount settlements.[64] In each of the three cases, the class action firms put forward by the Louisiana pension fund had donated to John Kennedy's campaign prior to their selection as class counsel. BLBG, the largest contributor to Kennedy among the plaintiffs' firms, appeared as counsel in all three cases.

Compare the securities class action plaintiffs' bar's generous contributions to Kennedy with their scant interest in Arizona politics. The Arizona state pension funds have assets under management that are comparable to Louisiana's, but Arizona did not participate as a lead plaintiff in securities class actions during the 2005 to 2011 period. We looked for contributions by the securities class action attorneys who contributed to John Kennedy to candidates in Arizona, but found only one contribution—for $840—from a securities class action attorney. In 2005 alone, we found that securities class action lawyers contributed $35,650 to Kennedy's campaign.

Frequent Filers in State Fiduciary Duty Suits

Repeat plaintiffs are not limited to federal lawsuits. Although pension funds now control most federal securities class actions, individuals continue to file most shareholder lawsuits filed under state law.

State law offers two common ways for shareholders to challenge the actions of corporate management. First, shareholders can file merger and acquisition litigation, alleging that a corporation's board of directors breached its fiduciary duties by agreeing to sell the corporation for a price below its true value. Second, shareholders can file derivative litigation, alleging that the board of directors breached its fiduciary duties in managing the company.

In both types of suits, repeat plaintiffs are common because states typically do not limit the number of lawsuits that individual plaintiffs are allowed to file. As a result, law firms can use the same individuals time and again as plaintiffs in their lawsuits.

Some individuals have filed 30, 40, or even 50 shareholder lawsuits over the past several years. Other plaintiffs' lawyers have themselves served as repeat plaintiffs or named close family members as plaintiffs.

In a time when nearly all large mergers and acquisitions are challenged in court, the legal system needs shareholder plaintiffs who are ready and willing to protect absent class members from frivolous lawsuits. As discussed below, repeat plaintiffs with interests that separate them from the rest of the class are often unable to perform this crucial role.

“In a time when nearly all large mergers and acquisitions are challenged in court, the legal system needs shareholder plaintiffs who are ready and willing to protect absent class members from frivolous lawsuits. Repeat plaintiffs with interests that separate them from the rest of the class are often unable to perform this crucial role.”

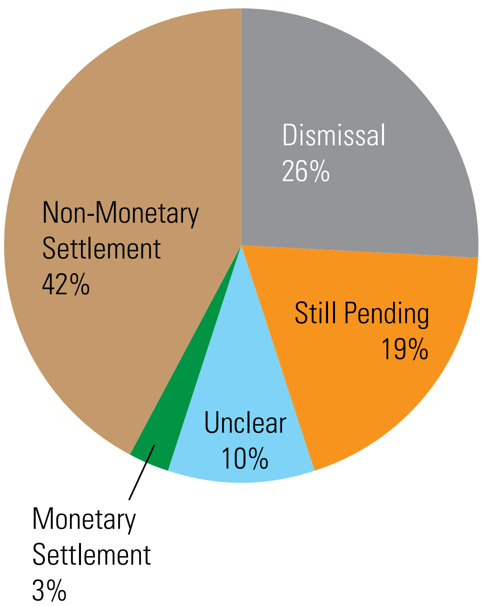
Individuals as Repeat Plaintiffs

Frequent filers in state fiduciary duty suits face far fewer constraints than their counterparts who file federal securities class actions. As noted above, the PSLRA bans a shareholder from serving as a lead plaintiff in more than five securities class actions in a three-year period. States typically do not have similar restrictions, however, allowing serial plaintiffs to file lawsuits as often as they want. In addition, the PSLRA includes a rebuttable presumption that the lead plaintiff in a securities class action will be the shareholder applicant with the largest financial stake in the litigation. Again, states generally do not have comparable provisions, allowing shareholders who own only a few shares in the target company to control the litigation. These gaps in state law have allowed many of the problems Congress tried to curtail in federal securities class actions to migrate to state courts.

A plaintiff named Sanjay Israni illustrates the impact of frequent filers in these lawsuits. In the early years after the passage of the PSLRA, Israni filed a small number of securities class actions.[65] As institutions became more significant players in these suits, however, Israni moved on to state law claims. Since mid-2009, Israni has filed 31 shareholder lawsuits—26 more suits than Israni would have been eligible to file under the PSLRA[66]—nearly all of which are based on alleged violations of state law.

Yet few of Israni's suits have resulted in direct monetary benefits for his fellow shareholders. To date, 25 of his lawsuits have concluded, and information was available for 22 of them. Eight of these lawsuits were dismissed, either by the court or because Israni chose not to pursue the litigation. The remaining suits settled. Of these settlements, only one included a cash payment to the shareholders or the plaintiff corporation, with the remainder of the cases settling for exclusively non-monetary consideration. Chart 2 below shows the outcomes of Israni's lawsuits.

Chart 2: Outcomes of Sanjay Israni's Lawsuits



Israni's non-monetary settlements included terms now common in state shareholder lawsuits. In derivative settlements, corporations often agree to change their corporate governance policies to settle the lawsuit.[67] In merger and acquisition settlements, corporations frequently agree to make additional disclosures to their shareholders or relatively minor changes to the terms of the merger.[68] The Delaware Court of Chancery has criticized these settlements, stating that they can amount to little more than a "Kabuki dance."[69] Despite such criticism of these types of settlements, they remain a common means of resolving shareholder lawsuits.[70]

Although shareholders received little direct financial benefit from Israni's lawsuits, they have been lucrative for Israni and

> *Although shareholders received little direct financial benefit from Israni's lawsuits, they have been lucrative for Israni and his attorneys. Israni received incentive payments for serving as a plaintiff in three of these suits, ranging from $1,000 to $7,500, while his lawyers collected fees that averaged over $500,000 per case.*

his attorneys. Israni received incentive payments for serving as a plaintiff in three of these suits, ranging from $1,000 to $7,500,[71] while his lawyers collected fees that averaged over $500,000 per case. Israni and his attorneys profited from these lawsuits even though the shareholders they supposedly represented received no money.

Israni and his lawyers may well be committed advocates for investors. According to affidavits filed in his lawsuits, Israni is a Certified Public Accountant with a background in finance.[72] Yet it is fair to ask whether any individual can properly monitor such a large number of lawsuits. The question becomes more acute in light of the scant financial returns Israni and his lawyers produced for Israni's fellow shareholders.

Mr. Israni is not alone in filing a large number of shareholder lawsuits. Multiple plaintiffs have filed a dozen or more shareholder lawsuits over the past several years. Indeed, a recent study found that repeat plaintiffs have filed more than 400 such lawsuits since the beginning of 2007.[73] Most of these shareholders challenged mergers and acquisitions, although repeat plaintiffs are common in shareholder derivative suits as well.

Lawyers and Their Families as Plaintiffs

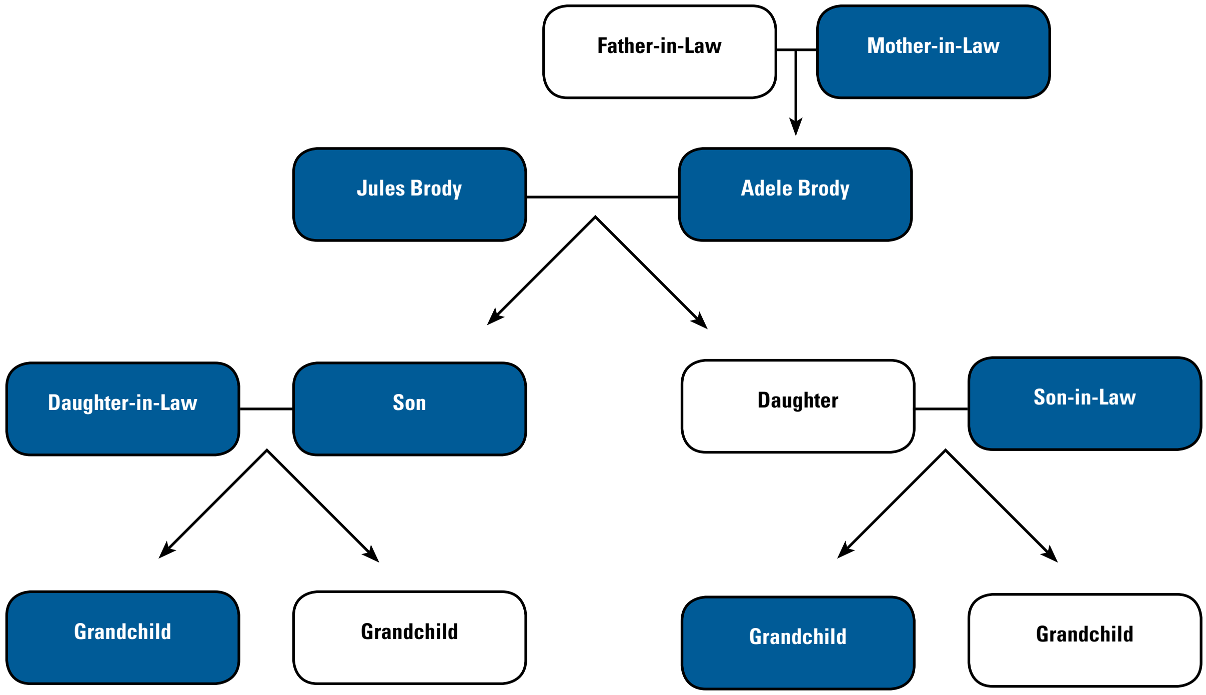
Plaintiffs' attorneys and their families also serve as repeat plaintiffs in shareholder lawsuits. These plaintiffs face possible conflicts of interest that may make it difficult for them to represent absent class members properly, as the two examples below illustrate.

The first example concerns Marc Henzel, a Pennsylvania-based lawyer who represents shareholders in securities class actions as well as state fiduciary duty suits.[74] Mr. Henzel has himself served as a plaintiff in shareholder lawsuits. His most recent lawsuit as a plaintiff was filed last year in Nevada state court.[75] Several of Mr. Henzel's family members have also served as plaintiffs in shareholder lawsuits. An individual who appears to be his wife has served as plaintiff in at least five lawsuits.[76] Both of his children also appear to have served as plaintiffs in state or federal shareholder suits,[77] and the Henzel Family Foundation, which is listed on many Internet sources as being based at the same address as Mr. Henzel's law practice, has served as a plaintiff in three other shareholder suits as well.[78]

Mr. Henzel is certainly not the only plaintiffs' lawyer to serve as a plaintiff himself or to have family members in these suits. Jules Brody is a named partner at Stull, Stull & Brody, a law firm with offices in both New York City and California. According to Securities Class Action Services, Mr. Brody's firm is traditionally one of the top 30 plaintiffs' firms when it comes to total settlement dollars in securities class actions. In addition, however, Mr. Brody and members of his family are also active plaintiffs in shareholder lawsuits, serving in approximately 30 shareholder lawsuits filed under state and federal law since 2000.

The Brody family's involvement in shareholder litigation is not limited to one or two individuals.[79] His wife, Adele Brody,[80] was identified as one of the "Most Frequently Named Plaintiffs" in a 2004 study of shareholder lawsuits filed in Delaware.[81] His son, who is now a lawyer at Stull, Stull & Brody, has served as a plaintiff in several shareholder lawsuits.[82] Two of Mr. Brody's grandchildren have even served as plaintiffs in multiple lawsuits, even though the grandchildren appear to have been younger than five years old at the time those suits were filed.[83] Overall, at least eight members of his extended family appear to have served as plaintiffs in shareholder lawsuits or other types of class actions.[84] The shaded boxes in the family tree below represent the individuals in Mr. Brody's family who have filed shareholder suits or other class action litigation.[85]

Chart 3: Brody Family Tree



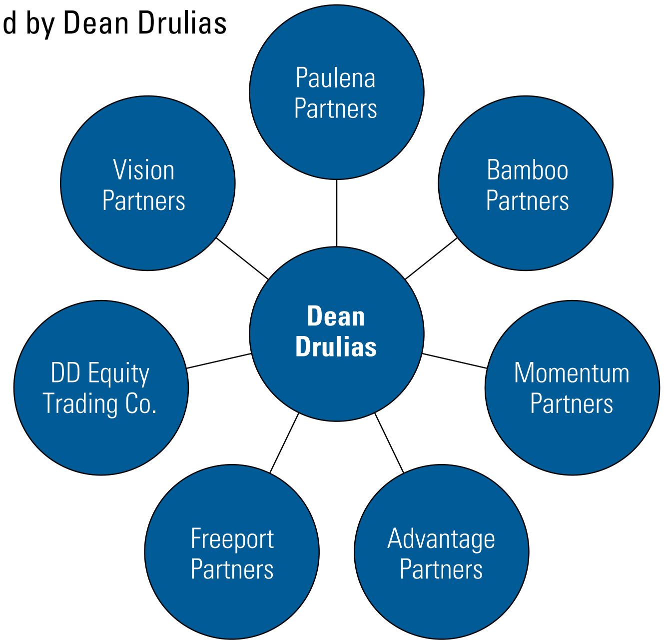
The Henzel and Brody families are far from unusual. A recent study found that lawyers or their family members have served as plaintiffs in approximately 100 lawsuits since 2002.[86] These plaintiffs raise even greater concerns than the typical repeat plaintiffs. Shareholder plaintiffs are supposed to serve as an independent confirmation on the litigation, ensuring that the lawsuit is in the best interests of the corporation and its shareholders. It is obviously difficult to perform this role when the attorney is one's spouse or close relative.[87] In short, these attorney plaintiffs and their family members face possible conflicts of interest that make it difficult for them to properly represent absent class members.[88]

Institutions as Repeat Plaintiffs

Although individuals file most state fiduciary duty suits, institutions are frequent filers as well. Many of these institutions are pension and retirement funds, the same types of institutions described above. Others, however, are more difficult to identify and appear to be private investment partnerships or other investment vehicles. These institutions typically disclose almost nothing about themselves in the litigation filings—not their owners, not the nature of their business, and not even their address.[89] The dearth of available information about these institutions raises questions about the ability of these institutions to protect shareholder interests.

This lack of information raises concerns that individuals may be creating entities for the primary purpose of filing litigation. A recent case from the Delaware Court of Chancery suggests that this possibility may be more than theoretical. *In re SS & C Technologies, Inc. Shareholders Litigation* was an acquisition class action arising out of the sale of a company called SS & C Technologies, Inc.[90] During the litigation, defense counsel learned that the plaintiff—an institution named Paulena Partners—was connected to numerous other entities, all of which were managed by a man named Dean Drulias.[91] The chart below illustrates the entities managed by Mr. Drulias.[92]

Chart 4: Entities Managed by Dean Drulias



Each of these partnerships owned a few shares of stock in 60 to 80 public companies.[93] According to the court, these interests meant that "at any given time [Mr. Drulias had] a minuscule, indirect interest in several hundred publicly traded companies."[94] In total, these partnerships filed at least 30 shareholder class actions, although Mr. Drulias could not remember the exact number in his deposition.[95] The court noted that Mr. Drulias "had made a number of false statements in documents filed with [the] court," and these misstatements "are easily susceptible to the inference" that they were intended to conceal a "web of partnerships."[96] The court also noted that these partnerships may have been created to "spawn[]" litigation.[97]

This case raises a larger question about the role of institutions as plaintiffs in shareholder lawsuits. It is remarkably easy to establish a corporation or other business entity. Plaintiffs seeking to avoid scrutiny as repeat plaintiffs could set up multiple companies and divide their investments among them. Lawyers who do not have success finding plaintiffs through traditional channels could do the same.

It is unclear if such tactics are common. The point is simply that the legal system includes very few safeguards to prevent such behavior. Defense attorneys typically conduct little or no investigation into individual shareholder plaintiffs. Courts similarly do not inquire into the plaintiff's background unless there is specific reason for concern. In short, no one knows what types of entities serve as plaintiffs in shareholder litigation because no one is asking.

The Problem with Repeat Plaintiffs in State Litigation

Repeat plaintiffs are common in both federal and state shareholder litigation, but the two types of plaintiffs raise different concerns. In federal securities class actions, the concern relates to attorneys' fees. As discussed above, when those who control institutional investors accept campaign contributions from plaintiffs' firms, they have less incentive to monitor the fees received by those firms. In shareholder lawsuits filed under state law, however, there is also the concern that repeat plaintiffs may allow their attorneys to file lawsuits that never should have been filed in the first place.

The latter concern is especially relevant given the dramatic increase in the number of shareholder lawsuits filed in state court over the past several years. In 2007, for example, shareholders challenged approximately half of all mergers and acquisitions valued at over $500 million.[98] By 2012, this percentage had risen to 96 percent.[99] In other words, plaintiffs' lawyers alleged that corporate boards violated their fiduciary duties to shareholders in nearly every significant deal over the last year. This figure strongly suggests that, rather than carefully assessing the merits of individual suits, many plaintiffs' attorneys are filing lawsuits at the first announcement of a merger or acquisition. Named and lead plaintiffs are supposed to prevent this type of frivolous litigation, ensuring that litigation is in the best interests of the shareholder class. However, shareholders whose attention is spread among multiple lawsuits may be unable or unwilling to perform this essential monitoring function.

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Suggestions for Reform

Existing legal rules do little to stop professional plaintiffs from filing lawsuit after lawsuit. Both the federal government and the states should consider new rules that enforce existing ethical requirements and encourage more active monitoring by shareholder plaintiffs.

We outline here potential reforms to tame the frequent filer problem in both federal securities class actions and state fiduciary duty suits.

These reforms fall into three general categories. First, Congress and the states should require disclosure of conflicts of interest that could affect a lead plaintiff's incentives to protect the class. Second, courts should select shareholder plaintiffs based on their ability to monitor the litigation and class counsel. Third, lawmakers should consider prohibiting some of the most egregious practices related to professional plaintiffs.

Disclosure

CONGRESS AND THE STATES SHOULD REQUIRE DISCLOSURE OF CONFLICTS

Both Congress and the states should consider requiring disclosure, under penalty of perjury, of any actual or potential conflicts of interest that could affect a lead plaintiff's incentives to protect the class. Under the current system, the court only learns about these conflicts if the defendant investigates the shareholder plaintiff and shares its discoveries with the court or if the court conducts its own inquiry into the plaintiff's qualifications. Frequently, defendants are indifferent to the identity of the lead plaintiff. Moreover, few courts are likely to take the initiative to fill this gap with their own inquiry. States should adopt disclosure rules that require plaintiffs and their attorneys to provide the court with the necessary information regarding conflicts of interest. Congress should consider expanding the disclosure already required under the PSLRA in federal court to ensure that courts are fully informed of potential conflicts between the lead plaintiff and the shareholder class members.[100]

As noted above, the PSLRA requires a sworn statement from plaintiffs certifying, among other things, that they reviewed the complaint and did not purchase the securities in order to participate in a lawsuit, as well as identifying any other lawsuits in which the plaintiff has sought to serve as lead plaintiff over the past three years. Both Congress and the states should expand upon that certification to also require: (1) disclosure of any familial, business, or financial relationships between the plaintiffs and class counsel; (2) a list of all shareholder lawsuits, whether in state or federal court, filed by the named plaintiff over a specified period of time; and (3) a statement that the plaintiff and those affiliated with institutional plaintiffs in a decision-making capacity will not accept any payment for serving as a representative

> *Both state and federal court rules should limit the pay-to-play apparently prevalent in this type of litigation by requiring disclosure of any campaign contributions from the law firm proposed as class counsel (including contributions from lawyers employed by that firm) made to public officials affiliated with state and municipal pension funds seeking lead plaintiff status, as well as contributions by those same law firms to the government official's party committees or other affiliated entities.*

party other than their pro rata share of the recovery and reimbursement for expenses actually incurred in serving as lead plaintiff. Disclosure of these conflicts would give courts the information they need to evaluate the ability of a proposed lead plaintiff to lead the class.

STATE AND FEDERAL COURT RULES SHOULD LIMIT PAY-TO-PLAY

In addition, both state and federal court rules should limit the pay-to-play apparently prevalent in this type of litigation by requiring disclosure of any campaign contributions from the law firm proposed as class counsel (including contributions from lawyers employed by that firm) made to public officials affiliated with state and municipal pension funds seeking lead plaintiff status, as well as contributions by those same law firms to the government official's party committees or other affiliated entities. Senator John Cornyn of Texas has introduced a bill that would require these disclosures in federal securities class actions, but it has yet to make it out of committee.[101]

Given the problems with frequent filers, disclosure of these conflicts is essential for courts to protect absent shareholders in class and derivative litigation. Even though courts have seldom taken the initiative to conduct their own investigations, judges would be hard pressed to turn a blind eye once potential problems are revealed. More importantly, disclosure would discourage plaintiffs' attorneys from relying on problematic plaintiffs in the first place, thereby reducing the need for judicial oversight of lead plaintiffs and their choice of counsel. For example, attorneys will be unlikely to name their spouses or children as plaintiffs if they know that these relationships must be disclosed in a certification to the court. Similarly, if government officials have to reveal campaign contributions from their lawyers when they are seeking lead plaintiff status for state pension funds, they will be less inclined to solicit those contributions in the first place. In this way, disclosure rules could not only bring problems to the attention of courts, they could also change litigation practices on the ground.

Standing Requirements

Lawmakers should also consider reforms that will put shareholder litigation in the hands of shareholders who are best able to protect absent class members. In enacting the lead plaintiff presumption of the PSLRA, Congress recognized that some plaintiffs are better able to monitor securities fraud and fiduciary duty suits than others. A plaintiff with a significant financial stake in the litigation is far more likely to question a settlement that provides little or no real benefit to class members than a plaintiff with a smaller stake. The PSLRA has shown real results in the form of lower attorneys' fees paid by shareholders in federal securities class actions. The question now is how to close the loopholes that have allowed frequent filers to remain active in both state and federal courts.

STATES SHOULD CONSIDER ADOPTING, OR EVEN EXTENDING, THE LEAD PLAINTIFF PROVISIONS OF THE PSLRA

State claims and federal claims may have different legal roots, but they both have the same need for active oversight. Moreover, states have had the benefit of following the PSLRA in action and could avoid some of the problems that have arisen. States should look for a solution that builds on the experience of the PSLRA, but recognizes the unique issues in state law claims. [102]

One approach might be to establish minimum ownership requirements for shareholder plaintiffs. To represent a class of shareholders or a plaintiff corporation in a derivative suit, a shareholder would need to own at least a minimum amount of stock in the corporation. This amount should not be so high that shareholder suits are *de facto* impossible, but it should be high enough to ensure that the shareholder has a true financial interest in the litigation. A plaintiff who has $100,000 invested in a corporation, for example, is far more likely to care about litigation affecting this investment than a plaintiff with only a $100 investment. In addition, consideration should be given to requiring competitive bidding for the selection of class counsel.

Restrictions on shareholder standing carry a cost. If attorneys cannot find shareholders who own sufficient stock in the corporation and who are willing to participate in the suit, some suits may never be filed. On the other hand, attorneys will likely come up with new strategies to locate suitable plaintiffs. Moreover, it may be a positive outcome if attorneys file fewer merger and acquisition lawsuits in particular. As noted above, one recent study found that, in 2012 alone, shareholders challenged 96% of acquisitions involving U.S. public companies valued at over $500 million,[103] up from 53% just a few years earlier.[104] These numbers suggest that plaintiffs' attorneys are

> *"States should consider adopting, or even extending, the lead plaintiff provisions of the PSLRA. State claims and federal claims may have different legal roots, but they both have the same need for active oversight."*

reflexively challenging virtually every large deal. This practice leads to a large number of lawsuits, but there is little evidence that these lawsuits help detect or prevent corporate misconduct. The legal system could instead address a smaller number of lawsuits that are better targeted to actual indicia of fraud and self-dealing.

Prohibitions

Lawmakers should ban the more egregious practices associated with frequent filers.

FIRST

States should ban payments to plaintiffs in class actions or shareholder derivative suits other than their pro rata share of the recovery. Under federal law, such payments are already prohibited.[105] States should align their laws with federal law on this issue. These statutes should exempt payments to plaintiffs that are approved by the court as reasonable compensation for their time and effort in pursuing the litigation.

SECOND

States should consider limitations on the number of lawsuits filed by a single shareholder. The PSLRA already bars shareholders from serving as a lead plaintiff in more than five securities class actions in any three-year period.[106] States could impose a similar limit for state fiduciary duty suits. One factor complicating the implementation of this reform, however, is that Congress was able to impose this limit on securities class actions because all of those suits fell within its jurisdiction (at least after Congress closed the state court loophole with SLUSA). In contrast, shareholder lawsuits brought under state law can be filed in state or federal courts across the country. Imagine, for example, if Delaware, the state of incorporation for most public companies, adopted a rule limiting the number of suits that a single plaintiff could file in its courts. An enterprising plaintiff could easily circumvent this requirement by filing additional suits in California, Nevada, or any other jurisdiction. To prevent this possibility of gamesmanship, states should specify in their statutes that the limitation includes any lawsuit in which the shareholder has served as a representative plaintiff, not just lawsuits filed in that particular jurisdiction.[107] Furthermore, there should be consideration of a federal statute that limits where these types of lawsuits can be filed, such as limiting them to the state of incorporation, in order to prevent the forum shopping described above.

THIRD

Both Congress and the states should examine whether the federal rule goes far enough to accomplish the stated objective of halting professional plaintiffs. The PSLRA allows five suits in a three-year period, but that limit is easily circumvented. To start, the restriction may be ignored by a court at its discretion. For example, our research found that Mississippi PERS was named lead plaintiff in 16 securities class actions between 2005 and 2011, notwithstanding the PSLRA's prohibition against appearing more than five times in a three-year period. The five-suit limit was raised in four of the cases in which Mississippi PERS sought lead plaintiff status. Each time, the court granted Mississippi PERS permission to serve as lead plaintiff based on the preference expressed by Congress in the PSLRA for institutional investors as lead plaintiffs.[108] In addition, individual state pension fund officials may control a number of different pension funds. As noted above, the Louisiana State Treasurer sits on the Board of Trustees for the Louisiana Municipal Police Employees' Retirement System, the Teachers' Retirement System of Louisiana, and the Louisiana Sheriffs' Pension and Relief Fund, among others. Depending on the holdings of the particular funds, state officials may be able to skirt the PSLRA's limits by relying on different funds in different cases.

Given these loopholes, it is worth asking whether any state official or individual plaintiff is capable of adequately monitoring multiple lawsuits, many of which may well be pending at the same time. A tighter limit, such as a maximum of three lawsuits over a three-year time period, covering any individual or state entity/entities without the possibility that a court could ignore the ban, would allow for appointment of the lead plaintiff who is better able to perform their monitoring responsibilities. Moreover, tightening the limits on frequent filers may force plaintiffs' attorneys to justify their litigation decisions to a broader group of shareholders when they are soliciting clients to file suits.

> *"A tighter limit, such as a maximum of three lawsuits over a three-year time period, covering any individual or state entity/entities without the possibility that a court could ignore the ban, would allow for appointment of the lead plaintiff who is better able to perform their monitoring responsibilities."*

Conclusion

The debate over frequent filers reflects a deeper debate over the gatekeepers in entrepreneurial litigation. The law expects representative plaintiffs to serve a gatekeeping function, yet does little to ensure that plaintiffs meet this expectation. We are not unrealistic about the role of shareholder plaintiffs.

Most plaintiffs in shareholder suits are non-lawyers with a minimal financial stake in the litigation, so they cannot be the only line of defense against frivolous lawsuits. Yet, the legal system anticipates that law firms will have to justify their litigation decisions to independent shareholders who have agreed to represent the interests of the shareholder class. Shareholders whose attention is spread among multiple lawsuits may not be able to perform this monitoring function. Similarly, a plaintiff with a conflict of interest in the litigation—whether a family connection, the hope of future business, or campaign contributions from class counsel—could be tempted to put their own interests ahead of the interests of the class. In short, the prevalence of frequent filers means that there is a missing monitor in many shareholder lawsuits, which in turn may help explain why plaintiffs' lawyers are able to file so many frivolous lawsuits.

The legal system must do more to encourage plaintiffs to monitor their lawyers in representative litigation. Shareholder litigation is uniquely suited for the reforms proposed here because many shareholders have the financial stake necessary to take an active role in litigation. Frequent filers undermine this effort, putting lawsuits back in the hands of plaintiffs' attorneys and ultimately hurting corporations and their shareholders. The proposed reforms would be an important step to ensure lead plaintiffs' interests are aligned with their fellow shareholders.

Endnotes

1 As one prominent (now disbarred and a felon) plaintiffs' attorney famously said, "I have the greatest practice of law in the world. … I have no clients." William P. Barrett, *I Have No Clients*, Forbes, Oct. 11, 1993, at 52 (quoting William Lerach).

2 Pub. L. 104-67, 109 Stat. 737 (1995), (codified as amended in scattered sections of 15 U.S.C.).

3 *See, e.g.*, Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?* 23 J. L. Econ & Org. 598 (2007); Marilyn F. Johnson et al., *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act*, 23 J. L. Econ & Org. 627 (2007).

4 *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (2006).

5 *See* First Superseding Indictment, *United States v. Milberg Weiss Bershad & Schulman LLP*, CR 05-587(A) (May 18, 2006 C.D. Cal.).

6 *See* Declaration of Richard Carrigan in Support of Plaintiff and Class Representative's Response to Court's Order to Show Cause, *Carrigan v. Solectron Corp.*, No. 1:07-cv-087219, *See* Declaration of Richard Carrigan in Support of Plaintiff and Class Representative's Response to Court's Order to Show Cause, *Carrigan v. Solectron Corp.*, No. 1:07-cv-087219, at ¶¶ 1, 7, 12.

7 *In re JPMorgan Chase & Co. S'holder Derivative Litig.*, No. 1:08-cv-00974-DLC, 2008 WL 4298588, at *9 (S.D.N.Y. Sept. 19, 2008).

8 *See* 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 (1986); 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 (1991); Elliott J. Weiss, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797, 1830 (2004).

9 *See* Elliott J. Weiss, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797, 1829, 1838 (2004); Jessica M. Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 Wm. & Mary L. Rev. 1749, 1807-25 (2010).

10 F.R.C.P. 23. Rule 23.1 of the Federal Rules of Civil Procedure imposes a similar requirement on shareholder plaintiffs in derivative suits.

11 *See, e.g.*, Supplemental Testimony of Stephen F. Smith, General Counsel and Director of Investor Relations of Exabyte Corporation (H.R. Sept. 22, 1994); Statement of James Kimsey, Chairman of America Online, Inc. Hearings Before the House of Representatives, H.R. 104-2, at (Jan. 19, 1995).

12 *See* H.R. Rep. No. 104-369, at 32-33 (1995); S.R. Rep. No. 104-98, at 6 (1995).

13 H.R. Rep. No. 104-50(I), at 33 (1995).

14 *See* Coffee, *supra*, note 8.

15 *See, e.g.*, Letter from Pension Fund Managers to Christopher Dodd and Pete Domenici, Hearings before the Subcomm. on Securities of the Comm. On Banking, Housing, and Urban Affairs, Sen. Hrg. 104-157, at 270 (July 19, 1994); Testimony of the Int'l Brotherhood of Teamsters Before the House Energy and Commerce Subcommittee on Telecommunications and Finance (1994).

16 H.R. Rep. No. 104-369, at 27 (1995).

17 S. Rep. No. 104-98, at 9 (1995).

18 *See* Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2065 (1995) ("The conflicts of interest

inherent in such actions lead some plaintiffs' attorneys—critics would say most—to give considerable weight to their interest in maximizing their fee income when deciding on what terms to settle class actions.").

19 Statement of Facts in Support of David J. Bershad Plea Agreement and Information, *United States v. Bershad*, CR 05-587 (C.D. Cal. July 6, 2007), at ¶ 4.

20 *Id.* at ¶ 6.

21 *Id.* at ¶ 7.

22. Patrick Dillon & Carl. M. Cannon, *Circle of Greed* (2010).

23 *See Stull v. Poole*, 63 F.R.D. 702 (S.D.N.Y. 1974).

24 *See Kirby v. Cullinet Software, Inc.*, 116 F.R.D. 303 (D. Mass. 1987).

25 *See Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 95 (7th Cir. 1977) (holding that the brother of class counsel was not a proper class representative).

26 *See In re Consumers Power Co. Secs. Litig.*, 105 F.R.D. 583 (D. Mich. 1985) (requiring an attorney to withdraw from the case because his father-in-law was the named plaintiff).

27 Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

28 President Clinton supported legislative reforms in this area, but he disagreed with certain specific provisions in the PSLRA. This disagreement dealt largely with provisions other than those addressing professional plaintiffs. *See* President Bill Clinton, Private Securities Litigation Reform Act of 1995—Veto Message From the President of the United States, H.R. Doc. No. 104-150, reprinted in 141 Cong. Rec. H15215 (daily ed. Dec. 20, 1995) (expressing concerns about the heightened pleading standards in the PSLRA, as well as certain other provisions).

29 S. Rep. No. 104-98 (1995). *See also* H.R. Conf. Rep. No. 104-369, at 32 (1995).

30 Private Securities Litigation Reform Act of 1995 § 101(a), 15 U.S.C. § 77z-1(a)(3)(B) (2006).

31 *Id.*

32 *Id.* § 77z-1(a)(3)(B)(vi) (2006).

33 *Id.* § 78u-4(a)(4).

34 *Id.* § 78u-4(a)(2).

35 *Id.*

36 *See* Stephen J. Choi, *Motions for Lead Plaintiff in Securities Class Actions*, 40 J. Legal Stud. 205, 213 (2011) (reporting that that at least one institution was the lead plaintiff in 56.2% of settled securities class actions filed from 2003 to 2005 and that at least one institution was the lead plaintiff in 53.6% of non-settled securities class actions filed from 2003 to 2005); Stephen J. Choi et al., *The Price of Pay to Play in Securities Class Actions*, 8 Journal of Empirical Legal Studies 650, 656, 660 (2011) (reporting that at least one institution was the lead plaintiff in 58.9% of settled class actions filed from 2002 to mid-2007).

37 Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2010 Review and Analysis*, at 8 (2011), *available at* http://www.cornerstone.com/files/News/029b31a7-ff84-4000-b1ff-d177014ced27/Presentation/NewsAttachment/fd13e1e4-5564-4d46-86a3-882f232147a9/Cornerstone_Research_Settlements_2010_Analysis.pdf.

38 *See* Stephen J. Choi, *supra* note 35, at 656, 660 (reporting that at least one public pension fund was the lead plaintiff in 18.7% of settled securities class actions filed from 2002 to mid-2007 and accounted for a little under one-third of the cases that involved at least one institutional lead plaintiff).

39 *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii).

40 H.R. Conf. Rep. 105-803, at 11 (1997).

41 *See id.*

42 Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995, U.S. Securities and Exchange Commission, Office of the General Counsel, April 1997 at 61.

43 *See* 15 U.S.C.A. § 77p (2011).

44 15 U.S.C.A. § 77p(d), (f).

45 *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984).

46 The most notable exception is Drew Johnson-Skinner, *Paying to Play in Securities Class Actions: A Look at Lawyers' Campaign Contributions*, 84 NYU L. Rev. 1725 (2009). Johnson-Skinner presents summary statistics of law firm political contributions side-by-side with pension funds' selection of law firms as counsel in securities class actions from 2002 to 2006. He finds that law firms do contribute to the officials of funds that select them as class counsel in a substantial number of cases. *See also* Stephen J. Choi et al., *supra* note 35; James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 Colum. L. Rev. 1587, 1611-13 (2006).

47 Neil Weinberg & Daniel Fisher, *The Class Action Industrial Complex*, Forbes, Sept. 20, 2004.

48 *In re Cendant Corp. Litig.*, 264 F.3d 201, 269 (3d Cir. 2002).

49 *In re Countrywide Fin. Corp. Sec. Litig.*, *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 604 (C.D. Cal. 2009).

50 *Id.* at 604, n. 46.

51 In a securities class action database we have used in other work that spans from 2002 to mid-2007, a Louisiana state public pension fund was lead plaintiff in 21 separate class action suits; a Mississippi state public pension fund was lead plaintiff in five separate class action suits.

Other examples of close connections between securities plaintiffs' attorney firms and state public officials connected with state public pension funds are available. For example, the top 20 contributors to North Carolina State Treasurer Janet Cowell's 2012 election campaign include three attorneys from Wolf Popper LLP, a plaintiffs' class action law firm. (*See* http://followthemoney.org/database/StateGlance/candidate.phtml?c=141471). Wolf Popper LLP in turn lists the State of North Carolina Retirement System as one of its clients. (*See* http://www.wolfpopper.com/pressrelease.cfm/ID/903). In addition, several attorneys from Bernstein Litowitz Berger & Grossmann LLP, another plaintiffs' class action law firm, contributed to Cowell's 2012 election. (*See* http://followthemoney.org/). Bernstein Litowitz Berger & Grossman LLP is one of the co-lead counsel in a securities class action lawsuit now pending against Facebook relating to Facebook's IPO. The North Carolina Department of the State Treasurer on behalf of the North Carolina Retirement Systems is one of the lead plaintiffs in the Facebook class action. (*See* Facebook Complaint *available at* http://securities.stanford.edu/1048/FB00_01/2013228_r01c_12MD02389.pdf).

Ohio politicians have also attracted the support of securities class action firms. In Ohio, the attorney general has the final authority regarding selection of outside counsel for the state employee pension fund. Ohio campaign finance law limits contributions that individuals can make to particular candidates, but Ohio does not limit the amount that can be donated to political parties. Those parties have been strong financial supporters of attorney general candidates. Our research indicates that securities class action firms have followed the election returns in that state, with their support switching from the Democratic Party to the Republican Party as control over the attorney general's office has shifted in that state. In 2008, when the race was to replace a Democratic attorney general who had resigned, the securities class action firms were strong financial supporters of the Democratic Party. In 2010, with a Democratic incumbent, the law firms again skewed to the Democratic candidate. In 2012, with a Republican attorney general running for reelection, the securities class action firms switched sides, becoming strong supporters of the Republican Party. The Ohio state pension fund has been named as lead plaintiff in five securities class actions between 2005 and 2012. In each of those cases, at least one of the firms selected as lead counsel had made a campaign contribution to an attorney general candidate prior their selection as lead counsel. *See* www.

followthemoney.org. *See also* Laura A. Bischoff & Jackie Borchardt, Dayton Daily News (Jan. 26, 2014).

52 *See* www.followthemoney.org. We use the list of top 20 contributors as reported by followthemoney.org for each candidate in question in our study as reported by followthemoney.org in the summer of 2013. When we checked followthemoney.org again in January 2014, some of the donors tied at the bottom of the top 20 contributor lists were different. For example, a securities plaintiffs' attorney who was on the top 20 list for Martha Coakley of Massachusetts in the 2010 election when we checked in summer 2013 with a $1,000 donation was not on the top 20 list for Martha Coakley in the 2010 election when we checked again in January 2014. We noted that several donors were in fact tied with $1,000 donations to Martha Coakley, both on and off the Top 20 contributor list, leading to some arbitrariness on which donors were on the top 20 list. For purposes of this study, we use the list of donors to the candidates in our study from our original polling of the followthemoney.org website in summer 2013.

53 Single issue contributors are contributors that are formed for the specific purpose of electing the candidate (or a person from the candidate's party) to the particular political office. For example, in 2011, the Democratic Attorneys General Association donated $150,000 to the campaign of Jim Hood in Mississippi. *See* www.followthemoney.org. Public subsidy contributions are from state or other governmental entities designed to provide a public subsidy to political candidates. For example, in 2010, the Massachusetts State Election Campaign Fund, a fund created and administered by the state of Massachusetts, donated $72,169 to Martha Coakley's campaign in Massachusetts. *See* www.followthemoney.org.

54 Miss. Code Ann. § 7-5-1 (2013).

55 Of the data years in our dataset on contributions to Jim Hood from www.followthemoney.org, 2011, 2007, and 2003 were election years for Jim Hood.

56 We checked from 2005 to 2011 on Westlaw's securities docket database and Stanford's securities class action clearinghouse. The Massachusetts Pension Reserves Investment Management Board was involved in very few cases. For example, it was the lead plaintiff in an action against Fannie Mae that was transferred and consolidated with many other actions relating to Fannie Mae. Other than this one consolidated action, we found no other actions involving a Massachusetts state pension fund in our research.

57 *See*, *e.g.*, Nate Raymond, *Judge certifies Diamond Food class despite 'pay to play' claims*, Thomson Reuters News & Insight (May 10. 2013).

58 *See* Eisenberg and Miller, *supra* note 49.

59 Miss. Code Ann. § 7-5-8 (2013).

60 The Louisiana State Employees' Retirement System, for example, has thirteen members on its board of trustees. *See* http://www.lasersonline.org/site354.php.

61 The connection between Kennedy's service on these boards and the selection of donors to his campaigns as counsel for these pension funds seems to be somewhat murky. *See* Neil Weinberg & Daniel Fisher, *The Class Action Industrial Complex*, http://www.forbes.com/forbes/2004/0920/150.html.

62 The two that were dismissed involved class actions against Silicon Storage Technology and Raymond James Financial.

63 The three that settled involved class actions against HCA, Inc. (BLBG and Lerach, Coughlin, Stoia, Geller, Rudman & Robbins), Wellcare (BLBG and Labaton Sucharow), and Citigroup (BLBG).

64 *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies 27, 53-54, 61 (2004) (documenting a negative relationship between class action recovery amount and the attorney fee percentage).

65 *See, e.g.*, *Israni v. GRIC Communications, et al.*, Case No. 1:01CV08087 (S.D.N.Y. Aug. 24, 2001).

66 The PSLRA specifically bans shareholders from serving as lead plaintiff in more than five federal securities class actions over a three-year period. State courts typically do not appoint a lead plaintiff in fiduciary duty lawsuits, although they may appoint lead counsel. As a result, this is not a direct apples-to-apples comparison.

67 *See, e.g.*, *Israni v. Thomson*, Case No. 4:10-cv-01117 (N.D. Cal. Mar. 16, 2010).

68 *Israni v. Ness Techs.*, Case No. 6569 (Del. Ch. June 15, 2011).

69 *In re Revlon, Inc. Shareholders Litigation*, 990 A.2d 940, 945 (Del. 2010).

70 In Israni's one case that produced a monetary settlement, he may not deserve much of the credit. This settlement occurred in a derivative lawsuit challenging public disclosures made by a Utah energy company, EnergySolutions, Inc. Israni filed his lawsuit in Utah federal court. *See* Verified Shareholder Derivative Complaint, *Israni v. Creamer et al.*, Case No. 2:10-cv-00849 (D. Utah Aug. 25, 2010), but he soon dismissed his suit in favor of a similar suit filed by other shareholders in New York state court. *See* Notice and Motion of Voluntary Dismissal, *Israni v. Creamer et al.*, Case No. 2:10-cv-00849 (D. Utah Oct. 9, 2010). The New York lawsuit eventually settled for $6.5 million, but the settlement agreement made little mention of Israni or his lawsuit. *See* Stipulation of Compromise and Settlement, *Fish v. Lindsay Goldberg & Bessemer, L.P., et al.*, Case No. 651708/2010, (N.Y. Sup. Ct. Nov. 30, 2012). In other words, Israni's sole monetary victory was likely due to the efforts of other shareholder plaintiffs.

71 *See, e.g.*, Order and Final Judgment, *In re Lawson Software, Inc. S'holder Litig.*, Case No. 6443 (Del. Ch. Dec. 15, 2011) (awarding $5,000 in reimbursement for time and expenses incurred in the litigation); Order and Final Judgment, *Israni v. First Mercuty Fin. Corp.*, Case No. 2:10-14482 (E.D. Mich. June 30, 2011) (awarding $7,500 incentive award); Order Awarding Plaintiffs' Counsel Attorneys' Fees and Expenses and Plaintiffs' Case Contribution Awards, *In re Accuray, Inc. S'holder Derivative Litig.*, Case No. 09-05580 (N.D. Cal. May 6, 2011) (awarding a $1,000 incentive award to each of the four plaintiffs in the litigation, including Israni).

72 *See* Affidavit of Co-Lead Plaintiff Sanjay Israni, *In re Lawson Software, Inc. S'holder Litig.*, Case No. 6443 (Del. Ch. Nov. 28, 2011).

73 Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 Fla. L. Rev. 1075 (2013).

74 *See* Law Offices of Marc S. Henzel, at http://www.henzellaw.com/.

75 *Henzel v. Prolor Biotech, Inc.* Case No. A-13-681020-C (Nev. Dist. Ct. May 1, 2013).

76 *See, e.g., Henzel v. XO Holdings, Inc.*, Case No. 6150 (Del. Ch. Jan, 26, 2011); *Henzel v. Starks*, Case No. 0:10-cv-03997 (D. Minn. Sept 21, 2010); *Henzel v. Image Entertainment, Inc.*, Case No. BC369249 (Cal. Super. Ct. Apr. 10, 2007). We conclude that the Henzel named is Marc Henzel's wife based on tax assessment information indicating they share a residence, as well as other Internet references to them as married.

77 *See, e.g., Henzel v. BMC Software Inc.*, Case No. 8542 (Del. Ch. May 9, 2013); *Henzel as Custodian for Eric Henzel v. Alger Small Portfolio*, Case No. 1:04-cv-00881 (D. Md. Apr 07, 2004).

78 *See, e.g., Henzel Family Foundation v. GenTek Inc.* (N.J. Super. Ct. Oct. 2, 2009); *Krausz v. ING Investments, LLC et al.*, Case No. 1:06-cv-12145 (D. Mass) (Nov. 29, 2006); *Henzel Family Foundation v. Kieran E. Burke, et al.*, Case No. 1805 (Del. Ch. Nov. 23, 2005).

79 Many, but not all, of the cases cited in this section arise under state law. Some cases were filed under federal law, illustrating that the PSLRA did not eliminate individuals serving as repeat plaintiffs.

80 The *New York Times* archive has an engagement announcement in 1965 for Jules Brody and Adele Nussbacher.

81 Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 Vand. L Rev. 133, 188 (2004); *see also, e.g., Brody v. Hearst-Argyle Television Inc.*, Case No. 3205 (Del. Ch. Sept. 4, 2007); *Brody v. Catell*, Case No. 8835/2006 (N.Y. Sup. Ct. May 20, 2006); *Brody v. Hellman & Friedman LLC, et al.*, Case No. 601512/2005 (N.Y. Sup. Ct. Apr. 27, 2005).

82 *See, e.g., Brody v. Alexander*, Case No. 06601610 (N.Y. Sup. Ct. May 8, 2006); *Brody v. Bilzin*, Case No. 667 (Del. Ch. Aug. 30, 2004); *Brody v. Pilgrim Baxter & Associates, Ltd.*, Case No. 1:03-cv-09216 (S.D.N.Y. Nov. 19, 2003).

83 *See, e.g.*, Class Action Complaint for Violation of the Federal Securities Laws, *Rubin v. Am. Express*, No. 1:02-cv-06440 (S.D.N.Y. Aug. 13, 2002); *Brody v. Bristol-Myers Squibb*, No. 1:02-cv-2385 (S.D.N.Y. Mar. 27, 2002); Class Action Complaint for Violation of the Federal Securities Laws, *Yaish v. Oracle Corp.*, No. 3:01-cv-01237 (N.D. Cal. Mar. 12, 2001).

84 The cases involving Adele Brody, Aaron Brody, and the two grandchildren are cited above. Jules Brody served as a plaintiff himself in a lawsuit filed against Tyco International. *See Brody v. Tyco International*, Case No. 1:99-cv-12047-JSR (S.D.N.Y. 1999). Mr. Brody's wife filed a lawsuit on behalf of her mother's estate. *See Residuary Estate of Mollie Nussbacher v. El Paso Corporation*, Case No. 4:02-cv-02838 (S.D.N.Y. July 25, 2002). Finally, Mr. Brody's son-in-law and daughter-in-law have also filed class action lawsuits. *See Rubin, et al. v. Cisco Systems, Inc., et al.*, Docket No. 5:01-cv-20613 (N.D. Cal. Apr 24, 2001); *Weisman v. Hearst Corp.*, Case No. 1:00-cv-05316, S.D.N.Y. (July 18, 2000).

85 We emailed Mr. Brody on two occasions asking him to confirm the accuracy of this family tree. He did not respond to either inquiry.

86 Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 Fla. L. Rev. 1075 (2013).

87 *See, e.g., Stull v. Poole*, 63 F.R.D. 702, 704 (S.D.N.Y. 1974) (disqualifying the wife of class counsel from serving as class representative because "the potential conflict of interest inherent in this situation is obvious").

88 This does not mean that any particular lawyer is an inadequate shareholder plaintiff. It simply means that these plaintiffs may merit additional scrutiny. As discussed below, such scrutiny rarely occurs.

89 Plaintiffs in shareholder lawsuits typically disclose only their names, the fact that they owned stock in the target corporation during the time in question, and (if necessary for diversity jurisdiction) their states of citizenship. Other details—such as the general nature of their businesses or the names of their owners—are not disclosed until discovery. If the case does not reach the discovery stage (and most do not), this information may never be disclosed.

90 *In re SS & C Techs., Inc. S'holders Litig.*, 948 A.2d 1140, 1142 (Del. Ch. 2008).

91 *Id.*

92 *Id.* Some of the partnerships in this Figure were actually the same entity because, as Mr. Drulias testified, he changed the name of these partnerships when he took over management of them. *Id.* n. 13.

93 *Id.* at 1144.

94 *Id.* Bamboo Partnerships owned three shares of stock in SS & C. *Id.* Mr. Drulias testified that he owned approximately 2% of these entities, often indirectly through other entities. He was not asked who owned the remaining 98%, and there is no public information available on this point. *See id.*

95 *Id.* at 1145.

96 *Id.*

97 *Id.*

98 Robert M. Daines & Olga Koumrian, Shareholder Litigation Involving Mergers and Acquisitions: Review of 2012 Merger Litigation, Cornerstone Research (Feb. 2013), at 1, *available at* http://www.cornerstone.com/ getattachment/199b1351-aba0-4f6d-92f0-

24b50f4a4b29/Shareholder-Litigation-Involving-Mergers-and-Acqui.aspx.

99 *See id.*

100 Among the states, Delaware already mandates a similar certification. *See* Del. Ch. Ct. R. 23.1. As discussed above, however, many suits against companies incorporated in Delaware are now filed outside of Delaware.

101 Securities Litigation Attorney Accountability and Transparency Act, S. 652, introduced March 22, 2013.

102 As one example, the PSLRA assumes that there will be one or more viable plaintiffs willing to participate in the litigation. The court's primary task under the PSLRA is to choose among these multiple applicants. This assumption may not hold in state law claims. In the high-dollar value suits, the court can choose among the shareholders vying to be lead plaintiff, selecting the one with the most significant financial stake. In the low-dollar value suits, however, it is entirely possible that none of the plaintiffs will have a real stake in the litigation. In other words, importing the PSLRA's requirements into state law could leave shareholders in the same position they are in today. It is possible the prevalence of individual investors would change if the states enacted PSLRA-style litigation reform. The percentage of institutional plaintiffs in securities class actions did increase dramatically following the passage of the PSLRA. On the other hand, state law suits have lower expected damages and therefore institutional investors may not flock to these suits in the same way that they have flocked to securities class actions.

103 Cornerstone Research, Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions, at 2, *available at* http://www.cornerstone.com/getattachment/199b1351-aba0-4f6d-92f0-24b50f4a4b29/Shareholder-Litigation-Involving-Mergers-and-Acqui.aspx.

104 *See id.*

105 *Id.* § 78u-4(a)(4).

106 15 U.S.C.A. § 78v-4 (a)(3)(vi) (2011).

107 If Delaware adopted this limitation, corporations could ensure its effectiveness by stipulating that any suit against the corporation or its officers and directors be brought in a Delaware state or federal court.

108 *See, e.g., Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing and Securitization LLC*, 616 F. Supp 2d 461, 467 (S.D.N.Y. 2009).

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